

Buie v Pfizer, Inc.

2008 NY Slip Op 30265(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0105650/2007

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART _____

Index Number : 105650/2007
KELLER, DONALD A.
vs
PFIZER INC
Sequence Number : 001
DISMISS ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

This motion is for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss on the
ground of forum non conveniens is
granted as per the attached memorandum
decision.

FILED
JAN 31 2008
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 1/22/08



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
DONALD A. KELLER and GAIL S. KELLER,
h/w,

Plaintiffs,

--against-

Index No.: 105650/07

PFIZER, INC.,

Motion Seq. No.: 001

Defendant.
-----X
-----X

CHARLES A. BUIE and MARY C. HALFACRE-BUIE,
h/w,

Plaintiffs,

--against-

PFIZER, INC.,

Defendant.
-----X

FILED
JAN 31 2008
NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 105651/07

Motion Seq. No.: 001

DORIS LING-COHAN, J.:

Donald A. and Gail S. Keller, residents of California, and Charles A. Buie and Mary C. Halfacre-Buie, residents of Arizona, bring these product liability/personal injury actions against Pfizer, Inc., the manufacturer of the drug Viagra®, claiming that Donald Keller and Charles Buie developed ischemic optic neuropathy after taking the drug. Pfizer moves to dismiss both actions on the ground of forum non conveniens, pursuant to CPLR 327, contending that New York is an inconvenient forum and that this action should be litigated in the plaintiffs' home states. For the reasons stated below, Pfizer's motions are granted with certain conditions.

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BACKGROUND

The Keller Plaintiffs

Plaintiff Donald A. Keller and his wife, Gail S. Keller, are residents of Los Alamitos, California. Complaint ¶ 1. Donald Keller alleges that his doctor prescribed Viagra for erectile dysfunction. Id. ¶ 3. He was provided with a prescription for Viagra from one physician, Dr. Andrew Manos, who is located in Long Beach, California. Pls. Interr. Answers, at p. 2. He filled his prescriptions for the drug at the Walgreens Pharmacy in Cypress, California. Id. He alleges to have ingested the drug only on four occasions between July 14, 2004 and January 31, 2005, three times at his home and once on vacation in Rancho Mirage, California. Id. at p. 3.

Donald Keller alleges that he suffered vision loss in his left eye on January 31, 2005, and was subsequently diagnosed with non-arteritic ischemic optic neuropathy (Complaint ¶ 3), a degenerative eye condition that leads to a loss of vision (Leskin Aff. ¶ 2). He was treated by four physicians and a ophthalmologist group, all located in California. Pls. Interr. Answers, at p. 3. He has identified only his wife Gail as a witness in this action. Id. at p. 4.

The Buie/~~Buie~~-Halfacre Plaintiffs

Plaintiffs Charles A. Buie and his wife, Mary Halfacre-Buie, are residents of Lake Havasu City, Arizona. Complaint ¶ 1. Charles Buie alleges that he took Viagra from approximately July 1998 to February 2006, as prescribed by his doctors for erectile dysfunction. Id. ¶ 3. He was provided with a prescription for Viagra from two physicians, one located in Washington, D.C. and one is his hometown of Lake Havasu City, Arizona. Pls. Interr. Answers, at p. 2. He filled his prescriptions for the drug at Walgreens Pharmacy in Lake Vavasu City, Arizona and at "CVS Pharmacy - Eastern Region" and Rite Aid Pharmacy - Midwest Regions." Id. at p. 3. As a background vocalist for Ms. Patti Labelle, Charles Buie alleges that he traveled

all over the world for 12-plus years and that he used his prescription for Viagra at various locations during his travels, but that after he and his wife married in September of 2003, from that time forward, Viagra was used on occasions when they were together. Id. at p. 3.

Plaintiff alleges that he suffered vision loss in his right eye in February of 2006 and was subsequently diagnosed with arteritic ischemic optic neuropathy. Complaint ¶ 3. He was treated by three physicians, all of whom are located in Lake Havasu City, Arizona. Pls. Interr. Answers, at p. 3. He has identified two people, his wife Mary and a cousin located in Youngstown, Ohio, as witnesses in this action. Id., at p. 4.

