

Matter of New York Bextra & Celebrex Prod. Liab. Litig.
2009 NY Slip Op 30304(U)
February 3, 2009
Supreme Court, New York County
Docket Number: 113086/07
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 113086/2007
ARCHIBALD, AGNES W.F., ET AL
vs.
PFIZER, INC., G.D. SEARLE, LLC
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4
5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

FILED

FEB 11 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/3/09

HON. SHIRLEY WERNER KORNREICH

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: PART 54

-----X
IN RE: NEW YORK BEXTRA AND CELEBREX
PRODUCT LIABILITY LITIGATION

Index No.: 762000/06

-----X
AGNES W.F. ARCHIBALD, ET AL,

Plaintiffs,

-against-

PFIZER INC., G.D. SEARLE, LLC, f/k/a, G.D. SEARLE
& CO., PHARMACIA CORP., MERCK & CO., INC.
and MERCK, SHARP & DOHME, LTD.,

Defendants.

Index No.: 113086/07

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DECISION & ORDER
FEB 11 2009
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-----X
SHIRLEY WERNER KORNREICH, J.:

In this pharmaceutical, personal injury action, defendants Merck & Co., Inc. (Merck) and Pfizer, Inc. (Pfizer) move to dismiss the actions brought by residents of the United Kingdom, Ireland and Spain, arguing *forum non conveniens*. They also ask for dismissal for failure to state a cause of action. CPLR 3211(a)(7). Plaintiffs oppose dismissal, but in the alternative, ask that conditions be set if dismissal is granted. For the reasons which follow, the motion is granted on the ground of *forum non conveniens*.

Plaintiffs are foreign residents who allegedly suffered personal injuries as a result of ingesting Celebrex and/or Vioxx. The drugs were marketed and sold in the United Kingdom, Ireland and Spain, regulated by the United Kingdom and the European Union and purchased and prescribed abroad. The plaintiffs were treated abroad, and their doctors and healthcare records are located abroad. Defendants are the U.S. companies who developed and manufactured the

drugs.

CPLR 327(a) provides for interest of justice dismissal of an action which should be heard in another jurisdiction, upon motion of a party, "in the interest of substantial justice." Dismissal may be conditional, and the fact that a party resides in New York does not preclude such dismissal. CPLR 327(a).

In the seminal case of *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-9 (1984), the Court explained that the doctrine of *forum non conveniens* is a common-law doctrine, which places the burden upon the defendant moving for dismissal to demonstrate that public and private interest factors show that the litigation would be better adjudicated elsewhere. *Accord Rosenberg v. Stikeman Elliott, LLP*, 44 A.D.3d 840, 841 (2d Dept. 2007). Noting that the doctrine is flexible and rests upon justice, fairness and convenience, the Court pointed to a number of circumstances to be considered. Those are: the residence of the plaintiffs, the place of the occurrence, the law to be applied, the burden on the New York courts, the potential hardship to the defendants and the availability of an alternate forum. *Id.* at 479-80. *Accord Adamowicz v. Besnainou*, ___ A.D.3d ___, 2009 NY Slip Op 427 (1st Dept. Jan. 27, 2009); *Kuwait Engineering Grp. v. Consortium of Intl. Consultants, LLC*, 50 A.D.3d 599 (1st Dept. 2008); *Smolik v. Turner Constr. Co.*, 48 A.D.3d 452 (2d Dept. 2008). Courts following *Pahlavi* also have considered the availability of witnesses and documents and have down-played consideration of an alternative forum. *Kinder Morgan Energy Partners, L.P. v. Ace Am. Ins. Co.*, 55 A.D.3d 482 (1st Dept. 2008); *Ungar v. Fisher*, 24 A.D.3d 108 (1st Dept. 2005).

Here, the factors militate in favor of dismissal. *See In re: VIOXX Prods. Liab. Litig.*, MDL No. 1657, Slip Op. (E.D. La. 2006); *In re VIOXX Litig.*, Case No. 619, Slip Op. (N.J.

