6-25-2023

Pepper v. C.R. England, 139 Nev. Adv. Op. 11 (May. 4, 2023)

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Pepper v. C.R. England, 139 Nev. Adv. Op. 11 (May. 4, 2023)[1]

A MOVANT FAILS TO MEET THE EVIDENTIARY BURDEN FOR A MOTION TO DISMISS FOR FORUM NON CONVENIENS BY NOT ATTACHING AN AFFIDAVIT IN SUPPORT OF THEIR MOTION AND SISTER-STATE-RESIDENT PLAINTIFFS ARE "FOREIGN" FOR ANALYSIS OF FORUM NON CONVENIENS.

Summary

A party moving to dismiss for forum non conveniens fails to meet their evidentiary burden when they fail to submit an affidavit in support of their motion. Additionally, a sister-state-resident plaintiff is "foreign" for the purposes of a forum non conveniens analysis.

Background

Respondent C.R. England is a company incorporated and headquartered in Utah, Respondent Alamin is a Nevada resident, and Appellant(s) Pepper are Texas residents. A relative of Appellant(s) died during a trucking accident with Respondents on a snowy road in Texas, en route to Colorado. Appellants filed a wrongful death lawsuit against respondents in Nevada district court. Respondents moved to dismiss for forum non conveniens but submitted no affidavit in support of their motion. The district court granted the motion to dismiss, treating appellants as "foreign" under *Placer Dome*, thereby affording Appellants less deference in their choice of forum. Appellant Pepper appealed.

Discussion

C.R. England and Alamin did not meet their evidentiary burden, as they failed to support their motion to dismiss for forum non conveniens with an affidavit.

Appellant, Pepper, argued that Nevada law requires a moving party to submit affidavits in support of a motion to dismiss for forum non conveniens. Respondents, C.R. England, and Alamin, countered that affidavits are sufficient but not necessary to support dismissal for forum non conveniens. In making its decision, the Court relied on its holding in *Mountain View Recreation v. Imperial Commercial Cooking Equipment Co.* There, the Nevada Supreme Court held that "[a] motion for change of venue based on forum non conveniens *must* be supported by affidavits' to enable the district court to assess whether there are exceptional circumstances favoring dismissal."[2] The Court therefore concluded the district court had abused its discretion here.

Sister-state-resident plaintiffs are "foreign."

Appellant argued she ought not to be considered "foreign" under *Placer Dome*[3] due to being a resident of a sister-state rather than a foreign country. Respondent countered that American citizenship is not a dispositive factor in the *Placer Dome* analysis; rather, the onus of *Placer Dome* is whether Appellant had "bona fide connections" to Nevada. The Court analyzed this issue by looking to the rationale behind the rule, specifically *Pollux Holding Ltd. v. Chase Manhattan Bank*,[4] in which the Second Circuit reasoned that there was nothing more convenient about a U.S. forum for a foreign plaintiff, "absent other [forum shopping] considerations."

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[2] *Mountain View Recreation v. Imperial Commercial Cooking Equipment Co.*, 129 Nev. 413, 420, 305 P.3d 881, 885 (2013).

[3] *Provincial Government of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 350 P.3d 392 (2015).

[4] 329 F.3d 64, 71(2d Cir. 2003).

Further, the Nevada Supreme Court reasoned that sister-state-resident plaintiffs, much like foreign-country-resident plaintiffs, have no presumptive convenience in filing in Nevada because the plaintiffs do not live in Nevada. In comparing the instant issue with the rationale of *Pollux*, the Court concluded that the rationale behind affording less deference to a foreign plaintiff's choice of a Nevada forum applies with equal force to a sister-state-resident plaintiff.[5]

Conclusion

Though the district court properly treated Appellant Pepper as "foreign" under *Placer Dome*, it was an abuse of discretion for the district court to grant the motion when Respondents had failed to meet their evidentiary burden without an affidavit submitted in support of their motion to dismiss. Therefore, the district court's decision was reversed, and the case was remanded for proceedings consistent with the opinion.

[5] *See also Fennell v. Ill. Cent. R.R. Co.*, 987 N.E.2d 355, 362 (Ill. 2012) (holding that because a plaintiff did not reside in Illinois, the plaintiff's choice of an Illinois forum was entitled to less deference "for this reason alone").