Pfizer and Viagra® Litigation

Viagra is a drug manufactured by Pfizer for the treatment of erectile dysfunction. Leskin Aff. ¶ 3. Pfizer is a Delaware corporation. Complaints ¶ 4. Although the company's general headquarters are in New York, it has offices and plants throughout the United States and the world. Grant Aff. ¶ 2. Viagra was developed in England, and pre-clinical testing occurred in England and France. Leskin Aff. ¶ 4. Clinical trials of the drug in North America were coordinated by Pfizer's research facility in Groton, Connecticut. Grant Aff. ¶ 2. The Groton office had the responsibility for preparing the new drug application for Viagra, including the proposed warnings and contraindications, and for communications with the U.S. Food and Drug Administration relating to that application. Id.

Viagra's counsel in this case is Kaye Scholer LLP, a New York firm. There is currently pending a federal multi-district ("MD") litigation for Viagra vision lawsuits in federal district court in Minnesota entitled In re Viagra Product Liability Litigation, MDL-1724. Kaye Scholer is also co-lead counsel in the Viagra MD litigation, in which the parties have completed fact discovery and are in the midst of expert discovery regarding the threshold issue of causation, i.e.,

whether the drug causes ischemic optic neuropathy. Leskin Aff. ¶ 12. Viagra's counsel further avers that the plaintiffs in the MD litigation have taken the deposition of five Pfizer employees and that three of those employees work at Pfizer's facilities in Sandwich, England. Id.

DISCUSSION

Pfizer argues that these actions should be litigated in California and Arizona, where the plaintiffs reside, rather than in New York, because those are the jurisdictions in which the plaintiffs' doctors prescribed Viagra, plaintiffs ingested the drug, where medical care for their alleged injuries was provided, and because none of plaintiffs' doctors are located in New York. Pfizer further contends that a *forum non conveniens* dismissal is compelled by Nicholson v Pfizer, Inc., 278 AD2d 143 (1st Dept 2000), where an action brought by a New Jersey resident who allegedly suffered congestive heart failure as a result of ingesting Viagra during clinical trials of the drug was dismissed on the basis of *forum non conveniens*. Pfizer admits that "some Pfizer employees who have testimony relevant to this action are located in New York" (Grant Aff. ¶ 6), but offers to: (1) make any New York employee who could have been subpoenaed in New York reasonably available for trial in California and Arizona; and (2) agrees that the Statute of Limitations will be tolled during the time that these actions were pending in New York, conditions that were imposed by the First Department in Nicholson.

Plaintiffs argue that Pfizer has failed to overcome the strong presumption in favor of their choice of forum, that Pfizer is headquartered in New York and thus litigation here is not inconvenient, that the testimony of any treating physicians is likely to be uncontroverted and well suited to presentation by videotaped deposition, and that, at a minimum, dismissal is premature and further discovery is required before this court should decide the motions.

CPLR 327(a) provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

The doctrine of forum non conveniens is employed, at the discretion of the court, to dismiss actions which, “although jurisdictionally sound, would be better adjudicated elsewhere.” Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), cert denied 469 US 1108 (1985). The burden rests upon the moving party to “demonstrate relevant private or public interest factors which militate against accepting the litigation.” Islamic Republic of Iran v Pahlavi, supra; see also Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A., 26 AD3d 286, 287 (1st Dept 2006).

Among the factors to be considered are: (1) the residency of the parties; (2) where the transaction giving rise to the action occurred; (3) the availability of an alternate forum; (4) the potential hardship to the defendant; (5) the location of a majority of the witnesses; and (6) the burden on New York courts. Islamic Republic of Iran v Pahlavi, supra; Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A., 26 AD3d at 287. The need to apply foreign law is also an appropriate concern on a forum *non conveniens* motion. Fox v Fusco, 4 AD3d 313 (1st Dept 2004); see also Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171, 176 (1st Dept 2004). No single factor is controlling, as the rule rests upon justice, fairness and convenience. Islamic Republic of Iran v Pahlavi, supra.

Citing an out-of-date legal commentary to McKinney’s and a First Department case that has since been limited to its facts, Pfizer argues that a forum *non conveniens* dismissal is mandated when a non-resident plaintiff is injured by a defective product out-of-state unless the plaintiff can show that “special circumstances” warrant the retention of the action. See Pfizer’s

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Mem. of Law at pp. 2, 11, citing McLaughlin, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C327:3, at 598 (1990)¹ and Economos v Zizikas, 18 AD3d 392 (1st Dept 2005). However, as the First Department more recently explained in Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A. (*supra*),

Pahlavi says nothing about shifting the burden where a nonresident plaintiff is involved. It merely says that nonresidence is one of several factors to be considered.

