

circumstances the trier of fact could have properly inferred the requisite intent. The failure of the officers to actually observe anyone enter the house or move the cans is accounted for by the fact that the officers, observing from the west, had no view of the east side of the house. Accordingly, insofar as petitioner challenges the sufficiency of the evidence, respondent's motion to dismiss or, alternatively, for summary judgment must be granted.

[5] Petitioner's next argument, that regarding the legality of the search of the motor home, having been fully litigated in Appellate Court, cannot be raised here. In *Stone v. Powell*, 428 U.S. 465, 494, 196 S.Ct. 3037, 3046, 49 L.Ed. 1067 (1976) the court set forth the rule that:

"... where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial."

[6] It is also argued that the testimony concerning the prior burglary at the Standard Oil plant was prejudicial, since petitioner was not charged with taking the Treflan from the plant. However, as the Appellate Court pointed out, such evidence was indeed relevant to show ownership of the Treflan as well as the fact that petitioner had exercised control over the cans without authorization. Moreover, the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is raised. *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976); *United States ex rel. Harris v. Illinois*, 457 F.2d 191 (7th Cir. 1972).

[7] Lastly, petitioner argues that the court erred in refusing to instruct the jury, as provided in the second paragraph of Illi-

3. IPI, Criminal, No. 3.02 provides:

"Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by

nois Pattern Jury Instructions, Criminal, No. 3.02, that a circumstantial evidence case should exclude every reasonable hypothesis of innocence.³ Such an instruction would have been appropriate here, since the state's case was entirely circumstantial. However, in view of the strength of the inference of guilt arising from the established facts, this court finds that petitioner was not deprived of a fair trial or substantial justice. Significantly, the Illinois courts have expressed great reluctance to grant a reversal for failure to give the second paragraph of IPI 3.02. See e.g., *People v. Hammers*, 35 Ill.App.3d 498, 341 N.E.2d 471 (1976). In *People v. Merkel*, 23 Ill.App.3d 298, 319 N.E.2d 77 (1974), the court stated that a failure to give this instruction would warrant reversal only in those instances where justice had been denied or it appeared that the verdict resulted from such error.

Accordingly, respondent's motion to dismiss or, in the alternative, for summary judgment is granted.



DALE METALS CORP. and Overseas
Development Corporation, Plaintiffs,

vs.
KIWA CHEMICAL INDUSTRY CO.,
LTD., Toyo Menka Kaisha, Ltd., Sakai
Trading New York, Inc., and Sakai
Trading Co., Ltd., Defendants.

No. 77 Civ. 3506.

United States District Court,
S. D. New York.

Dec. 27, 1977.

In an action which had been removed
from state court and in which the complaint

you together with all the other evidence in the
case in arriving at your verdict.

You should not find a defendant guilty unless
the facts and circumstances proved exclude
every reasonable theory of innocence."

DALE METALS CORP. v. KIWA CHEM. INDUSTRY CO., LTD. 79

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alleged fraudulent business practices, a defendant moved to dismiss as against all defendants on the grounds of *forum non conveniens* or, in the alternative, to stay pending arbitration. The plaintiffs counter-moved to remand. The District Court, Lasker, J., held that: (1) the fact that defendants might ultimately be required to call more witnesses than plaintiffs was not dispositive of the motion to dismiss for *forum non conveniens* and in light of a substantial number of New York witnesses which plaintiffs intended to call, presence of relevant documents in New York and alleged occurrence of "furthering" acts in the state, defendants could not meet the burden of showing that the balance of convenience was strongly in favor of defendants, and (2) where all defendants were claimed to share responsibility for wrongdoings allegedly committed and it was safe to say that in an arbitration proceeding between two parties every issue that was raised in the action would be vigorously pressed, stay pending arbitration was appropriate even though it affected parties not bound to arbitrate.

Motion to remand denied; dismissal denied; motion to stay granted on condition.

1. Federal Courts ⇐ 45

That defendants might ultimately be required to call more witnesses than plaintiffs was not dispositive of motion to dismiss for *forum non conveniens*; in light of substantial number of New York witnesses which plaintiffs intended to call, presence of relevant documents in New York and alleged occurrence of "furthering" acts in the state, defendants could not meet burden of showing that balance of convenience was strongly in favor of defendants.

