

IN THE DISTRICT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No.: 4D08-269

OCEAN YACHTS, INC.,

Appellant,

vs.

Low Tribunal No. 50-2007 CA

008261XXXXMB

(on appeal from the Fifteenth Judicial
in and for Palm Beach County)

ANTHONY TANTILLO and
NISSAN 112 SALES CORP.

Appellees. _____/

APPELLEES' ANSWER BRIEF

(Appeal of Non-Final Order)

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ISSUES PRESENTED

- I. The trial court correctly determined Appellant/Defendant failed to meet its burden in demonstrating venue to be improper in the 15th Judicial Circuit in and for Palm Beach County, Florida.

- II. The trial court correctly determined Appellant/Defendant failed support its assertions that Florida provides an inadequate forum requiring dismissal on the grounds of *forum non conveniens*.

STATEMENT OF THE CASE AND FACTS

On May 24, 2007, Appellees/Plaintiffs NISSAN 112 SALES CORP. (hereinafter “NISSAN”) and ANTHONY TANTILLO (hereinafter individually and collectively referred to as “TANTILLO”) filed their five count Complaint against both Appellant/Defendant OCEAN YACHTS, INC. (hereinafter “OCEAN” or the “Manufacturer”) and Defendant Staten Island Yacht Sales, Inc. (*See App. at AB001-0029*). OCEAN is a party to all five counts in the Complaint, which arose out of the purchase and use of the vessel, M/Y “POPPY’S TOY”, by TANTILLO.

Count I of TANTILLO’S Complaint requests relief for Revocation of Acceptance of the non-conforming vessel. (*App. at AB010-011*). Counts II, IV and V request relief for breaches of express, implied and statutory warranties. (*App. at AB011-012 and AB014-019*). Count III requests relief under Florida’s Deceptive and Unfair Trade Practices Act. (*App. at AB012-014*). OCEAN moved for dismissal on several theories. (*See Appellant’s Initial Brief, App. at A039-042*). The trial court denied OCEAN’s Motion to Dismiss as to 1) improper venue and 2) *forum non conveniens*. (*See App. at AB067-076*). OCEAN is presently appealing those rulings.

The uncontroverted factual allegations set forth in TANTILLO’S Complaint, OCEAN’S Motion to Dismiss, and the corresponding exhibits, memorandums and supporting affidavits attached thereto are as follows:

1) The purchase of the vessel by NISSAN for the use and benefit of its owner TANTILLO is evidenced by the a) Bill of Sale (*see* App. at AB021), b) Manufacturers Statement of Origin (*see* App. at AB021) and c) OCEAN's Purchase and Warranty Registration card (*see* App. at AB034).

2) NISSAN is a New York corporation with its principle place of business in New York. (App. at AB002, ¶ 3).

3) TANTILLO is the sole share holder and CEO of NISSAN. (App. at AB077-78).

4) TANTILLO is a resident of Florida. (App. at AB002, ¶ 2).

5) OCEAN is a New Jersey corporation with its principle place of business in New Jersey. (App. at AB002, ¶ 4).

6) TANTILLO's Complaint alleges OCEAN "...breached written, express and implied warranties within the State of Florida." (App. at AB003, ¶¶ 9, 10, 13 and AB007, ¶ 40). Moreover, TANTILLO alleges venue is proper because defects to the vessel were serviced by OCEAN through its agents or representatives in Florida. (App. at AB003, ¶ 13 and AB007, ¶ 40).

7) In October 2005, OCEAN paid its south Florida warranty repair representative Rybovich Spencer Boat Yard in West Palm Beach, Florida for warranty work to TANTILLO's vessel. (*See* App. at AB066).

8) The work took place in Florida and was warranted by OCEAN and OCEAN's agent or representative.

9) The Bill of Sale for the subject vessel contains no venue provision whatsoever. (App. at AB034).

10) The OCEAN 5&1 Limited Warranty contains no venue or forum provision for filing actions or hearing disputes. (App. at AB025).