The Third Department case cited by the motion court (Mensah v Moxley, 235 AD2d 910 [1997]), does state that a nonresident has the burden of showing special circumstances to warrant retention of jurisdiction. Mensah relied upon another case from that department stating that "in tort cases, the plaintiff must demonstrate 'that special circumstances warrant the retention of the action in New York' " (Blais v Devo, 92 AD2d 998, 999 [1983] [citation omitted], *affd* 60 NY2d 679 [1983]). Blais, in turn, relied solely on Dean (now Judge) McLaughlin's McKinney's Practice Commentaries for that proposition. It is true that Blais, the practice commentaries and the above "special circumstances" rule have all been recently cited with approval by this Court (Economos v Zizikas, 18 AD3d 392, 393 [2005]). However, any departure from the rule articulated in Pahlavi should be restricted to the transitory motor vehicle accident type of cases involved in Blais, Mensah and Economos.

26 AD3d 287-88; see also American Banknote Corp. v Daniele, 45 AD3d 338 (1st Dept 2007)

(fact that both parties were non-residents is only one factor in forum non conveniens analysis, and the defendant still bears a "heavy burden" to show that the plaintiffs' selection of New York as the forum to resolve their dispute is not in the interest of substantial justice).

Turning first to the residency of the parties, the fact that none of the plaintiffs are residents of New York supports dismissal. However, Pfizer has its general headquarters in this state and the lawyers that handling its Viagra vision-related litigation are located here. Thus, as a general matter, defending these lawsuits in New York would not be inconvenient for Pfizer. This factor is, therefore, neutral.

¹The current commentary to CPLR 327 is written by Vincent C. Alexander and is contained in the 2001 edition and 2008 pocket part.

Plaintiffs argue that the fact that Pfizer's global headquarters are in New York should "figure prominently" in the court's analysis. Pls. Response at p. 3. Notwithstanding Nicholson v Pfizer, supra, and the fact that CPLR 327(a) specifically provides that "the residence in this state of any party shall not preclude the court" from granting a forum *non conveniens* motion, the cases upon which plaintiffs rely are all distinguishable. For example, in Anagnostou v Stifel (204 AD2d 61 [1st Dept 1994]), the forum *non conveniens* dismissal was not reversed because the defendants resided in New York, as plaintiffs argue herein, but because a number of relevant factors favored the plaintiffs' choice of a New York forum. The factors noted by the First Department included the significant delay in moving for dismissal, the fact that the six paintings at issue were not only located in New York but were subject to a previously-issued preliminary injunction, and the fact that the nominal owner of the paintings was a decedent's estate administered in New York.

The second factor -- where the transactions giving rise to the actions occurred -- clearly favors dismissal. In the case of Donald Keller, he was prescribed Viagra and filled his prescriptions in California; all of his medical care was provided in California, and none of his doctors are located in New York. Likewise Charles Buie was prescribed Viagra by physicians in Arizona and Washington, D.C., and filled his prescriptions in Arizona and elsewhere. Most of Mr. Buie's medical care was provided in Arizona, and none of his treating physicians are located in New York. While he alleges using Viagra at various locations during his travels for work, he does not claim that any specific usage occurred in New York. In addition, the underlying events concerning the development, testing, and labeling of Viagra appear to have no connection to New York. Thus, New York has no significant interest in lawsuits by out-of-state residents over the use of a drug that was tested, developed, prescribed and ingested outside of New York that

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allegedly caused injuries for which the plaintiffs were treated out-of-state.

Since these are drug product liability cases and New York's connection to the actions are tenuous, it is likely that the substantive law of the forum where Viagra was prescribed, purchased, ingested and where the plaintiffs were harmed will be applied even if the case is tried in New York. See In re New York County DES Actions, 238 AD2d 172, 173 (1st Dept 1997); see also Schultz v Boy Scouts of America, Inc., 65 NY2d 189, 197 (1985) (law of the jurisdiction having the greatest interest in the litigation will be applied). In the case of Donald Keller, that would be California, and in the case of Charles Buie, Arizona. Although this court is capable of applying either California or Arizona law, the courts of those states are better suited to do so. As the U.S. Supreme Court has stated, a case should be tried "in a forum that is at home with state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." Gulf Oil Corp. v Gilbert, 330 US 501, 509 (1984).² New York courts "should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus to New York." Silver v Great Am. Ins. Co., 29 NY2d 356, 361 (1972).