2. Arbitration ⇐ 7

Time drafts by which payment was made did not supersede confirmations of sale which contained arbitration clauses. 9 U.S.C.A. § 206.

3. Removal of Cases ⇐ 79(11)

Where case involved arbitration agreements, defendants could remove case to

federal court at any time before trial, and statute allowing petition for removal within 30 days after receipt by defendant of copy of initial pleading was not applicable. 9 U.S.C.A. § 205; 28 U.S.C.A. § 1446(b).

4. Arbitration ⇐ 338

Where all defendants were claimed to show responsibility for wrongdoings allegedly committed and it was safe to say that in an arbitration proceeding between two parties every issue that was raised in action would be vigorously pressed, stay pending arbitration was appropriate even though it affected parties not bound to arbitrate.

Siegel, Matson & Lasky, New York City, for plaintiffs.

Guggenheimer & Untermyer, New York City, for defendant Toyo Menka Kaisha, Ltd.

Yamada & Condemi, New York City, for defendants Kiwa Chemical Industry Co., Ltd., Sakai Trading New York, Inc. and Sakai Trading Co., Ltd.

LASKER, District Judge.

Toyo Menka Kaisha, Ltd. ("TMK") moves to dismiss the action against all defendants on the grounds of *forum non conveniens*. In the alternative, TMK seeks a stay of this action, pending completion of the arbitration proceeding that has been commenced in Japan, in which TMK is suing Overseas Development Corporation ("ODC") for moneys due under the sales agreement that underlies this case (see Exhibit N, TMK Moving Affidavit). The plaintiffs counter-move to remand this case, which is here on removal, to the state court. Their motion is denied (see, *infra*, at 81, n.1). TMK's motion is granted in part and denied in part.

Dale Metals Corp. ("Dale") and its principal shareholder and affiliate, ODC, claim to have been fraudulently induced to distribute products manufactured by Kiwa Chemical Industry Co., Ltd. ("Kiwa") (¶¶ 9-12, Complaint, annexed as Exhibit C to TMK

Moving Affidavit). They further claim that after they embarked on the distribution plan, TMK, Kiwa and the two Sakai companies (Sakai Trading Co., Inc. and Sakai Trading New York, Inc.) conspired to wrest the United States toehold created by plaintiffs and to appropriate the established paths of distribution so that the two Sakai companies, rather than plaintiffs, could act as the American distributors of Kiwa products (§§ 19-22, Complaint).

The underlying business relationship started in July, 1975 when Hiroyuki Masuda, an employee of TMK—Kiwa's sales agent—wrote to Mort Levin, Dale's President (Exhibit C, Plaintiffs' Opposing Affidavit). Masuda expressed Kiwa's interest in creating a United States market for Kiwalite, a reflective sheeting material used for the construction of highway signs. Levin was sufficiently interested in the Kiwa proposal to visit Japan in October, 1975 (§§ 6, 8, Masuda Affidavit; § 12, Levin Affidavit). There, he toured Kiwa's facilities and negotiated an agreement with Kiwa and TMK. Levin claims that in the course of the negotiations, it was "specifically represented to [him] that Kiwalite had not been marketed generally in the United States and that plaintiff Dale would be the exclusive representative of the product. It was only upon these representations . . . that [Levin] agreed on behalf of plaintiffs Dale and ODC to take the product on." (§ 12, Levin Affidavit).

Plaintiffs subsequently set up marketing facilities for the American distribution of Kiwalite (§ 13, Levin Affidavit), and, between January, 1976 and November, 1976, received 640,000 feet of material, under confirmations of sale that were signed by TMK and ODC (Exhibit E, TMK Moving Affidavit; § 11, Plaintiffs' Moving Affidavit). It later came to Levin's attention that Sakai New York was (allegedly) attempting to market Kiwalite and was approaching prospective purchasers who had originally been contacted by Dale and ODC (Exhibit F, Plaintiffs' Opposing Affidavit). Negotiations followed, concerning what plaintiffs believed to be a breach of the distribution agreement. When these proved unfruitful,

plaintiffs filed this suit in the Supreme Court of the State of New York, New York County (February 13, 1977). Three months later, on May 19, 1977, TMK commenced an arbitration proceeding in Japan against ODC (Exhibit N, TMK Moving Affidavit). The proceeding was authorized by the arbitration clause that appeared on the confirmation of sale documents, under which the goods had been shipped to the United States (Exhibit E, TMK Moving Affidavit). On May 19, 1977, plaintiffs obtained an order from the state court, staying the arbitration proceeding. One day later, the defendants petitioned for removal (Exhibit S, TMK Moving Affidavit) and the case was taken up by this court.

