

Kuchinsky v Pfizer, Inc.

2009 NY Slip Op 31090(U)

April 17, 2009

Supreme Court, New York County

Docket Number: 114266/06

Judge: Martin Shulman

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

PRESENT: _____ J.S.C. _____
Justice

PART 1

Index Number : 114266/2006
KUCHINSKY, ROSE
vs
PFIZER INC.
Sequence Number : 001
DISMISS ACTION/INCONVENIENT FORUM

INDEX NO. 114266/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-K
Answering Affidavits — Exhibits A
Replying Affidavits — Exhibit 1

PAPERS NUMBERED
1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in
accordance with the attached decision
and order.

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 17, 2009

MARTIN SHULMAN 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 1

----- X
ROSE E. KUCHINSKY,

Plaintiff,

Index No. 114266/06

-against-

PFIZER INC.,

Defendant.

FILED

APR 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

Martin Shulman, J.

Defendant Pfizer, Inc. ("defendant" or "Pfizer") moves to dismiss this complaint pursuant to CPLR 327 on the grounds of forum non conveniens, in favor of litigation in Virginia. Plaintiff Rose Kuchinsky ("plaintiff" or "Kuchinsky") opposes this motion, seeking to have the complaint heard in a New York court.

BACKGROUND AND FACTUAL ALLEGATIONS

Pfizer is a Delaware corporation having a principal place of business in New York, New York. Pfizer manufactures and markets Lipitor, a prescription cholesterol-lowering medicine which was invented and developed in Ann Arbor, Michigan.

Kuchinsky alleges that after taking Lipitor, she experienced traumatic side effects, and continues to sustain some of those injuries. She filed a lawsuit against Pfizer including claims for failure to warn and negligent misrepresentation, among others. Plaintiff alleges that if Pfizer had adequately disclosed the side effects that she experienced, she would not have taken Lipitor. Pfizer seeks to have the claim dismissed on the grounds of forum non conveniens, stating that plaintiff was not a

resident of New York either during the time she allegedly sustained the injury or at the time she filed this action.

Kuchinsky was born in Brooklyn in 1922 and lived there on a permanent basis until her husband's death in 1996. Around 1997, plaintiff began residing with her daughter, son-in law and two grandchildren, who live in Great Falls, Virginia. It appears that plaintiff has been living with her family in Virginia and has been visiting Brooklyn a few times a year for a few days at a time. Plaintiff continues to return to Virginia after her visits to Brooklyn, although she says that she plans to return to New York to live when she is able to.

Kuchinsky indicates that she is a New York resident and seeks to pursue claims against Pfizer in the New York courts. She lists several factors favoring her residency of New York, some of which include:

- Plaintiff keeps all her clothing, jewelry, antiques, coin and stamp collections at her home in Brooklyn;
- She continues to own a 99% interest in her home, with her son owning the other 1%;
- She continues to pay the utility bills real estate taxes on her Brooklyn home;
- She maintains bank accounts in New York and has her social security check sent to her bank in Brooklyn;
- She wishes to have her funeral in Brooklyn; and
- She still considers her home to be in New York.

Plaintiff's Memorandum of Law at p. 5.

Pfizer attempts to demonstrate that plaintiff was not a resident of New York either before, during or after she allegedly sustained her injuries. Defendant documents these facts, among others:

- Plaintiff has been voluntarily living with her family in Virginia for over a decade, and has visited New York at most a "[f]ew times a year," staying for, at most, three nights at a time;
- Plaintiff's medical records confirm that she was living in Virginia on a permanent basis after 1998, at the latest;
- Plaintiff's records do not identify a single New York doctor with whom she had contact after 1997 or a prescription filled in New York after that date;
- She obtained Lipitor from her treating physician in Virginia and also filled this prescription there;
- She was never treated for any alleged side effects of Lipitor outside of Virginia;
- She obtained a valid Virginia driver's license in 2002 and renewed it in 2007. She has not had a New York license since 2002;
- She receives mail in Virginia, specifically directing her New York based-banks and Medicare to send mail to her in Virginia;
- Plaintiff's son resides in the house in Brooklyn and she had to sell him a 1% ownership in the house since the insurance company needed someone who lived there "full-time"; and
- She has made no effort either before or after using Lipitor to move back to the house in Brooklyn.

