

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MAXWELL HODGKINS and SECOND
AMENDMENT FOUNDATION, INC.,

Plaintiffs,

v.

ALBERTO GONZALES,

Defendant.

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CIVIL ACTION NO 3:06-CV-2114-B

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs Maxwell Hodgkins and the Second Amendment Foundation file their Response to Defendant’s Notice of Recent Supreme Court Decision, and in support thereof show the Court as follows:

Defendant’s assertion that the Court “may dismiss a case on grounds of *forum non conveniens* before establishing its own jurisdiction,” Notice, 3/6/07, is irrelevant. If anything, the recent *forum non conveniens* case of Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping, ___ S.Ct. ___, 2007 WL 632763 (March 5, 2007) advances and re-affirms Plaintiffs’ position.

1. The Motion Cannot Be Governed By *Forum Non Conveniens* Doctrine Because Defendant Seeks Transfer To A Domestic Court.

“The common-law doctrine of *forum non conveniens* ‘has continuing application [in federal courts] only in cases where the alternative forum is abroad.’” Sinochem, at *6 (quoting American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994)); see also Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996). Sinochem affirms that 28 U.S.C. § 1404(a), not the doctrine of *forum non conveniens*, governs discretionary inter-district transfers. Sinochem, at *6.

2. Defendant Confuses Analysis of This Court’s Jurisdiction With That of the Proposed Transferor Forum.

Defendant is correct that under a *forum non conveniens* analysis, the Court need not “establish its own jurisdiction.” Notice, at p. 1. However, the Court must still establish the jurisdiction of the proposed alternative forum. It is well-established that the Court cannot transfer a case to a court that would not hear a plaintiff’s claim.

“[A] district court [must] first decide whether an available and adequate forum exists. ‘A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum.’” Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1146 (5th Cir. 1989) (citation omitted); Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated and remanded on other grounds, 460 U.S. 1007 (1983). “[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.” Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981) (citation omitted).

Sinochem repeatedly re-affirmed the requirement that a District Court must consider the jurisdiction of the transferee court. “A federal court has discretion to dismiss a case on the ground of *forum non conveniens* ‘**when an alternative forum has jurisdiction to hear [the] case.**’” Sinochem, at *6 (citation omitted) (emphasis added). “A *forum non conveniens* dismissal . . . is a determination that the merits **should be adjudicated** elsewhere.” Sinochem, at *8 (citations omitted) (emphasis added). Such consideration of the transferee forum’s jurisdiction were the basis for the Supreme Court’s decision in Sinochem:

Here . . . Malaysia International faces no genuine risk that the more convenient forum will not take up the case. Proceedings to resolve the parties’ dispute are underway in China . . . Jurisdiction of the Guangzhou Admiralty Court has been raised, determined, and affirmed on appeal.

Sinochem, at *10.

In contrast, the D.C. Circuit's unique standing doctrine, see Plaintiffs' Opp. to Motion, 2/5/07, at pp. 20-24, would render the D.C. District Court unavailable under a *forum non conveniens* analysis.

3. This Court Is Required To Consider The Transferee Court's Lack of Jurisdiction.

In a case originating in this district, the Supreme Court made clear that if a transferee court lacks personal jurisdiction, "it is not a district 'where [the action] might have been brought'" under Section 1404(a)." Hoffman v. Blaski, 363 U.S. 335, 344 (1960) (citation omitted). This is so even if the defendant waives personal jurisdiction. Id.; Toshiba Corp. v. Hynix Semiconductor, Inc., 2005 U.S. Dist. LEXIS 22047 at *13 (N.D. Tex. Sept. 30, 2005) (retaining action against defendants where transferee court lacks jurisdiction).

Unlike personal jurisdiction, the absence of subject matter jurisdiction cannot be waived. Thus, it is equally true that a transferee court is not one "where [the action] might have been brought" where the court lacks subject-matter jurisdiction. See, e.g. Schecher v. Purdue Pharma L.P., 317 F. Supp. 2d 1253, 1256 (D. Kan. 2004) (footnote omitted).

Moreover, under 28 U.S.C. § 1404(a), the transferee court's possible lack of jurisdiction renders a transfer contrary to "the interests of justice." As discussed in Plaintiffs' Opposition, plaintiffs are entitled to choose the forum. Section 1404(a) does not allow defendants to shop for a court that would refuse to hear the case.

4. Plaintiffs' Citizenship Status Would Be Relevant Under *Forum Non Conveniens*.

Even if the Court were to apply *forum non conveniens* standards to Defendant's motion to transfer, the fact that Plaintiffs in this case – unlike the foreign plaintiff in Sinochem – are United

States citizens, would counsel application of a different standard than that applied in Sinochem. “**Citizens** or residents deserve somewhat more deference than foreign plaintiffs.” Piper Aircraft, 454 U.S. 235 at 256 n.23 (emphasis added). “**Citizenship** and residence are proxies for convenience.” Id., at n.24 (citation omitted) (emphasis added). While the amount of deference owed to a citizen’s choice of forum in a *forum non conveniens* analysis is “not dispositive,” Id., at n.23, it is extremely substantial:

In general, the standard of deference for a U.S. plaintiff’s choice of a home forum permits dismissal only when the defendant ‘establish[es] such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience, which may be shown to be slight or nonexistent.’

Duha v. Agrium, Inc., 448 F.3d 867, 873-74 (6th Cir. 2006) (quoting Koster v. Am. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (other citations omitted)); see also Kempe, 876 F.2d at 1146.¹

Dated: March 8, 2007

Respectfully Submitted,

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¹While this is not Plaintiffs’ “home” forum, the high deference is the same given Plaintiffs’ citizenship status. As quoted *supra*, in Piper the Supreme Court used citizenship and residence interchangeably. See also Duha, 448 F.3d at 873 (referencing “the deference required for a forum choice made by a U.S. plaintiff under [Koster].”) And as a matter of law, this district cannot be inconvenient for the Attorney General. Stafford v. Briggs, 444 U.S. 527 (1980).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served upon all counsel of record, as identified below, on March 8, 2007:

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