

Teufel v RTI Donor Servs., Inc.
2011 NY Slip Op 33716(U)
January 27, 2011
Supreme Court, Richmond County
Docket Number: 700005/10
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:700005/10
Motion No.:001**

**JEAN DOUGLAS TEUFEL and
ROBIN S. SAMOLOW,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**RTI DONOR SERVICES, INC.,
RTI BIOLOGICS, INC. f/k/a Regeneration Technologies, Inc.,
LIFECCELL CORPORATION,
LIBERTY GROVE MEMORIAL GARDENS CREMETORY,
STEPHEN FINLEY,
BERARDINELLI FOREST HILL MEMORIAL,
BIOMEDICAL TISSUE SERVICES, LTD.,
MICHAEL MASTROMARINO,
JOHN DOE CORPORATIONS 1-10, and
JOHN DOE INDIVIDUALS 1-10,**

Defendants

The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support of Motion	2
Answering Affidavits	3
Memorandum of Law in Opposition	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Berardinelli Forest Hill Memorial and Stephen Finley, move to dismiss this action, which is part of a consolidated mass tort action known as *In Re: New York Human Tissue Products Liability Litigation*, Index No. 750,000/08. The defendant argue that this court lacks personal jurisdiction over them; and alternatively that the matter should be dismissed on

forum non conveniens grounds. The defendants' motion is denied.

It is undisputed that both moving defendants, as well as the plaintiffs, are residents of New Jersey. In support of the defendants motion, Stephen Finley avers that "Berardinelli did not derive substantial financial benefits from individuals or consumers located in New York." However, the plaintiffs argue that the moving defendants used their facilities to train "organ harvesters" that later worked in New York. Thereby, making them part of a complex network of businesses that profited from the illegal harvesting of organs and other biologic material from corpses entrusted to them. The plaintiffs further maintain that upon the completion of further discovery it is likely that agreements will come to light that will demonstrate a direct connection to profit in New York between the moving defendants and the New York State co-defendants.

Although a plaintiff bears the ultimate burden of proof on the issue of personal jurisdiction, in opposing a motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a *prima facie* showing of jurisdiction, but instead must only set forth a sufficient start and show their position not to be frivolous.¹ Here the plaintiffs' have shown that the their argument in favor of personal jurisdiction pursuant to CPLR § 302(a)(1) is sufficiently started and not frivolous in nature. As such the defendants' motion to dismiss pursuant to lack of personal jurisdiction is denied.

The defendants also move under CPLR § 327 to dismiss this action under the rule of *forum non conveniens*. The basis of the defendants' motion is based on the conclusory statement that "any alleged negligence and/or wrongful conduct of Defendants on which the entire case is based occurred only in New Jersey, as that is the location of Berardinelli's mortuary and funeral home business." In the *Islamic Republic of Iran v. Puhlavi*² the New York Court of Appeals held

¹ *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 AD3d 623, [2d Dept 2009].

² *Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984].

that there are several factors a trial court must consider when evaluating a *forum non conveniens* motion:

[a]mong the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. . . The court may also consider that *both* parties to the action are nonresidents . . . And that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction... No one factor is controlling. . .³ (emphasis added)

“[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.”⁴

In this case, several of the named defendants are either individual residents of New York, or corporations doing business in New York. Additionally, the present stage of discovery in this litigation does not lend itself for this court to conclude, as a matter of law, that the plaintiffs’ causes of action arose primarily in a foreign jurisdiction.

It is also important to note that the moving defendants have been defending three additional cases (*Thorton*, Index No.(unknown); *Rizzolo*, Index No. 750,028/08; and *Newberg* 750,023/08), which according to the plaintiffs are identical to this case. These cases were filed individually as late as 2007 and are also part of this mass tort. Furthermore, the moving defendants are only two of five named defendants, along with approximately 10 “John Doe” individuals and an addition 10 “John Doe Corporations.” Notably, none of the non-moving co-defendants join in this application challenging the convenience of this forum. As such, the defendants’ motion to dismiss under *forum non conveniens* grounds is denied.

Accordingly, it is hereby:

³ Id.

⁴ Id. at 479.

ORDERED, that the motion to dismiss made by Stephen Finley and Berardinelli Forest Hill Memorial is denied, with leave to renew upon the completion of discovery; and it is further

ORDERED, that the parties shall return to **DCM Part 3 on Friday, May 13, 2011 at 11:00 a.m.** in connection with the certification conference ordered by this court in the mass tort, *In Re: Human Tissue Product Liability Litigation*, 750,000/08.

ENTER,

DATED: January 27, 2011

Joseph J. Maltese
Justice of the Supreme Court