Pfizer's Memorandum of Law in Support of Motion at pp. 2-5.

Plaintiff was prescribed Lipitor in early August 2004. She claims that in October 2004, while she was at her daughter's home, she "suffered a sudden, unexplained group of symptoms that left her in a confused state, which doctors initially thought had been caused by a massive stroke." Plaintiff's Memorandum of Law in Opposition, at

p.3. Kuchinsky was hospitalized in October 2004, and released after a week. After her symptoms did not improve, plaintiff was re-hospitalized again in November 2004.

During this hospitalization, she stopped taking Lipitor. After she stopped taking Lipitor, her symptoms began to lift immediately and she regained her ability to walk and talk, and could drive a car again. Plaintiff states that she still has some residual problems from the Lipitor usage such as intermittent memory loss. However, in her deposition, Kuchinsky testified that after she stopped taking Lipitor, "I was back to the person I was before I started the Lipitor." Exhibit 1 to Motion at p. 45. Testimony indicates that the following March, plaintiff was healthy enough to take a bus trip by herself to Atlantic City. *Id.* at 113.

Wilson v Pfizer, Inc.

Plaintiff has declined to enter into a stipulation and order of conditional dismissal as have other out of state plaintiffs in *In re: New York Lipitor Products Liability Litigation* (N.Y. County Index No. 767000/07), who have stipulated to a dismissal with the right to preserve any appellate rights, based on this court's recently decided forum non conveniens case, *Wilson v Pfizer, Inc.*, 20 Misc 3d 1104(A), 867 NYS2d 21 (Sup. Ct., NY Cty, 2008). In *Wilson*, plaintiff was a Georgia resident who, similar to the present plaintiff, experienced side effects after taking Lipitor. The plaintiff in *Wilson* argued that his injuries were directly related to corporate decisions as to how Lipitor should be marketed and sold, and that the drug's labeling was misleading. He brought his cause of action in New York, citing that Pfizer's headquarters and documentation are located there. The court in *Wilson* granted Pfizer's motion to dismiss on the grounds on non

conveniens, and followed the decision making process in another recent case, *Jordan v Pfizer, Inc.*, 2007 NY Misc LEXIS 6008 (Sup. Ct., NY Cty, Edmead, J.).

In the present case, Kuchinsky states that the other plaintiffs were undisputed non-New York residents, therefore, the decision in *Wilson* applies to them. However, in her case, she alleges that she is a New York resident and this fact distinguishes her case from *Wilson* and the others involving non-New York plaintiffs. As such, Kuchinsky contends that her case should remain in this court.

Pfizer has stipulated that if this case is dismissed and re-filed in Virginia, Pfizer will consent to jurisdiction in Virginia. Pfizer has also stipulated that it will make any New York employee who could have been subpoenaed by this court reasonably available for trial in Virginia, and it will allow any discovery taken to date to be used in litigation in Virginia as if taken in that action. Pfizer has also stipulated that if this case is dismissed and timely re-filed in Virginia, the statute of limitations on plaintiff's claim will be deemed to have been tolled during the time that the action was pending in New York (to the extent it had not already expired at the time this action was filed).

DISCUSSION

The doctrine of forum non conveniens, articulated in CPLR 327 (a), permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere. The burden rests on the defendant challenging the forum to illustrate relevant private or public interest factors which outweigh accepting the litigation. *Sambee Corp., Ltd. v Moustafa*, 216 AD2d 196, 198 (1st Dept 1995). Among the factors courts consider when deciding a motion to

dismiss on the ground of forum non conveniens are: (1) the burden on New York courts; (2) the lack of an alternate forum; (3) the fact that the transaction giving rise to the action occurred in a foreign jurisdiction; (4) the residency of the parties; (5) the location of a majority of the witnesses; and (6) the potential hardship to the defendant. No one factor is controlling. *Jordan supra*, citing *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 (1984).