11) OCEAN filed a Motion to Dismiss and a Memorandum with a supporting Affidavit, citing several grounds. (*See* Appellant's Initial Brief, App. at A039-042 and A130).

12) In response, TANTILLO filed a Memorandum in Opposition to OCEAN's Motion to Dismiss (App. AB035-066) together with the Affidavit of TANTILLO in support thereof (App. AB077-080).

13) On September 19, 2007, OCEAN's Motion to Dismiss was heard by the Honorable Robin Rosenberg of the 15th Judicial Circuit in and for Palm Beach County. Pursuant to this hearing, the lower court entered an Order on December 20, 2007, denying OCEAN's Motion to Dismiss on the issues of a) improper venue and b) *forum non conveniens*. (App. at AB067).

14) OCEAN now appeals the trial court's December 20, 2007 Order.

STANDARD ON REVIEW

Whether venue is proper in a particular forum is not a matter of judicial discretion. *Management Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. 1st DCA 1999). “The question is not whether the trial court should transfer, but whether it must.” *Id.* When a trial court is presented with a motion to transfer venue or a motion to dismiss based on the impropriety of the plaintiff’s venue selection, the defendant is arguing that, as a matter of law, the lawsuit has been filed in the wrong forum and the party challenging venue must carry its burden of proof to overcome the plaintiff’s choice of proper venue. *PricewaterhouseCoopers LLP v. Cedar Resources, Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999). *Polackwich v. Florida Power and Light Company, et al*, 576 So.2d 892, 894 (Fla. 2d DCA 1991) citing *United Engines, Inc. v. Citmoco Services, Inc.*, 418 So.2d 409 (Fla. 2d DCA 1982). Where the facts relating to a plaintiff’s choice of venue are not in dispute, the order of the trial court turns on a question of law; and, therefore, the appellate court’s standard of review is de novo. *Tobin v. A&F Eng’g*, 2008 Fla. App. LEXIS 750 (Fla. 3d DCA 2008).

On a motion to dismiss on *forum non conveniens* grounds, a lower court’s ruling is reviewed for an abuse of discretion. *Kinney System, Inc. v. Continental Insurance Co.*, 674 So. 2d 86, 90-94 (Fla. 1996). As such, an appellate court will not “disturb a trial court’s decision on a motion to dismiss on the ground of forum

non conveniens absent an abuse of discretion.” *Club Med Brasil, S.A. v. Sicurella*, 921 So. 2d 49, 50 (Fla. 3d DCA 2006) citing *Cardoso v. FPB Bank*, 879 So. 2d 1247 (Fla. 3d DCA 2004). However, courts have held “review of the Kinney standard has evolved into an abuse of discretion/de novo standard, depending on the extent of the trial judge's analysis and whether the appellate record is sufficient to allow the reviewing court to reach its own conclusions.” *Kawasaki Motors Corp. v. Foster*, 899 So. 2d 408, 410-411 (Fla. 3d DCA 2005). Misapplication of the *Kinney* factors may be redressed on appeal where the record is sufficiently developed and the facts pertinent to the *forum non conveniens* issue are undisputed. *Hilton Int'l Co. v. Carrillo*, 971 So. 2d 1001 (Fla. 3d DCA 2008) citing *R.J. Reynolds Tobacco Co. v. Carter*, 951 So. 2d 105, 107 (Fla. 3d DCA 2007).

SUMMARY OF THE ARGUMENT

1. The trial court properly concluded that TANTILLO’s choice of venue in Palm Beach County, Florida is proper. (App. at AB075-76).
2. Further, the trial court properly concluded OCEAN failed to meet its burden to show venue is Palm Beach County, Florida is improper. (App. at AB075-76).
3. The trial court found proper venue in Palm Beach County, in part, because inspections of the vessel for the purpose of warranty claims and warranty repairs occurred at Rybovich Spencer Boat Yard in West Palm Beach, Florida.

