



39 A.D.3d 735, 835 N.Y.S.2d
606, 2007 N.Y. Slip Op. 03291

****1** Charles Stravalle et al., Respondents

v

Land Cargo, Inc., et al., Defendants and Third-Party
Plaintiff-Appellants, et al., Defendant. Chemquest,
Inc., et al., Third-Party Defendants-Respondents.

Supreme Court, Appellate Division,
Second Department, New York
2006-01779, 4701/04
April 17, 2007

CITE TITLE AS: Stravalle v Land Cargo, Inc.

HEADNOTES

[Contracts](#)

[Construction](#)

[Forum Selection Clause](#)

[Courts](#)

[Forum Non Conveniens](#)

Smith Mazure Director Wilkins Young & Yagerman, P.C.,
New York, N.Y. (Louis H. Klein of counsel), for defendants
third-party plaintiffs-appellants Land Cargo, Inc., and Fabio
A. Garro, s/h/a Alberto Garro.

Simmons, Jannace & Stagg, LLP, Syosset, N.Y. (Daniel P.
Gregory of counsel), for third-party defendant-respondent
Chemquest, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New
York, N.Y. (Patrick Lawless, Richard E. Lerner, and Brian
Schwartz of counsel), for third-party defendant-respondent
Bigler Trading Company, L.P.

In an action to recover damages for personal injuries, in
which a third-party action was interposed for indemnification
or contribution, the defendants third-party plaintiffs Land
Cargo, Inc., and Fabio A. Garro, sued herein as Alberto Garro,
appeal, as limited by their brief, from so much of an order
of the Supreme Court, Queens County (Kitzes, J.), entered
December 30, 2005, as granted those branches of the motion
of the third-party defendant Bigler Trading Company, L.P.,

which were pursuant to [CPLR 327](#) and [3211 \(a\) \(1\)](#) to dismiss
the third-party complaint insofar as asserted against it, and
granted that branch of the separate motion of the third-party
defendant Chemquest, Inc., which was pursuant to [CPLR
3211 \(a\) \(8\)](#) to dismiss the third-party complaint insofar as
asserted against it.

Ordered that the order is affirmed insofar as appealed from,
with one bill of costs. ****2**

The Supreme Court properly determined that dismissal of the
third-party action insofar as asserted by the defendant third-
party plaintiff Land Cargo, Inc. (hereinafter Land Cargo), as
against the third-party defendant Bigler Trading Company,
L.P. (hereinafter Bigler), was warranted based on a forum
selection clause contained in a bill of lading signed by Bigler
and the de ***736** fendant third-party plaintiff Fabio A. Garro,
sued herein as Alberto Garro, on behalf of Land Cargo. “A
contractual forum selection clause is prima facie valid and
enforceable unless it is shown by the challenging party to
be unreasonable, unjust, in contravention of public policy,
invalid due to fraud or overreaching, or it is shown that a
trial in the selected forum would be so gravely difficult that
the challenging party would, for all practical purposes, be
deprived of its day in court” (*LSPA Enter., Inc. v Jani-King
of N.Y., Inc.*, 31 AD3d 394, 395 [2006]; see *Brooke Group v
JCH Syndicate* 488, 87 NY2d 530, 534 [1996]; *Best Cheese
Corp. v All-Ways Forwarding Int'l. Inc.*, 24 AD3d 580, 581
[2005]; *Fleet Capital Leasing/Global Vendor Fin. v Angiuli
Motors, Inc.*, 15 AD3d 535, 536 [2005]; *Premium Risk Group
v Legion Ins. Co.*, 294 AD2d 345, 346 [2002]). Land Cargo
failed to make the requisite showing that any of those factors
are operative here.

The Supreme Court also properly dismissed the third-party
action insofar as asserted by Garro as against Bigler on the
ground of forum non conveniens. On a motion to dismiss
on the ground of forum non conveniens, the burden is on
a defendant challenging the forum to demonstrate relevant
private or public interest factors which militate against
accepting the litigation (see *Islamic Republic of Iran v
Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108
[1985]; cf. *Korea Exch. Bank v A.A. Trading Co.*, 8 AD3d
344, 345 [2004]). The court has discretion as to whether to
retain jurisdiction (see *National Bank & Trust Co. of N. Am. v
Banco De Vizcaya*, 72 NY2d 1005, 1007 [1988], cert denied
489 US 1067 [1989]; *Islamic Republic of Iran v Pahlavi*,
supra at 479). The court's determination generally will not
be disturbed on appeal unless the court has failed to properly

consider all the relevant factors (see *National Bank & Trust Co. of N. Am. v Banco De Vizcaya*, supra at 1007; *Islamic Republic of Iran v Pahlavi*, supra at 479; *Cheggour v R'Kiki*, 293 AD2d 507, 508 [2002]). Among the factors the court must weigh are “the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling” (*Wentzel v Allen Mach.*, 277 AD2d 446, 447 [2000]). Here, the Supreme Court considered the relevant factors involved. Under the circumstances of this case, the court's determination should not be disturbed (cf. *Cheggour v R'Kiki*, supra).

The Supreme Court also properly found that personal jurisdiction over the third-party defendant Chemquest, Inc. (herein *737 after Chemquest), pursuant to CPLR 302 (a) (1), (2), or (3) (ii) was lacking, and that further discovery on the jurisdictional issue with respect to Chemquest was unwarranted (see *Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351, 352 [2004]; *Turbel v Societe Generale*, 276 AD2d 446, 447 [2000]).

In view of our determination, we need not reach the parties' remaining contentions. Crane, J.P., Krausman, Covello and Carni, JJ., concur.

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