Despite plaintiff's alleged distinction between this case and *Wilson*, the analyses and the decision in *Wilson* are on point with the present case. As it did in *Wilson*, this court will also analyze each of the six factors.

Burden on New York Courts

With respect to burdening the New York courts, they are "not compelled to retain jurisdiction in a case that has no substantial nexus to New York." *Demenus v Sylvester*, 146 AD2d 668 (2nd Dept), app. den. 74 NY2d 606 (1989). In *Wilson*, the court held that the plaintiff's home state of Georgia had an interest in "determining whether pharmaceuticals which were prescribed, marketed, distributed, and ingested in the state were appropriately tested and labeled." This is consistent with holdings of the Appellate Division, First Department, which determined that the law of the state where the medicine was prescribed and ingested should prevail. *See, e.g., Kush v Abbott Labs.*, 238 AD2d 172 (1st Dept 1997). The place of wrong is considered to be the place where the last event necessary to make the actor liable occurred. *Id.*, citing to *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 195 (1985).

In our case, although Kuchinsky claims to be a New York resident, she ingested the medicine in Virginia and was treated for her side effects in that state. Hence, Virginia clearly has a greater nexus than New York in this aspect for purposes of forum non conveniens.

As the court held in *Wilson*, although New York courts can apply foreign law, "it is an undue burden to this court to apply foreign law where all of the events leading up to the action took place out of state." Furthermore, Virginia has a greater public interest in hearing claims of injuries alleged to have occurred in Virginia. As in *Wilson*, where Georgia substantive law would apply, in the present case, Virginia substantive law would most likely govern this claim and a Virginia court is better suited to this task.

Lack of Alternative Forum

Neither party can dispute that an alternative forum is available to Kuchinsky. Plaintiff, her family and the witnesses reside in Virginia. Pfizer has stipulated that if plaintiff were to timely re-file in Virginia, Pfizer will consent to jurisdiction in Virginia and all discovery taken to date may be used in that action. Pfizer has also agreed to make its New York witnesses reasonably available for trial in Virginia. Given this information, plaintiff's cause of action will not be significantly delayed if pursued in an alternative forum. Although this action has a slight nexus to New York, and it will be inconvenient for some witnesses wherever the trial takes place, on the whole, it appears that this is a less appropriate forum.

Situs of Action

Plaintiff argues that key corporate decisions regarding the labeling and disbursement of Lipitor were made at Pfizer's New York headquarters. However, as the

court in *Wilson* concluded, *Jordan* is directly on point. In *Jordan*, out-of-state plaintiffs also argued that personnel in New York may have made key decisions and overseen the development process of another drug manufactured by Pfizer. However, the court in *Jordan* found that the fact that the transaction out of which the lawsuit arose occurred in a foreign jurisdiction favors dismissal. As the court stated, “[s]ince the key [f]acts giving rise to plaintiffs’ injuries, and the injuries were sustained in plaintiffs’ respective home states, such factors militate in favor of dismissal of these actions.” *Jordan, supra*.

Although Lipitor was invented and developed in Michigan, plaintiff obtained her prescription in Virginia and ingested the drug there. It appears that she also received all of her medical treatment related to ingesting Lipitor in Virginia. Pfizer has documented that Kuchinsky received all of her medical care between March 1998 and September 2008 in Virginia by Virginia healthcare providers. Her medical records indicate that she attended over eighty medical appointments with Virginia healthcare providers prior to her hospitalization in October 2004. She also filled 175 prescriptions in a Virginia pharmacy prior to this date. Cheffo Aff. in Further Support of Motion, at ¶¶ 2-4. All of the facts of the transaction which gave rise to plaintiff’s injury occurred in a foreign jurisdiction, which, again, militate in favor of dismissal of this action.