4. OCEAN designated Rybovich Spencer Boat Yard as the location for inspections of the vessel and warranty repair work. Rybovich Spencer Boat Yard is OCEAN's agent or representative and is located in West Palm Beach, Florida.

5. Furthermore, warranty inspections and warranty work conducted by Rybovich Spencer Boat Yard in Palm Beach County, Florida, were paid for, in part, by OCEAN.

6. TANTILLO's Complaint alleges the warranty work performed on the subject vessel by Rybovich Spencer Boat Yard in Palm Beach County, Florida was unsatisfactory. (App. at AB008, ¶ 48; AB009, ¶ 55; and AB012, ¶ 71).

7. Therefore, services to the vessel that were warranted by OCEAN occurred in Palm Beach County, Florida. The warranted services were performed in an unsatisfactory manner by OCEAN's agent or representative in Palm Beach County, Florida. The warranted services were paid for, in part, by OCEAN. As such, the breach of warranty accrued in Palm Beach County, Florida.

8. The substandard work performed at Rybovich Spencer Boat Yard is not disputed by OCEAN and supports TANTILLO's selection of venue in Palm Beach County, Florida.

9. As to OCEAN's assertion that Florida is an inconvenient forum, the trial court properly applied the *Kinney* test for *forum non conveniens* and denied dismissal as to this issue.

10. The trial court was not persuaded by the factual allegations in OCEAN's Motion to Dismiss, Memorandum in Support thereof nor the affidavit of OCEAN's customer services representative Scott Krawiec regarding *forum non conveniens*.

11. OCEAN failed to provide any argument or rebuttal addressing the *Kinney* elements set forth by TANTILLO, which the trial court decided weighed in favor of TANTILLO.

12. Specifically, all private and public interest factors support TANTILLO's chosen forum in Florida because the warranty claims accrued and the vessel and pertinent witnesses are located in Florida.

13. Notwithstanding OCEAN's arguments in its Initial Appellate Brief, the *Kinney* factors continue to favor TANTILLO's choice of forum.

14. Therefore, there was no abuse of discretion by the lower court and dismissal based on *forum non conveniens* was properly denied.

ARGUMENT

I. Venue is proper in Palm Beach County, Florida and OCEAN fails to meet its burden of proof to demonstrate otherwise. Therefore, the trial court's decision should be upheld.

Venue is a privilege, and where OCEAN has failed to meet its burden to show that the venue selected by TANTILLO is improper, their privilege regarding an alternative forum has been waived. *Inverness Coco-Cola Bottling Co. v.*

McDaniel, 78 So.2d 100 (Fla. 1955). Specifically, where a foreign corporation fails to show it is authorized to do business in the state, it is not entitled to the privilege of venue afforded foreign corporations under Fla. Stat. § 47.051. *United Engines, Inc. v. Citmoco Services, Inc.*, 418 So.2d 409 (Fla. 2d DCA 1982). Therefore, this action may take place in any county where personal jurisdiction may be acquired. *Id.*

OCEAN is a New Jersey corporation with its principle place of business in New Jersey (App. at AB002, ¶ 4) and is not authorized to conduct business in Florida under Florida's corporation statute, Fla. Stat. § 47.051. Notwithstanding, OCEAN has admitted that the courts of Florida have general, personal jurisdiction over it. (App. at AB030, ¶ 2). As such, OCEAN cannot contest improper venue under Florida's venue statute where it has not been authorized to do business in Florida as a foreign corporation.

Moreover, OCEAN makes no argument that venue is proper in any other Florida county. Therefore, OCEAN has waived any privilege to contest venue. Where the actions establishing the underlying claims accrued in Palm Beach County, Florida, TANTILLO's choice of venue is proper and should be upheld.

A. Venue is proper in Palm Beach County, Florida as the cause of action accrued within this county.

Assuming, *arguendo*, OCEAN may be entitled to the venue protections afforded foreign corporations under Fla. Stat. § 47.051, venue in Palm Beach

County, Florida is proper where 1) the cause of action accrued in Palm Beach County and 2) OCEAN has an agent or other representative in Palm Beach County, Florida.

