

Eugene Kohn,

Plaintiff

v.

**DECISION AND ORDER**

Leslie Charm, et al.,

Defendants

This matter is before the Court on Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*. Defendants' also filed a supporting memorandum and affidavit. In response to Defendants' motion, Plaintiff filed an Opposition to Defendants' Motion to Dismiss, and a supporting affidavit.

Through their motion, Defendants contend that Maine is not an appropriate forum in which to litigate the parties' dispute regarding the management and operation of Restoration Associates II, a partnership formed to own and manage real property located in Rockland, Maine. Defendants maintain that Massachusetts is a more appropriate forum for the dispute.

Factual Background

The pleadings reveal that during the 1970's, Plaintiff, Defendant Charm and Defendant Youngman formed a partnership (Youngman, Charm and Kohn Associates) for the purpose of pursuing various business ventures, including the purchase, management and/or sale of businesses and properties. The parties, who reside in Massachusetts, formed the partnership in and established its principal place of business in Massachusetts.

Around 1980, the same individuals formed Restoration Associates II, a partnership that was formed to purchase and manage certain commercial property in Rockland, Maine. In April 2008, Plaintiff commenced this action in which he alleges that Defendants Charm and Youngman breached their fiduciary duties, and misappropriated the assets of Restoration Associates, II. In June 2008,

Defendants Charm and Youngman filed suit in Massachusetts in which suit they contend that Plaintiff breached his fiduciary duty.

### Discussion

Maine has “recognized that the doctrine of forum non conveniens is a legitimate reason for our courts to decline to exercise jurisdiction.” *Corning v. Corning*, 563 A.2d 379, 380 (Me. 1989) (citing *MacLeod v. MacLeod*, 383 A.2d 39, 41 (Me. 1978)). “Under that doctrine ‘a state may decline to exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.’” *Id.* (quoting *RESTATEMENT (SECOND) OF CONFLICT OF LAWS §84 at 251* (1971)). In fact, “courts should dismiss a case filed in Maine on the ground of forum non conveniens only if ‘dismissal will further the ends of justice and promote convenience of the suit for all parties.’” *Id.* (quoting *MacLeod v. MacLeod*, 383 A.2d 39, 41 (Me. 1978)).

In deciding whether to dismiss a claim based on forum *non conveniens*, the Court should consider the following factors:

1. the private interests of the plaintiff;
2. the relative ease of access to sources of proof;
3. the availability of compulsory process and the cost for attendance of witnesses;
4. the necessity and possibility of a view of the premises;
5. whether the plaintiff’s choice of forum was made solely to vex, harass, or oppress the defendant; and
6. whether, in light of the public interest in having a localized controversy decided where it originated, the state in which the suit was filed has some tangible or intangible relation to the litigation.

*Corning v. Corning*, 563 A.2d 379, 380 n. 3 (Me. 1989).

Because the individual parties reside in Massachusetts, and because it appears that the parties have conducted business on behalf of Restoration Associates II in Massachusetts, the parties have another forum (i.e., Massachusetts) in which they can litigate this dispute. The issue is whether, after consideration of the above factors, Maine would be a “seriously inconvenient forum for the trial”. *Corning*, 563 A.2d at 380.

Given Plaintiff's lack of contact with Maine, Plaintiff's interest in litigating the case in Maine is not readily apparent. Plaintiff resides in Massachusetts, and has operated several businesses in Massachusetts. His contact with Maine, at least from a business standpoint, is limited.

Plaintiff contends that his primary basis for litigating the matter in Maine is Plaintiff's request for the appointment of a receiver for the Maine property, which relief Plaintiff maintains cannot be granted by a Massachusetts court. In his Complaint, Plaintiff requests an order "[r]equiring judicial oversight (in the form of a receiver or *otherwise*.)" (*Plaintiff's Complaint*, ¶ 21(b), emphasis supplied). Even if a Massachusetts court cannot appoint a receiver for the property, through its jurisdiction over the parties, the Massachusetts court can provide judicial oversight, if necessary,<sup>1</sup> to preserve and manage the property. In other words, as Plaintiff recognizes in his request for relief, the appointment of a receiver is not the exclusive mechanism by which a court can provide judicial oversight. Furthermore, a court's inability to grant all of the relief a party seeks does not render the court an inadequate alternative forum. "Dismissal on grounds of forum non conveniens may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981); *see also, Irigorri v. International Elevator, Inc.*, 203 F.3d 8, 14 (1<sup>st</sup> Cir. 2000). Indeed, an alternative forum will typically be deemed inadequate only if "the remedy provided by the alternative is so clearly inadequate or unsatisfactory that it is no remedy at all." *Mercier v. Sheraton Int'l*, 981 F.2d 1345, 1349 (1<sup>st</sup> Cir. 1992). Massachusetts is, in the Court's view, an adequate forum for the resolution of the dispute.

Not only is Massachusetts an adequate forum, but it is also a convenient forum. Most of the evidence and likely witnesses are located in Massachusetts. For instance, the parties are located in Massachusetts, they have conducted the business of Restoration Associates II in Massachusetts, and the partnership's accountant evidently works in Massachusetts. Compared with Maine, the sources of proof are more accessible in Massachusetts.

Similarly, because most, if not all of the witnesses, are located in Massachusetts, the parties would not be able to compel all of the witnesses to testify at a trial in Maine. The parties would not have such a problem if the dispute proceeded to trial in Massachusetts. Additionally, the fact that

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<sup>1</sup> Because the parties have not provided the Court with much information about the manner in which the Maine property is used, the Court cannot determine whether a receiver or any other form of judicial oversight is or will be necessary.

the partnership owns property in Maine is not controlling particularly when a view is not required. Nothing of record suggests the need for a view as part of the resolution of the dispute.

As mentioned above, Plaintiff asserts that he commenced this action in Maine at least in part to preserve his ability to secure a receiver for the Maine property. Although the Court determined that Massachusetts was nevertheless an adequate forum, the Court cannot, on this record, conclude that Plaintiff initiated the matter in Maine solely to harass the other parties.

Finally, Maine's only relation to the dispute is that the real property owned by the partnership is located in Maine. While Plaintiff maintains that Maine is better positioned to grant Plaintiff all of the relief that he seeks, the Court is not convinced that a receivership is necessary or that Massachusetts would be unable to provide supervision of the property if such relief is warranted. Perhaps more importantly, the case consists of a dispute between Massachusetts' residents, involving a Massachusetts partnership,<sup>2</sup> and is at least in part related to a dispute regarding other the partners' other Massachusetts-based business ventures. Under these circumstances, Massachusetts' interest in resolving the dispute is far superior to Maine's interest.

### Conclusion

Based on the foregoing analysis, the Court concludes that Maine is a "seriously inconvenient forum for the trial" of the matter, and that Massachusetts is "a more appropriate forum" for the resolution of the dispute. *Corning*, 563 A.2d at 380. Because the partners are also parties to litigation in Massachusetts, which litigation in part includes the subject matter of this action, dismissal of this action would "further the ends of justice and promote convenience of the suit for the parties". *Id.* Accordingly, the Court grants Defendants' Motion to Dismiss.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 9/10/08

  
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Justice, Maine Business & Consumer Court

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<sup>2</sup> Although Plaintiff alleges in his Complaint that Restoration Associates II is a Maine partnership, the sworn testimony of record establishes that Restoration Associates II is a Massachusetts partnership. (*Affidavit of Leslie Charm in Support of Defendants' Motion to Dismiss*, ¶ 15).