Residency

Plaintiff testifies that she considers herself to be a New Yorker, and as such, this weighs heavily in favor of litigating this action in New York. Plaintiff cites to *Kastendieck v Kastendieck*, 191 AD2d 328 (1st Dept 1993), which states that “although not the sole determining factor, the residence of a plaintiff has been held to generally be the most

significant factor in the [forum non conveniens] equation.” To consider a place as a residence for venue purposes, for example, “one must stay there for some time and have a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency.” *Mandelbaum v Mandelbaum*, 151 AD2d 727, 728 (2nd Dept. 1989), citing *Katz v Siroty*, 62 AD2d 1011, 1012 (2nd Dept 1978). Residence must be “determined at the time of the commencement of the action and indicia of residence acquired after the commencement of the action are irrelevant [internal citations omitted].” *Santulli v Santulli*, 228 AD2d 247, 248 (1st Dept 1996).

Although Kuchinsky may consider herself a New Yorker, her actions demonstrate that for purposes of this litigation she is and was a resident of Virginia. Although she has occasionally visited New York, plaintiff has been residing with her daughter since at least 1998, six years prior to taking Lipitor. She has not seen one doctor in New York in over ten years and only saw Virginia doctors related to her alleged injuries sustained by taking Lipitor. Virginia doctors treated plaintiff about eighty times prior to her first hospitalization in October 2004. Cheffo Aff. in Further Support of Motion, at ¶¶ 2-4. Plaintiff received a valid Virginia driver’s license in 2002 and renewed it in 2007. In her application for a license, she had to document that she is a Virginia resident.¹ Exhibit F to Motion. Even if Kuchinsky intended to return to Brooklyn to live there permanently, she has not made any attempt to do so over the last ten years.

¹ Plaintiff testified that she thought she could have a license in both New York and Virginia.

Since 2004, plaintiff claims that she has had no choice but to reside with her daughter "because Lipitor made her seriously ill," not because she wanted to leave New York. However, this testimony seems to conflict with what plaintiff stated at her deposition on January 5, 2009. When asked about stopping Lipitor in November 2004, plaintiff stated, "[i]t was like a miracle." Plaintiff further testified that she was back to the person she was before she started Lipitor. Exhibit 1 to Motion, at p. 45. As Pfizer noted about the good quality of plaintiff's life, plaintiff currently drives, grocery shops for her family, plays cards with her friends, and helps her grandchildren with their homework.

Although plaintiff may still maintain strong physical and emotional ties with New York, the factors surrounding the current litigation outweigh these ties. Kuchinsky ingested the drug in Virginia, received treatment there and continues to reside there. Although for other purposes she may be considered a New York resident (i.e., tax purposes), for purposes of the Lipitor litigation, she is not a resident of New York.

Pfizer's New York Residency

Plaintiff argues that since Pfizer's headquarters are located in New York and its strategy for marketing Lipitor was developed in New York, Pfizer's New York residency should play a prominent role. She alleges that many of her claims involve defendant's decisions regarding the non-disclosure of potential side effects which she experienced after Lipitor's FDA approval took place. Plaintiff argues that Pfizer is headquartered in New York and is represented by New York attorneys. Plaintiff contends those factors, coupled with her own New York residency, should support the court's retention of jurisdiction.

CPLR 327 (a) specifically states that “[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.” New York courts are not compelled to retain cases in which there is not a substantial nexus to New York. Although residency is a factor to consider, “the mere fact that one or more of the parties may be residents of this State does not preclude the court from exercising its discretion to dismiss in an appropriate case [internal citations omitted].” *Demenus v Sylvester*, 146 AD2d at 668-669. “The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience . . .” *Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479 (1984). As the court concluded in *Wilson*, Pfizer’s New York residence is “no obstacle to dismissal of this action by a non-resident plaintiff based on his ingestion of a drug and alleged injuries and medical treatment in his home state.” Likewise, in the present case, even if plaintiff was a resident of New York, other factors such as the site of the alleged injury and the location of the witnesses warrant dismissal of this case.

