

Keeping Discovery Within the Scope of a Forum Non Conveniens Motion

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I recently was presented a complaint that contained all the factors for a forum non conveniens motion on its face – foreign parties, foreign contract, foreign location of injury. But, sometimes the pleadings simply do not provide a defendant with all the facts necessary to either file a successful forum non conveniens motion or even make the determination to do so. Luckily, under our Code of Civil Procedure there is no requirement that such a motion be made before filing a response and proceeding with litigation. CCP § 410.30. While there is no strict timeframe, the very process which assists in making the determination whether to file or not, discovery, can also be the means by which a party can lose its forum non conveniens motion.

A forum non conveniens motion does not require extensive discovery, and the motion can succeed on evidence from basic discovery responses, declarations and undisputed general knowledge. *Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1462. But, an abuse of the discovery process will operate to cut-off a party's ability to assert a forum non conveniens motion. In this context, discovery abuse is much different than the typical failure to provide a complete response or lack of a meet and confer. Instead, "[a] party abuses the discovery process when it takes advantage of California's laws and legal processes to propound discovery beyond the scope of establishing the grounds for a forum non conveniens motion and then, after getting its discovery, asserts California is an inconvenient forum." *Martinez v. Ford Motor Co.* (2010) 185 Cal.App.4th 9, 18.

The scope for establishing the grounds for a forum non conveniens motion should be tailored to address the question of whether California is a seriously inconvenient forum to hear the dispute. *See Ford Motor Co. v. Ins. Co. of No. America* (1995) 35 Cal.App.4th 604, 611. Factors subject to discovery that may prove California is a seriously inconvenient forum include the location and residency of the parties and witnesses, the site of the injury or incident, plaintiff's contacts with California and the alternative forum, and the reliance on any forum selection clauses. *See Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751; *Rinauro v. Honda Motor Co.* (1995) 31 Cal.4th 506, 510; *Berg v. MTC Electronic Technologies* (1998) 61 Cal.App.4th 349, 358. Discovery outside of those boundaries will likely be deemed extraneous to a forum non conveniens motion; this applies to even basic form interrogatories, such as those exploring the substance of the claims. *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180.

While it seems simple enough to stay inside those boundaries, sometimes there are no red flags that indicate a forum non conveniens motion should be filed until after discovery has commenced. In those instances, the question becomes one of prejudice: *has the moving party taken advantage of California's discovery mechanisms?* Simply engaging in the discovery process in excess of the scope of establishing a forum non conveniens motion will not always prejudice the non-moving party. But, courts will find prejudice has occurred when parties use discovery for an unfair advantage. *Roulier*, 101 Cal.App.4th at 1191. An unfair advantage occurs when a party engages in California discovery procedures not available in the alternative forum. *Martinez*, 185 Cal.App.4th at 21. State to state discovery mechanisms and procedures

might be analogous, but that certainly is not the case when considering foreign legal systems. Of course, any discovery beyond the narrow scope will prejudice the non-moving party if the alternative forum has no procedure for discovery at all.

Martinez v. Ford Motor Company: An Example of Discovery Abuse

Martinez v. Ford Motor Company, *supra*, 185 Cal.App.4th 9 exemplifies how engaging in discovery can cost a party the ability to later succeed on an otherwise obvious forum non conveniens motion. In *Martinez*, victims of an automobile accident in Mexico filed suit in San Diego alleging a myriad of actions against both Ford and Cooper Tire. While the automobile and tires were purchased in San Diego, the death certificates attached to the complaint identified the decedent-victims' nationalities as "Mexican." On motion by Cooper Tire, the case was initially transferred to Los Angeles to coordinate with other similar "Winston Tire" proceedings.

Thereafter, Ford served on each plaintiff requests for production, form interrogatories, and special interrogatories. The requests and interrogatories sought information on the automobile purchase, all communications regarding the accident, the automobile accident and repair history, settlement demands, medical history, employment history and litigation history. Only three of the special interrogatories asked about citizenship and residence of the plaintiffs, while more than a dozen requested information regarding financial responsibility. Likewise Cooper Tire served a twenty-eight page "fact sheet" requesting information ranging from details of the accident to felony convictions of the parties. "All told, Ford and Cooper Tire propounded more than 1400 pages of written discovery" and the "responses spanned more than 650 pages." *Id.* at 878.

Ford filed its forum non conveniens motion nearly one year after receiving the responses, asserting for the first time that Mexico was a more suitable forum to hear the dispute. Naturally, Ford's motion was based upon the grounds that all plaintiffs resided in Mexico, the accident occurred in Mexico, the investigation occurred in Mexico, and all medical treatment occurred in Mexico. While the plaintiffs pointed out defendant's delay to take advantage of discovery mechanisms in California, the trial court agreed with Ford and dismissed the case concluding that California was a seriously inconvenient forum to hear the dispute. *Id.* at 878-879.

The appellate court, however, did not agree. Finding that Ford and Cooper Tire had abused the discovery process, the forum non conveniens motion was returned to the trial court with instructions to reverse and deny. The appellate court noted the inherent prejudice in both the delay and the extreme overuse of discovery by the defendants. Of particular interest to attorneys in Southern California, the court cautioned:

Mexico... does not allow the type or scope of discovery that California permitted respondents to propound here. Mexico does not allow written discovery akin to interrogatories and provides for only limited request for production of documents. Indeed, Ford's expert witness on Mexican law stated, "We don't have discovery in Mexico." *Id.* at 879.

Following *Martinez*, it appears that any discovery propounded unrelated to a forum non conveniens motion will prevent the granting of such a motion in favor of Mexico as a suitable forum. Notwithstanding the exaggeration of Ford's expert witness' statement, it is accepted that discovery is so limited in Mexico that any information obtained in California will likely be above and beyond what could otherwise be received and be deemed automatically prejudicial.

How to Approach Discovery in Forum Non Conveniens Setting

If a complaint alludes to foreign parties or locations, red flags should be immediately raised with appropriate brakes placed on the discovery mechanism. Discovery does not need to be stopped altogether, but only requests that are carefully tailored towards a forum non conveniens motion should be propounded. Remember, a successful forum non conveniens motion can succeed on evidence from basic discovery responses, declarations and undisputed general knowledge. *Morris*, 144 Cal.App.4th at 1462. Therefore, the only requests propounded should seek information regarding the location and residency of the parties and witnesses, the site of the injury or incident, plaintiff's contacts with California and the alternative forum, and the reliance on any forum selection clauses.

However, even if flags are only raised after a broad range of discovery responses have already been produced, all may not be lost. First, determine if the alternative forum has discovery mechanisms and limits similar to California. The more analogous, the better the argument that the responding party has not been prejudiced by proceeding with discovery here rather than in the alternative forum. Then, as is always the case with a forum non conveniens motion, do not delay filing the motion any longer than necessary.