



THE LANE LAW LETTER

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The “America’s Cup” Is Decided by the New York Court of Appeals

We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

Questions or Comments?

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The “preeminent international sailing regatta,” and its interesting history and the trust document that started it all more than 150 years ago, are all combined in this recent decision of the New York high court. The case is officially known as *Golden Gate Yacht Club v. Societe Nautique de Geneve* (2009), and is a far cry from the usual stuff that fills a decision on the interpretation of a dry trust document.

“The story of the America’s Cup begins on August 22, 1851, after the schooner yacht, *America*, entered a race against British sailing vessels around the Isle of Wight, winning a large silver cup.” That cup became the “America’s Cup” and so remains to this day. It was used as the corpus of a charitable trust embodied in a Deed of Gift and was donated to the New York Yacht Club in 1857. The Deed of Gift establishes the rules governing the America’s Cup race and provides that the holder of the Cup becomes the sole trustee and is succeeded only by a successful challenger in a race at sea.

The original Deed required only that the challenger be an “organized” yacht club. That led to 30 years of problems, including disappointing races with challenging vessels which could not withstand the “rigors” of open sea competition. The *Countess of Dufferin* had “fresh water written all over her,” according to reports, while the *Atalanta*, another challenger, was denounced as “a new yacht, hastily built and totally untried and miserably equipped.” In 1887, George L. Schuyler, the sole-surviving donor, amended the Deed to require that a challenger be an organized yacht club from a country other than the current champion, incorporated or licensed by the Legislature, admiralty or other executive department, and “having for its

annual regatta an ocean water course.” That last stipulation was at the center of this dispute.

The Deed provides that a challenger must submit a notice of challenge and demonstrate that it meets all of the stipulated requirements. The first to do so becomes the successful Challenger of Record, with the right to compete against the current Champion. The first notice of challenge for the 33rd America’s Cup race was submitted by Club Nautico de Vela, of Spain. Plaintiff Golden Gate Yacht Club submitted its own notice of challenge. Golden Gate met all of the requirements. Club Nautico did not.

Golden Gate challenged the submission by Club Nautico Espanol de Vela because it did not meet the requirement that it hold “its annual regatta [on] an ocean water course or sea.” In fact, Club Nautico was newly formed and had never held an annual regatta. Club Nautico urged the court to give a different interpretation to what is very clear language in the 1887 deed, allegedly to discern the true intent of the settlor of the trust. The Court of Appeals refused and held that Golden Gate Yacht Club, not Club Nautico Espanol de Vela, had qualified as the Challenger of Record for the 33rd America’s Cup competition.

“The right to act as trustee of the America’s Cup should be decided on the water and not in the courtroom,” said the Court. “This noble sailing tradition should remain a perpetual Challenge Cup for friendly competition between foreign countries. (Deed of Gift, October 24, 1887, ¶ 3).”

We've Been Busy . . .



John Lane recently attended the June meeting of the Conference of Freight Counsel, a roundtable of attorneys who defend freight loss and damage claims and suits in all modes of transportation.

Peter Bobchin recently obtained a transfer of venue of a serious New Jersey trucking accident case, from the federal court in Connecticut to the District of New Jersey, in *Tentoni v. Jeffers*. This decision is featured in our article, *Forum Non Conveniens – What's It All About?* – found on these pages, and on our website, thelanelawfirm.com.

John obtained summary judgment for our trucking company client whose delivery driver was severely injured during a delivery of steel products to a sheet metal shop. On our motion for summary judgment, the Supreme Court, Kings County, agreed with our client, and also our driver, that he was well qualified and trained, and dismissed the claim against the trucker-employer. See *Guest v. AWL Industries*, on our website.

John obtained summary judgment for a maritime client sued in Middlesex County, New Jersey, by a rail yard employee injured in a freak jackknife accident while he was parking a chassis and container in the yard, in *Cirone v. Evergreen America Inc.* The container moved by sea from China to the west coast and then to New Jersey by railroad. See our detailed story on our website.

Likewise, our client, a non-vessel operating common carrier, was dismissed from a wrongful death suit because it had no involvement in loading a container in Korea and no opportunity or duty to inspect the container. Plaintiff's husband suffered fatal injuries while unloading the container in New Jersey. For details, see *Estate of Lising v. Daegu Export Packaging, Co.*, also on our website.

In the field of construction defect claims, Peter and John both recently obtained extremely favorable settlements for our clients in two separate cases. John represented a roofing subcontractor which had worked on a portion of a condominium project in northern New Jersey, in *Bald Eagle Commons v. Bald Eagle Manor*. Peter also represented a roofing contractor, in *Summerwinds at Bradley Beach*. In each case the nominal settlements negotiated for our clients allowed the closing of the files, while the multi-million dollar lawsuits continued against others.

Commercial Landlord Not Liable for Injury Caused by Roof Leak

In *Robinson v. M. Parisi & Son Construction*, a case handled by Peter Bobchin, the Appellate Division of the New York Supreme Court affirmed an award of summary judgment in favor of our client, Emery Air Freight Corporation. Plaintiff was a warehouse dockworker who allegedly slipped and fell in a puddle of water in the warehouse, leased to his employer by Emery. He claimed that the puddle was formed from a leaking roof and that Emery had a duty to inspect the roof and repair the condition.