As for the existence of an alternative forum, there is no dispute that plaintiffs' home states of California and Arizona are alternative forums where these lawsuits may be tried without inconvenience to the plaintiffs.

Next, there is a potential hardship to Pfizer in that the plaintiffs' treating physicians are all located outside of the reach of a New York subpoena. In Nicholson v Pfizer, Inc. (278 AD2d

²Gulf has been superseded by statute on other grounds. As explained in American Dredging Co. v Miller (510 US 443, 449, n. 2 [1994]), Gulf held that it was permissible to dismiss an action brought in a District Court in New York by a Virginia plaintiff against a defendant doing business in Virginia for a fire that occurred in Virginia. Such a dismissal would be improper today because of the federal venue transfer statute, 28 USC § 1404(a).

143, supra), Pfizer moved to dismiss a lawsuit commenced by a New Jersey resident who was allegedly injured as a result of ingesting Viagra during clinical trials of the drug.³ The First Department reversed the denial of Pfizer's motion, holding that:

[t]he trials were coordinated out of Groton, Connecticut, and administered at the Joslin Center for Diabetes, located in Princeton, New Jersey. Although plaintiff initially became ill and was hospitalized in Florida, he returned to New Jersey, where he received further medical care. It is uncontroverted that plaintiff's treating physicians, including those who treated his diabetic condition, are located in New Jersey, and beyond the reach of New York's subpoena power. In view of this, defendant established its entitlement to dismissal on the ground of forum non conveniens.

278 AD2d at 143. In Nicholson, the trial court was unpersuaded by the fact that all nine of the plaintiff's treating physicians were located in New Jersey, opining that because the plaintiff had the burden of proof, he would "surely" arrange to bring them to New York for trial. Nicholson v Pfizer, Inc., Sup Ct, NY County, June 22, 2000, Shafer, J., Index No. 120304/98 at *2-3. In successfully arguing for a reversal, Pfizer contended that none of these physicians attributed the cause of the plaintiff's injuries to Viagra usage, and thus it was Pfizer, not the plaintiff, who needed the testimony of these physicians.

Plaintiffs argue that Pfizer has provided no specific basis for its assertion that none of the plaintiffs' treating physicians would voluntarily choose to testify at a trial in New York, distinguishing these cases from Moran v Pfizer, Inc., supra, where the record affirmatively disclosed that several out-of-state physicians had refused to come to New York for their

³Similar actions in this court involving Viagra where non-resident plaintiffs have alleged vision-related injuries have been dismissed on forum non conveniens grounds. See Jordan v Pfizer, Inc., et al., NYLJ, Aug. 17, 2007, at 26, col 1 (Sup Ct, NY County July 17, 2007) (Edmead, J.); Grant v Pfizer, Inc., Sup Ct, NY County, Oct. 8, 2004, Shafer, J., Index No. 122164/02; Moran v Pfizer, Inc., Sup Ct, NY County, April 10, 1999, Gans, J., Index No. 113602/98. The plaintiffs in each of the five actions dismissed in Jordan have appealed the dismissal of their lawsuits.

depositions. Here, the record is not as fully developed as either the Moran or Nicholson cases, and it remains to be seen whether Mr. Keller and Mr. Buie's treating physicians would voluntarily cooperate and on whose behalf they may ultimately testify. Nevertheless, their presence in California and Arizona, states which are both located far from New York and outside the subpoena power of this court, is an important factor in deciding a forum non conveniens motion in a personal injury case, and supports dismissal. See, e.g., Nicholson, supra; Cheung v General Slicing Inc., 209 AD2d 226 (1st Dept 1994); Bewers v American Home Products, 99 AD2d 949, 950 (1st Dept), aff'd 64 NY2d 630 (1984); Dahl v Gardner, 49 AD2d 861, 862 (1st Dept 1975). In this court's experience, treating physicians are reluctant to interrupt their practices to appear at trials. Accord, Cuzzupoli v Metro-North Commuter R.R., 2003 WL 21496879, * 6 (SD NY June 30, 2003) ("Treating physicians are characteristically reluctant to interrupt their practice to appear at trials, even in the localities where they treat their patients. It is not unusual for plaintiff's counsel to have to subpoena the plaintiff's treating physician . . ."); Blake v Delta Steamship Lines, Inc., 1985 WL 322 *3 (SD NY Feb. 26, 1985) (doctors "are well known for their busy schedules" and have a duty to be available to their patients).