It is undisputed that the subject vessel, POPPY'S TOY, was originally delivered to TANTILLO in New York. However, after the vessel was transported to Florida by TANTILLO, defects in the vessel were noted by TANTILLO. As such, OCEAN directed TANTILLO to take the vessel to Rybovich Spencer Boat Yard in West Palm Beach, Florida for warranty repairs. OCEAN's 5&1 Limited Warranty was to cover some, if not all, of these warranty repairs. However, the subject warranty repairs were substandard and gave rise to part of the claims in the underlying lawsuit in regards to breaches of warranty for the defective vessel and its repairs.

Below, the trial court addressed venue as it relates to breaches of warranty for defective products. It determined that venue was proper in the county where a defective or non-conforming good is delivered, rather than purchased. The lower court cited cases supporting this conclusion, one of which is summarized below.

In *L.E. Whittington v. Lany*, 566 So.2d 599 (Fla. 5th DCA 1990), the Court held venue was proper where the **warranted, replacement goods were delivered** and not where the original purchase took place. This case is similar to the case at bar. The plaintiff in *Whittington* had multiple problems with an engine he

originally purchased in Palm Beach County. *Id.* The defendant sent a replacement engine to the plaintiff in Volusia County. *Id.* When the plaintiff had problems with the replacement engine and sued the defendant in Volusia County, venue was deemed proper in Volusia County since this was the place of delivery of the **replacement engine**. *Id.*

Here, TANTILLO had multiple, on-going problems with the vessel. (App. at AB001). Due to these problems, OCEAN directed TANTILLO to take the vessel to Rybovich Spencer Boat Yard in Palm Beach County, Florida for **warranty** repairs. (App. at AB0078, ¶¶ 10, 12 & 13, *see also* App. at AB066). The work and **replacement parts** provided in Palm Beach County were warranted by OCEAN under its 5&1 Limited Warranty and through its agent or representative Rybovich Spencer Boat Yard. As such, the **warranted services** were conducted and **warranted replacement parts** were **delivered** in Palm Beach County, Florida. Where these services and repairs were substandard, TANTILLO's claim for breach of warranties accrued in Palm Beach County, making venue in Palm Beach County proper.

B. OCEAN's agent or representative in Palm Beach County, Florida conducted warranty repairs that are the subject of the underlying litigation.

The trial court found no convincing evidence that OCEAN **did not** have agents or representatives in Florida or that venue in Palm Beach County was

improper. On appeal, OCEAN's sole argument that it **does not** have agents in Florida rests entirely on the text of its 5&1 Limited Warranty. OCEAN contends the warranty "conclusively demonstrates that Rybovich Spencer Boat Yard is not an agent of Ocean Yachts." (App. at AB094). However, this argument alone cannot stand as a reason to find improper venue under Florida law.

When deciding an appeal based on venue, the Florida's Second District Court of Appeal in *Breed Technologies, Inc. v. AlliedSignal, Inc.*, 861 So.2d 1227, 1232 (Fla. 2d DCA 2003), stated that "...descriptive labels employed in agreements are not determinative as to the actual legal relationship between the parties." citing *Parker v. Domio's Pizza, Inc.*, 629 So.2d 1026, 1027 (Fla. 4th DCA 1993); *Nazworth v. Swire Fla., Inc.*, 486 So.2d 637, 638 (Fla. 1st DCA 1986). In *Breed*, the appellant asserted that its contract with its service provider specified "...services centers were independent contractors and not [appellant's] agents or legal representatives." *Id.* at 1229. The court did not give effect to the express language of the cited contract and deemed the service center a representative of the appellant for venue purposes. *Id.* at 1232-33. See also, *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 854 (Fla. 2003)(holding "[w]hile the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends **not** on the statements of the parties but upon all the circumstances of their dealings with each other")(emphasis

added) citing *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1966). See also, *Parker*, 629 So.2d at 1027.