Forum Non Conveniens

[1] In denying TMK's motion to dismiss, we note that this case is not one with a merely tenuous connection to New York, *Fitzgerald v. Westland Marine Corporation*, 369 F.2d 499 (2d Cir. 1966), nor is it one that will require, in largest part, the testimony of foreign witnesses, *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), cert. denied, 423 U.S. 1052; 96 S.Ct. 781, 46 L.Ed.2d 641 (1976). Although, as TMK contends and plaintiffs concede, the alleged fraud and later conspiracy are claimed to have been initiated in Japan, "the illegal scheme and activities of defendants were carried out within the United States, primarily through the actions of defendant Sakai New York, but with the active participation in this country of employees and agents of defendants Kiwa and Toyo Menka" (§ 6, Plaintiffs' Opposing Affidavit; see, in reference to alleged conspiratorial acts in New York, § 5, Levin Affidavit and Exhibit F, Plaintiffs' Opposing Affidavit). In addition to the connection that this case has with New York, four of plaintiffs' five witnesses are New Yorkers (December 19, 1977 Letter of Robert Matson, Counsel for Plaintiffs) and much of the documentary evidence relevant to plaintiffs' case is located in the offices of ODC and Dale, that is, in New York. Perhaps understandably, defendants are not sure of the number or identities of

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the witnesses they will call. Judging from the affidavits of defense counsel, the number of witnesses they expect—all of them Japanese—range from zero to approximately eight. However that may be, the fact that defendants may ultimately be required to call more witnesses than plaintiffs is not dispositive of a motion to dismiss for *forum non conveniens*. [In light of the substantial number of New York witnesses that plaintiffs intend to call, the presence of relevant documents here, and the alleged occurrence of "furthering" acts in this state, defendants have not met, and cannot meet, the burden of showing that "the balance of [convenience] is strongly in favor of the defendant."] *Gulf Oil v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). At best, defendants have pushed the balance into equipoise, and with it resting there, plaintiffs' choice of forum will not be disturbed.

Stay Pending Arbitration

[2-4] TMK asks, as an alternative to dismissing this case, that the court stay this case pending arbitration.¹ As discussed above, TMK and ODC are parties to an arbitration that has already commenced in Japan, where TMK seeks payment for goods that were delivered under the confirmations of sale. Plaintiffs' opposition to the stay is based on the fact that several of the parties to this action are not subject to the arbitration clause or to the proceeding.

[From the papers submitted, it is apparent that the charges against TMK and Kiwa are identical and that the harm alleged to have been suffered by ODC and Dale is also

1. In support of their motion to remand, plaintiffs advance the unusual contention that the time drafts by which payment for the Kiwalite was made supersede the confirmations of sale. The latter contain arbitration clauses. The former do not. Since removal was based on the existence of the arbitration agreement, 9 U.S.C. § 205, the alleged disappearance of the agreement is said to compel remand. Plaintiffs offer no authority for the proposition that an instrument of payment supersedes the underlying agreement that gives rise to the obligation to pay. If this were true, every ordinary check issued to pay for, say, a bargained-for sale of goods would dissolve the underlying contract.