Plaintiffs argue that deposition by videotape is a well-established method of presenting testimony from this type of witness, citing In the Matter of Oxycontin, 15 Misc 3d 388 (Sup Ct, Rich. County Jan. 19, 2007). Further, they contend that their treating physicians "are by no means the key witnesses in the case," that their testimony "likely will be uncontroverted and well suited to presentation by videotape deposition" (Pls. Response at p. 5), and that the trial and its precedent discovery will focus on the design, manufacture, and labeling of Viagra.

Matter of Oxycontin, supra, is distinguishable because the research and development of the drug at issue in that case -- Oxycontin -- occurred at various New York facilities, and thus the

lawsuit had a much greater connection to New York than in the instant two actions. In addition, at issue therein was whether to dismiss 924 non-New York plaintiffs from 1,117 pharmaceutical cases filed as part of a coordinated products liability action, and the court ruled that requiring the defendants to obtain commissions to take the out-of-state depositions of treating physicians was not more burdensome than defending those cases around the country.

Pfizer's ability to obtain videotaped deposition testimony of the out-of-state treating physicians by commission pursuant to CPLR 3108 and then present that evidence at trial pursuant to CPLR 3117(a)(4), does not change the court's viewpoint. Although the question of using videotaped depositions at trial does not appear to have been addressed in Nicholson v Pfizer, Inc., supra, it was the fact that the treating physicians were "beyond the reach of New York's subpoena power" that compelled a forum non conveniens dismissal. 278 AD2d at 143. The process of obtaining commissions from this court, filing a proceeding in California and Arizona to recognize those commissions and request the issuance of subpoenas, arranging for personal service of the subpoenas and setting up a location for the taking of deposition in those states, is often an expensive and time-consuming task, just the type of inconvenience that a CPLR 327(a) dismissal was intended to avoid.

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil Corp. v Gilbert, 330 US at 508. Nor can it be said on this record that the testimony of the plaintiffs' treating physicians will not be highly relevant to both liability and damages.

The only other non-party witnesses identified thus far are an Ohio cousin of Mr. Buie, presumably for whom litigation in New York would be equally inconvenient as Arizona, and

Pfizer employees. As to these latter witnesses, it appears that three of the five Pfizer employees sought to be deposed in the MD litigation are residents of England. In any event, Pfizer has agreed to make any New York employees reasonably available to testify at trial in California and Arizona.

"[F]orum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties (citations omitted)." Economos v Zizikas, 18 AD3d at 393. Since there are other forums "which will best serve the ends of justice and the convenience of the parties" (Silver v Great Am. Ins. Co., 29 NY2d at 361), the court finds that dismissal of both the Keller and Buie cases is warranted, but with two conditions. First, dismissal is conditioned on Pfizer complying with the representations of Susan Grant in her affidavits sworn to September 25, 2007 that the company will make any New York employee who could have been subpoenaed in New York reasonably available for trial in California. Second, that the defense of the Statute of Limitations will be deemed to have been tolled during the time these actions were pending in New York, specifically from the dates the complaints in both actions were filed, namely April 26, 2007, to the date of entry of judgment.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss the complaint in Donald A. Keller and Gail S. Keller, h/w v Pfizer, Inc., Index No. 105650/07 is granted pursuant to CPLR 327(a) and the complaint is hereby dismissed on condition that defendant Pfizer, Inc. comply with the representations of Susan Grant in her affidavit sworn to September 25, 2007 that it will make any New York employee who could have been subpoenaed in New York reasonably available for

trial in California, and that the defense of the Statute of Limitations will be deemed to have been tolled during the time this action was pending in New York; and it is further

ORDERED that defendant's motion to dismiss the complaint in Charles A. Buie and Mary C. Halfacre-Buie, h/w v Pfizer, Inc., Index No. 105651/07 is granted pursuant to CPLR 327(a) and the complaint is hereby dismissed on condition that defendant Pfizer, Inc. comply with the representations of Susan Grant in her affidavit sworn to September 25, 2007 that it will make any New York employee who could have ~~been~~ subpoenaed in New York reasonably available for trial in California, and that the defense of the Statute of Limitations will be deemed to have been tolled during the time this action was pending in New York; and it is further

ORDERED that the Clerk is directed to enter conditional judgments of dismissal, without costs and disbursements, in favor of defendant; it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiffs with notice of entry.

Dated: January ²² , 2008

FILED
JAN 31 2008
NEW YORK
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Hon. Doris Ling-Cohan, J.S.C.

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