TANTILLO's Complaint alleges Rybovich Spencer Boat Yard, as OCEAN's agent or representatives, conducted work on the subject vessel in West Palm Beach, Florida. (See App. at AB007, ¶ 40 & App. at AB008, ¶ 46; see also App. at AB078, ¶¶ paragraphs 10, 12 & 13; see also App. at AB066). OCEAN bases its claim that it has no agents or representatives in Palm Beach County, Florida solely on the self serving and inconclusive statements in its 5&1 Limited Warranty. The binding case law on this issue is clear, holding the nature and relationship of the parties controls rather than the descriptive labels employed by the parties themselves. *Parker*, 629 So.2d at 1027. It is OCEAN's burden to prove that venue in Palm Beach County is improper. However, OCEAN fails to provide any reliable evidence showing it does not have agents or representatives in Florida. Therefore, TANTILLO's choice of venue must stand, and the ruling of the trial court upheld.

II. TANTILLO filed this action in Florida against OCEAN, who fails to present sufficient support for dismissal of this action based on forum non conveniens. Therefore, the trial court's decision to keep this case in Florida should be upheld.

The factors evaluated by courts regarding *forum non conveniens*, codified in Fla. R. Civ. P. 1.061, are as follows:

“(1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;

(2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiff’s initial forum choice;

(3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and

(4) the trial judge ensures that the plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.” Fla. R. Civ. P. 1.061.

The above cited test was established in the Florida Supreme Court case of *Kinney Systems, Inc. v. Continental Ins., Co.*, 674 So.2d 86, 90 (Fla. 1996).

A. OCEAN’s proposed “adequate alternate form” is foreign to OCEAN and no more convenient than the Florida forum chosen by TANTILLO.

In *Kinney*, the Florida Supreme Court determined that the existence of an alternative forum having jurisdiction to review the subject litigation is a pre-requisite in dismissing a case on *forum non conveniens* grounds. *Id.* Without an adequate alternate forum, any *forum non conveniens* analysis ceases and a motion to dismiss based thereon denied. *Id.*

OCEAN argues New York is an adequate alternate forum. However, OCEAN is a New Jersey corporation (*see* App. at AB002, ¶ 4) and OCEAN does

not contend it has any corporate representatives in New York or that it is amenable to service in New York. Further, OCEAN has no relevant documents in New York and there are no relevant geographical sites to inspect in New York in regards to this litigation. Additionally, any judgment rendered against OCEAN in New York, or Florida for that matter, would necessarily be domesticated in New Jersey. The above facts were contemplated by TANTILLO when filing the action in Florida rather than New York. As such, with regard to OCEAN, New York is not a more adequate or convenient forum than Florida.

To add, OCEAN makes no guarantees that it would not make the same *forum non conveniens* arguments should the action be dismissed in Florida and re-filed in New York. Without guarantees in place, and considering the diverse nature of the parties, OCEAN fails to demonstrate that New York is an adequate alternate forum “...which possesses jurisdiction over the whole case, including all of the parties” as required by Fla. R. Civ. P. 1.061. It is OCEAN’s burden to clearly prove the forum selected by the TANTILLO is improper. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne and Trust Co.*, 238 So.2d 665, 666-67 (Fla. 4th DCA 1970). OCEAN’s arguments fail to establish that a more convenient forum other than Florida exists and thus has failed to carry its burden.

As such, the remaining analysis under the *Kinney* factors is unnecessary. However, if this Court deems a complete *forum non conveniens* analysis necessary, further scrutiny of the *Kinney* factors establishes that TANTILLO's chosen forum in Florida is proper.

B. “Private interests” weigh heavily in favor of TANTILLO's choice of forum and should not be disturbed on the grounds of *forum non conveniens*.

In analyzing “private interests” in a *forum non conveniens* context, the court must consider the following:

- 1) access to evidence and relevant sites;
- 2) adequate access to witnesses;
- 3) adequate enforcements of judgments; and
- 4) the practicalities and expenses associated with the litigation.