Super. Ct., 2006), *aff'd*, 928 A.2d 935 (N.J. App. Div. 2007). The plaintiffs are all residents of European countries, and their purchase and ingestion of the drugs occurred in those countries. See *Bewers v. Amer. Home Prods. Corp.*, 99 A.D.2d 949 (1st Dept.), *aff'd*, 64 N.Y.2d 630 (1984). The regulations and laws applicable to each case would be governed by E.U. and United Kingdom law, and New York courts would be burdened with interpreting these regulations and law and passing on the judgment of foreign regulatory bodies, even though the E.U. and the United Kingdom have a compelling interest in such interpretation and judgment. *Id.* As noted in *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1129-1130 (S.D.N.Y. 1992), a products liability case in which Irish residents were suing American manufacturers and distributors of blood clotting factor:

The forum whose market consumes the product must make its own determination as to the levels of safety and care required. That forum has a distinctive interest in explicating the controlling standards of behavior, and in enforcing its regulatory scheme. The standards of conduct implemented, and the level of damages assessed, will reflect the unique balance struck between the benefit each market derives from the product's use and the risks associated with that use; between the community's particular need for the product and its desire to protect its citizens from what it deems unreasonable risk. The forum's assessment will affect not merely the quality of the product, but also the price, quantity, and availability to its public. Such an assessment must remain the prerogative of the forum in which the product is used; each community faces distinct demands, and has unique concerns that make it peculiarly suited to make this judgment. We are ill-equipped to enunciate the optimal standards of safety or care for products sold in distant markets, and thus choose to refrain from imposing our determination of what constitutes appropriate behavior to circumstances with which we are not familiar. While imposing our presumably more stringent standards to deter tortious conduct within our borders could afford a higher degree of protection to the world community, such an approach would also ignore the unique significance of the foreign forum's interest in implementing its own risk-benefit analysis, informed by its knowledge of its community's competing needs, values, and concerns.

In addition, a New York jury would be asked to determine the reasonableness of

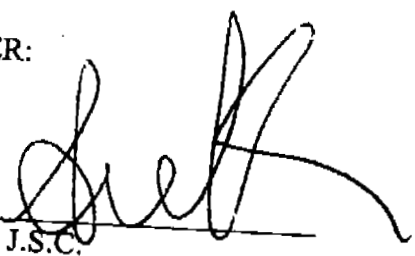
defendants' conduct in the context of a foreign healthcare and regulatory system, and New York courts would have no compulsory process over non-party witnesses and custodians of documents in the countries in which plaintiffs reside. See *Brewer, id.*; *Harrison v. Wyeth Labs. Div. of Amer. Home Prods. Corp.*, 510 F. Supp. 1, 5 (E.D. Pa. 1980), *aff'd* 676 F.2d 685 (3d Cir. 1982)(fairness to defendant mandates that defendant's conduct be judged by standards of community affected by its actions). Moreover, alternative forums exist in which these cases may be brought. Plaintiffs' arguments that they would be deprived of jury trials, their derivative actions, contingency fees and many discovery devices available in New York, do not weigh against dismissal. See *Pahlavi, supra* at 481 (availability of alternative forum is pertinent factor but not precondition to dismissal); *Ungar v. Fisher, supra*, 24 A.D.3d 108 (to no avail that Quebec's no-fault law deprived plaintiff of forum); *Ledingham v. Parke-Davis Div. of Warner-Lambert Co.*, 628 F. Supp. 1447, 1450 (E.D.N.Y. 1986)(although potential damage award may be smaller in Canada and litigation there might be more expensive and more difficult, Canadian forum provided adequate alternative forum). Indeed, much of the discovery is complete, and plaintiffs have the advantage of having access to deposition testimony. Accordingly, it is

ORDERED that defendants' motion to dismiss this case upon the ground of *forum non conveniens*, is granted upon the following conditions:

- 1) that defendants consent to jurisdiction in the foreign forum and accept process;
- 2) that defendants waive statute of limitations defenses if suit is brought in the foreign jurisdiction within six months of this decision; and
- 3) that defendants produce witnesses and documents under their control for trial in

the foreign forum, at defendants' expense.

ENTER:



J.S.C.

DATE: February 3, 2009

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