It is well settled that a person can have two residences. See, e.g., *Antone v General Motors Corp., Buick Motor Div.*, 64 NY2d 20, 28 (1984) (analysis of residency for purposes of CPLR 202); *Matter of Prudential Prop. & Cas. Ins. Co. [Galioto]*, 266 AD2d 926 (4th Dept 1999) (one may have two residences for insurance coverage purposes). Accordingly, as previously mentioned, even if plaintiff could be deemed a New York resident, this would be irrelevant since the court still has the discretion to

dismiss this case in preference of a better suited forum. The facts show that plaintiff is effectively a resident of Virginia, too.

Location of Witnesses

The majority of the witnesses are located outside of New York, including plaintiff, her family and testifying doctors and hospital staff. As plaintiff plainly states, "four of Mrs. Kuchinsky's five physicians and the hospital where she was treated for her Lipitor-related injuries are located in the same office complex in Reston . . ." Plaintiff Memo of Law, at 11. Plaintiff maintains in her interrogatories that she spoke to four doctors regarding Lipitor and was also treated by the emergency staff in a Virginia hospital. She also discloses that her daughter and son-in law, who live in Virginia, would be potential witnesses to her alleged side effects due to Lipitor.

Although Pfizer's corporate offices are located in New York, as previously mentioned, key events related to Lipitor's development took place outside of New York. Arguably, witnesses from various locations could be required to testify for Pfizer. Regarding the witnesses in New York, Pfizer has agreed to produce witnesses that would have been available in New York for a trial in Virginia.

Potential Hardship to Defendant

Defendant argues that it faces a substantial hardship since the plaintiff's treating doctors and witnesses who observed her alleged health changes are located in Virginia, outside the reach of a New York subpoena. Although Kuchinsky has stated that she will pay for the doctors to testify at a New York trial, there is no guarantee that these doctors will appear in person. According to her own testimony, plaintiff has not even told her doctors about any pending litigation. Frequently, "physicians are reluctant to

interrupt their practices to appear at trials." See, e.g., *Keller v Pfizer, Inc.*, 18 Misc 3d 1128(A), 856 NYS2d 498 (Sup. Ct., NY Cty, 2008). It is uncontested that the physicians are beyond this court's subpoena power. Busy schedules coupled with a duty to their patients make it difficult for this court to believe that plaintiff's doctors would willingly appear to give live testimony in New York.

Plaintiff argues that videotaped depositions would be available if the Virginia doctors were not able to provide live testimony. As the courts similarly analyzed in *Wilson*, "the First Department has long admitted the use of videotaped depositions of out-of-state witnesses at trial." However, videotaped depositions carry significant drawbacks, such that "counsel cannot revise their examination to take account of unexpected developments at trial, but given the breadth of civil pre-trial discovery, the danger of such surprise is largely attenuated." *Wilson, supra*.

Although it appears that the use of video-taped deposition testimony of the out-of-state treating physicians was not an issue in *Nicholson v Pfizer, Inc.*, 278 AD2d 143 (1st Dept 2000), the fact that the treating physicians were "beyond the reach of New York's subpoena power" compelled a dismissal on the basis of forum non conveniens. *Id.* at 143. Here, as in *Nicholson* and *Wilson*, notwithstanding the availability of videotaped depositions, the court finds that on the whole, the remaining factors call for dismissal of the case. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted pursuant to CPLR 327 (a) and the complaint is hereby dismissed on condition that defendant Pfizer, Inc. comply with the affirmation of Mark S. Cheffo dated October 31, 2008 that: it

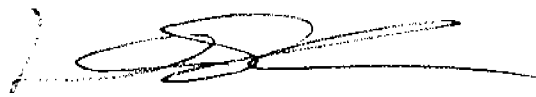
will consent to jurisdiction in Virginia and make any New York employee who could have been subpoenaed in New York reasonably available for trial in Virginia; all discovery taken to date in New York may be used in a Virginia action; and the defense of the statute of limitations will be deemed to have been tolled during the time this action was pending in New York, to the extent that it had not already expired at the time this action was filed; and it is further

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

ORDERED that, in the event that the above conditions are not met upon plaintiff's commencement of an action in another forum, plaintiff may move for an order vacating this judgment.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
April 17, 2009



Hon. Martin Shulman, J.S.C.

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