identical. Furthermore, all the defendants are claimed to share responsibility for the wrongdoings allegedly committed by the Sakai companies. In short, it is fair to say that in an arbitration proceeding between TMK and ODC, every issue that is raised here will be vigorously pressed. In such circumstances, a stay is appropriate even though it affects parties who are not bound to arbitrate. *Lawson Fabrics, Inc. v. Akzona, Incorporated*, 355 F.Supp. 1146, 1151 (S.D.N.Y.), *aff'd* 486 F.2d 1394 (2d Cir. 1973). In *Lawson*, the plaintiffs commenced an arbitration proceeding alleging delivery of sub-standard goods and non-payment. Subsequently, the plaintiffs commenced a federal action, naming the arbitration defendant and an additional party as defendants. In reaching the decision to stay the federal proceedings, despite the presence of a "new" party who was a stranger to the arbitration, the court emphasized that, as is true in the instant case, the claims before it and the arbitrators were substantially similar:

" . . . The claims against Akzona [the stranger to the arbitration] basically involve the allegation that it conspired with and encouraged Blanchard to deliver improper, mislabeled goods in order to defraud Lawson. The decision of the arbitration as to whether, in fact, Lawson has been defrauded will inevitably decide whether non-conforming and mislabeled goods were delivered, and thus will at least partially determine the issues which form the basis of the claim against Akzona.

Plaintiffs also argue that removal here was untimely because the petition for removal was not filed "within thirty days after the receipt by the defendant[s] . . . of a copy of the initial pleading . . ." 28 U.S.C. § 1446(b). Nothing could be plainer than the language of 9 U.S.C. § 205, which plaintiffs have ignored and which, in pertinent part, provides that in cases involving arbitration agreements, "the defendants may, at any time before the trial thereof, remove" to federal court (there is no dispute that the case was removed before trial). Given an explicit time rule contained in § 205, the notion that the time provision of 28 U.S.C. § 1446(b) applies is totally without merit.

"Since the arbitration proceedings are in progress, it cannot be argued that there is likely to be an unreasonable delay of this Federal action" 355 F.Supp. at 1151.

Finally, the court noted that refusal to stay the federal action would thwart the pronounced federal policy in favor of arbitration. The reasoning of the court in *Lawson Fabrics Inc.*, is applicable to the case before this court and is persuasive.

The motion to remand is denied. The motion to stay is granted on condition that all defendants agree in writing within thirty days to submit to the pending arbitration proceeding and to be bound by any award granted by the arbitrators and to allow Dale to participate as a party in the arbitration if it wishes. In the event defendants do not accept the conditions stated, the motion to stay will be denied upon further application.

Submit order on notice.

UNITED STATES of America, Plaintiff,

v.

534.28 ACRES OF LAND, MORE OR LESS, situate IN HUNTINGDON COUNTY, et al., Defendants.

Civ. A. No. 75-504.

United States District Court,
M. D. Pennsylvania.

Dec. 28, 1977.

In a land condemnation case, the jury returned a verdict in favor of the landowners in the amount of \$61,500. The United States filed a motion for new trial or, alternatively, for a remittitur and the District Court, Herman, J., held that: (1) the verdict was not based on sympathy and preju-

dice for the landowner; (2) it was within the court's discretion to allow the jury to determine for itself whether the alleged comparable sales were in fact comparable and what weight should be given thereto; (3) the Government was not unfairly prejudiced by the cross-examination of its expert appraisal witness as to the location of a bridge on a state-prepared county highway map; (4) the verdict was neither against the weight of the credible evidence nor excessive; and (5) because the verdict was within the range of the expert testimony as to fair market value, the Government was not entitled to a new trial.

Motion denied.

1. Evidence ⇐474(18)

The basis for admitting opinion testimony of a landowner as to the value of his land in a condemnation proceeding is a presumption of special knowledge arising out of ownership.

2. Eminent Domain ⇐224

Even though it was obvious by landowner's demeanor that he was quite nervous while testifying in condemnation proceeding, where verdict was some \$18,500 lower than the landowner's estimate of his property's worth, Government was not entitled to a new trial on the ground that the "pathos" evinced by the appearance of the landowner was "obviously too much for the jury to withstand."

3. Eminent Domain ⇐124

The United States does not pay the amount by which the land condemned for a project might be enhanced in value by the very project for which the land is needed.

4. Eminent Domain ⇐124

The owner of land taken by governmental agency is entitled to the fair market value of the property at the time of the taking as unaffected thereby.

5. Evidence ⇐142(1, 2, 3)

For purpose of determining whether a sale is a "comparable sale" capable of providing valuable assistance in determining