We moved for summary judgment on the ground that Emery owed no duty to plaintiff. The owner was an out-of-possession land-

lord who had transferred exclusive possession and control of the premises to plaintiff's employer under a lease which made the employer responsible for making repairs to the roof. The lower court granted our motion. Upon plaintiff's appeal, the Appellate Division affirmed, stating that "an out-of-possession landlord is not liable for injuries that occur on its premises unless it has retained control over the premises or is obligated to make repairs." Here the defendant demonstrated that it had "relinquished control of the premises and was not contractually bound to maintain or repair the leased premises."

Forum Non Conveniens—What's It All About?

Forum non conveniens is an equitable doctrine that allows one court that already has jurisdiction over the dispute and the parties, to yield that jurisdiction to another court that also would have full jurisdiction of the matter. The doctrine is found in case law and in statutes, and the new court can be in another county, another state, or indeed, another country. Typically a defendant will file a motion to dismiss the complaint on the ground of forum non conveniens, arguing that the first forum is not convenient for the parties and witnesses and that the case should be tried elsewhere. Often the defendant argues that crucial witnesses can be subpoenaed, or possible additional defendants can be sued, only in the second forum. The decision rests within the sound discretion of the court hearing the motion. A court can even make its own motion if warranted.

This is not a motion to dismiss for lack of jurisdiction. Forum non-conveniens presumes that jurisdiction in the original court is proper. In 1947 in *Gulf Oil Corp. v. Gilbert*, the Supreme Court of the United States approved a dismissal of a case brought in New York federal court. The Court said, "The principle of forum non conveniens is that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized...." The claimant was a business in Lynchburg, Virginia, whose warehouse was damaged by an explosion and fire after defendant's delivery of gasoline to the warehouse. The case was transferred to a Virginia federal court. In so deciding, the Supreme Court emphasized that, "[i]ndeed the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or venue" in the original court.

A court hearing a forum non conveniens motion may apply appropriate conditions to a dismissal order. In *Turay v. Beam Bros. Trucking, Inc.* (2009), a New York state appellate court directed that a trucking accident lawsuit be dismissed on the condition that the defendant agree to submit to jurisdiction in North Carolina, and to waive the statute of limitations. The accident occurred in North Carolina, emergency treatment was rendered to the claimants there, and Beam Bros. Trucking was located in southern Virginia.

The federal courts, sitting in admiralty cases,

have the power to dismiss a case for forum non conveniens, and to direct that the parties litigate their dispute in a foreign country. The recent case of *Cavlam Business Ltd. v. Certain Underwriters at Lloyd's, London* (S.D.N.Y. 2009) is a good example. Jean Maurice Bergeron, a French citizen, purchased a yacht in Florida, named it the *Amira*, and obtained boat insurance from Lloyd's through a broker in Maryland. He set up Cavlam Business Ltd. in the British Virgin Islands to own the vessel. Some time later the yacht sank at its moorings in Venezuela. A dispute arose between Bergeson and Cavlam Business Ltd., on the one hand, and Lloyd's, as to whether coverage should be denied because the claimants did not keep *Amira* in a seaworthy condition, a requirement of the policy. Bergeson sued Lloyd's in New York federal court, while Lloyd's brought a declaratory judgment action in London. The New York court dismissed its case, concluding that "the High Court in London is the more appropriate and convenient forum for adjudicating this controversy."

A federal statute, 28 U.S.C. '1404(a), enacted after *Gulf Oil v. Gilbert*, provides for transfer of a case from one federal district (already having proper jurisdiction and venue) to another, "for the convenience of parties and witnesses, in the interest of justice." We successfully used this statute recently, in *Tentoni v. Jeffers*, to transfer a case from the District of Connecticut, where plaintiff resided and obtained some of her medical care, to the District of New Jersey, where the accident occurred and was investigated, where all of the liability witnesses except plaintiff reside, and where our client could obtain jurisdiction over another tortfeasor which could only be sued in New Jersey. The Connecticut court held that although respect should be given to plaintiff's choice of forum, "the balance of factors here weigh in favor of transfer."

Forum non conveniens is used sparingly, with deference given to plaintiff's choice of forum. Nevertheless, this remedy is a powerful tool when a party finds itself in a court far away from the operative facts of a dispute and from the witnesses and documents, and other potential parties, needed to establish its defenses.

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized...."





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Federal Court Denies Request for Spoliation Inference

Judge Miriam Cedarbaum of the Southern District of New York decided a spoliation-of-evidence case in *The Port Authority Police Asian Jade Society of New York & New Jersey*, in which the Court held that an adverse-inference jury charge was not warranted. Judge Cedarbaum gave a helpful description of spoliation and the elements to be proven to warrant a charge that a jury may infer that the missing evidence would have been beneficial to the party seeking the evidence.

The Society sued the Port Authority for allegedly discriminating against Asian Officers in promotions. Some of the officers' performance evaluations were missing, leading to the request for "an inference that the evidence would have been unfavorable to the party responsible for its destruction." This is one remedy for spoliation of evidence, which Judge Cedarbaum defines as "the destruction or significant alteration of evidence, or the failure to preserve property for an-

other's use as evidence in pending or reasonably foreseeable litigation." The remedy, however, is not automatic and rests with the sound discretion of the court.

The purpose of an adverse inference is to restore the claimants "to the positions they would occupy but for the spoliation." To be entitled to it, the party must demonstrate (1) the party charged with spoliation had an obligation to preserve the evidence; (2) the destruction was done with a "culpable state of mind," and (3) the conduct in failing to preserve the records was negligent, but not grossly so, with no culpable state of mind. Moreover, plaintiffs failed to establish the need for the records to establish their prima facie case. Thus, in this case, the request for an adverse inference charge was not warranted.