Kinney System, 674 So.2d at 90.

First, all relevant evidence in regards to TANTILLO's claims is located in Florida. In its arguments on appeal, OCEAN completely ignores Florida's connections with the subject vessel and the numerous warranty problems that were discovered by TANTILLO and specifically addressed by OCEAN in Florida. The vessel was purchased by TANTILLO, a Florida resident, through his New York corporation, NISSAN. After the vessel was purchased, TANTILLO navigated the vessel to its home port in Florida. (*See App. at AB005, ¶ 27*). While the vessel

resided in Florida, TANTILLO afforded OCEAN, the manufacturer, and Defendant Staten Island, the dealer, many opportunities to inspect the vessel and make efforts to cure defects in the non-confirming vessel. Consequently, OCEAN instructed TANTILLO to have the vessel serviced at Rybovich Spence Boat Yard in West Palm Beach, Florida. (*See* App. at AB003, ¶¶ 10 & 13; *see* App. at AB078, ¶¶ 10, 11 & 12; *see* App. at AB066). All evidence of inspections of the vessel by Rybovich Spence Boat Yard, as agent or representative of OCEAN, is located in Florida. Furthermore, all evidence of the unsuccessful repairs of the vessel by Rybovich Spence Boat Yard, as agent or representative of OCEAN, is located in Florida.

In addition to the evidence, the relevant geographical sites in regards to TANTILLO's claims are located in Florida. All or most of the efforts to cure defects in the vessel occurred in Florida at Rybovich Spencer Boat Yard. At present, the vessel is located and has at all relevant times remained in Florida. As such, any inspection of the vessel for the purpose of this litigation will take place in Florida. There is no other forum where a relevant site exists, and OCEAN offers none. Therefore, where the evidence, the vessel and Rybovich Spencer Boat Yard are all located in Florida, the first consideration of "private interests" weighs in favor of a Florida forum.

As to the second *Kinney* factor, there will be many depositions of witnesses taken by all parties involved in this litigation. To start, the depositions of OCEAN's and Defendant Staten Island's corporate representatives are relevant to the underlying case. Since OCEAN and Defendant Staten Island are foreign corporations, regardless of where this action continues, these depositions will necessarily take place in different states, requiring deponents and/or legal counsel to travel to other states. However, the majority of depositions will take place in Florida since most witnesses are located here. Specifically, the depositions of the management and workers at Rybovich Spencer Boat Yard in West Palm Beach, Florida will be highly probative in the discovery of non-conformities in the subject vessel and resulting repair work, which are at the heart of this case. Further, NISSAN's corporate representative with the most knowledge in this case is TANTILLO, who resides in Florida.

In its Initial Brief, OCEAN asserts that because the sale took place in New York, the appropriate forum is New York. However, OCEAN fails to take into consideration that they themselves are **not** a New York corporation. As such, OCEAN is likely to make the same *forum non conveniens* argument if this action is dismissed in Florida and re-filled in New York. Whether this action takes place in Florida or New York, OCEAN and TANTILLO will be involved in depositions taking place outside each party's home state. Further, there are more potential

witnesses in Florida than in either New York or New Jersey, the domicile of OCEAN. Therefore, OCEAN fails to establish that access to witnesses is more convenient in New York. As such, the second consideration of “private interest” weighs in favor of TANTILLO’s chosen forum in Florida.

As to the third *Kinney* factor, a Florida judgment is just as enforceable as a judgment rendered in New York. When TANTILLO obtains a Florida judgment against OCEAN, TANTILLO will domesticate the judgment in New Jersey. If the action is dismissed and re-filed in New York, as OCEAN suggests is proper, then TANTILLO may similarly domesticate the New York judgment in New Jersey. There is no difference between these two actions and a New York judgment is no more enforceable than a judgment entered by a Florida court. Therefore, the third consideration of “private interests” involving enforcement of judgments weighs in favor of TANTILLO’s choice of form, rather than a New York form, which is foreign to both TANTILLO and OCEAN.

Lastly, the *Kinney* factor as to the practicalities and expenses associated with litigation weighs in favor of a Florida forum. The costs associated with litigation will increase should the action be dismissed in Florida and re-filed in New York. Out-of-state depositions would still take place in New Jersey, New York and Florida. However, since there are more witnesses in Florida than in any other state relevant to this litigation, the costs of deposing these witnesses will increase if this

action was dismissed in favor of a New York forum. Since abundant work and inspections of the subject vessel took place in Florida, there is conclusively more discovery that will take place in Florida than anywhere else. In addition, the subject vessel and OCEAN's warranty facility Rybovich Spencer Boat Yard are the only relevant sights and are both located in Florida. Therefore, the fourth consideration of "private interests" concerning costs of litigation weighs in favor of TANTILLO's chosen forum.

As established above, the private interests of TANTILLO and OCEAN are not in "equipoise." As such, any further *forum non conveniens* analysis is unnecessary and the trial court's ruling that Florida is a proper forum should be upheld.

C. Florida has a sufficient nexus to the underlying dispute to justify its commitment of judicial time and resources. Therefore, the trial court's ruling should be upheld.

Only when the court finds the "private interests" of the parties to be in equipoise or near equipoise should analysis of a *forum non conveniens* argument continue to the third step, the "public interest factors." *Kinney Systems*, 674 So.2d at 91. TANTILLO has established the "private interest" considerations weigh in TANTILLO's favor. However, if this Court deems a further *forum non conveniens* analysis necessary, examination of the "public interest" factors set forth in *Kinney* establishes that TANTILLO's chosen forum in Florida is proper.

TANTILLO avers that Florida has a relevant “public interest” in hearing this case. These “public interest” factors include the following:

- 1) that courts protect their dockets from cases which arise within their jurisdiction, but which lack a significant connection to it;
- 2) that courts may legitimately encourage trial of controversies in the localities in which they arise; and
- 3) that courts may validly consider their familiarity with governing law when deciding whether or not to retain jurisdiction over a case.

Kinney Systems, 674 So.2d at 92.

Florida has an interest in the underlying litigation where this matter has significant connections to Florida. OCEAN and its dealer, Defendant Staten Island, sold the subject vessel to Florida resident TANTILLO, as the beneficial owner of the vessel and CEO and sole shareholder of NISSAN. (*See* App. at AB002, ¶¶ 2 & 3; *see* App. at AB077, ¶¶ 1, 3 & 4). TANTILLO’s Complaint meticulously describes how Florida resident TANTILLO purchased the subject vessel for his personal use in Florida. When the vessel arrived in Florida, TANTILLO discovered multiple, significant defects in the vessel. These defects made it dangerous to use the vessel in the territorial waters of Florida and on the open ocean. In order to address these defects, OCEAN directed TANTILLO to take the vessel to Rybovich Spencer Boat Yard in West Palm Beach. (*See* AB003, ¶¶ 9, 10, 13, and AB008, ¶¶ 46 & 48; *also* AB078, ¶¶ 10, 11, 12, 13 & 14). As such, OCEAN conducted warranty work through its agent or representative

Rybovich Spencer Boat Yard located in Palm Beach County, Florida. (*See App. at AB066*).

Florida's connection to this lawsuit is illustrated by the fact that the defective vessel manufactured by OCEAN and the unsatisfactory warranty work conducted at Rybovich Spencer Boat Yard in Florida caused safety hazards in Florida and to Florida residents. (*See App. at AB006-7, ¶¶ 37, 38, 39 & 40*). Florida has an interest in OCEAN's use of Rybovich Spencer Boat Yard as their Florida agent or representative to address warranty issues. The subject warranty repairs ultimately led to life threatening hazards to TANTILLO, TANTILLO's family and other non-parties navigating Florida waters. The Florida public has an interest in the purchase and safe use of vessels in its territorial waters. The un-rebutted allegation of substandard warranty work that occurred in Florida provides significant connection between the instant case and the state of Florida. As such, where OCEAN has agents or representatives in Florida, TANTILLO's claim in regards to the substandard work performed by this agent or representative in Florida provides a sufficient and significant connection with Florida.

Further, the substandard warranty work performed in Florida by Rybovich Spencer Boat Yard comprises part of TANTILLO's Complaint. As such, part of the underlying controversy arose in Florida, establishing Florida's interest in this matter. TANTILLO's Complaint and other pleadings assert that the vessel failed

to perform to its stated specifications while the vessel was located in Florida. Due to these defects, OCEAN directed TANTILLO to take the subject vessel to its agent or representative Rybovich Spencer Boat Yard for inspection and repair. However, OCEAN's Florida agent or representative Rybovich Spencer Boat Yard failed to provide sufficient remedies to cure the vessel's problems and defects. Consequently, TANTILLO brought the underlying action, based partly on the substandard repairs warranted by OCEAN and performed by its agent or representative in Florida. Therefore, part of the underlying controversy arose within Florida, establishing Florida's interest in this matter.

The trial court found TANTILLO's allegations sufficient to overcome OCEAN's Motion to Dismiss regarding *forum non conveniens*. As to OCEAN's pleadings, the trial court determined the affidavit of OCEAN's representative Scott Krawiec to be insufficient to support OCEAN's contention that it has no agent or representative in Florida. (*See App. at AB074 and AB032*). OCEAN presents no additional arguments in this appeal refuting its lack of contacts with Florida by and through its agent or representative Rybovich Spencer Boat Yard.

As to the third public interest factor, Florida courts are sufficiently familiar with any law applicable to the underlying controversy. TANTILLO agrees New York, New Jersey and Florida have connections to this action. However, to the extent New York or New Jersey law may govern some of the contract claims in the

underling litigation, it puts no unreasonable burden on the Florida trial court. This is not an action that involves any foreign country. South Florida regularly deals with business of other states, and, in particular, business with New York and New Jersey. This court should not dismiss this case on the basis of its unfamiliarity with the law in New York or New Jersey.

Where all of the public interest factors establish Florida as the proper forum, this court should uphold the trial courts ruling on the issue of *forum non conveniens*.

CONCLUSION

OCEAN has the burden to provide proof that venue is improper in Florida. However, in all respects, OCEAN has failed to carry this burden. First, OCEAN is not entitled to the protection of Florida's venue statute, Fla. Stat. § 47.051. Second, TANTILLO has provided competent, substantial evidence that OCEAN has agents or representatives in Palm Beach County, Florida. TANTILLO's allegations have not been refuted by any competent evidence presented by OCEAN. Therefore, TANTILLO's chosen venue of Palm Beach County, Florida is proper and the trial court's rulings denying OCEAN's Motion to Dismiss for improper venue should be affirmed.

Additionally, OCEAN has failed to identify a single adequate alternate forum for the underlying action. There is no forum other than Florida that

conclusively has jurisdiction over the entire case, contains relevant geographical sites, evidence and witnesses of interest. Further, Florida has a significant interest in hearing this matter, which involves a recreational vessel plying Florida waters. Therefore, the trial court's rulings denying OCEAN's Motion to Dismiss on *forum non conveniens* grounds should be affirmed.

WHEREFORE, Appellees NISSAN 112 SALES CORP. and ANTHONY TANTILLO respectfully request this Court enter an order affirming the trial court's order denying Appellant OCEAN YACHTS, INC.'s motion to dismiss on the grounds of improper venue and *forum non conveniens*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail on this _____ day of April, 2008 to Michel O. Weisz, Esq., Berger Singerman, 200 South Biscayne Blvd., Suite 1000, Miami, FL 33131, attorneys for Ocean Yachts and Cindy L. Ebenfeld, Esq., Hicks & Kneale, P.A., 9900 Stirling Road, Suite 101, Hollywood, FL 33024 for Staten Island.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with all the font requirements of Fla. R. App. P. 9.210.

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