Bailen v Air & Liquid Sys. Corp.
2013 NY Slip Op 32794(U)
October 25, 2013
Sup Ct, New York County
Docket Number: 190318/2012
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER **PART** 30
Justice

EDDIE HOWARD BAILEN and RENA NORENE ASH-BAILEN,

Plaintiffs,

- v -

AIR & LIQUID SYSTEMS CORP., et al.,

Defendants.

INDEX NO. 190318/12
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

This motion is decided in accordance with the annexed memorandum decision dated 10.25.13

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

Dated: 10.25.13

SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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EDDIE HOWARD BAILEN and RENA NORENE ASH-BAILEN,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORPORATION., as Successor by Merger to Buffalo Pumps, Inc., *et al.*,

Defendants.

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Index No. 190318/2012
Motion Seq. 006

DECISION & ORDER

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Union Pacific Railroad Company ("Union Pacific") moves to dismiss the complaint pursuant to CPLR 327[1] on the ground that New York is an inconvenient forum. As more fully set forth below, the motion is denied.[2]

Plaintiffs Eddie Howard Bailen and his wife Rena Norene Ash-Bailen commenced this action on July 25, 2012 to recover for personal injuries allegedly caused by Mr. Bailen's exposure to asbestos-containing products. Among other things, the complaint alleges that Union Pacific violated the Federal Employer's Liability Act, 45 USC § 51, *et seq.*, by negligently exposing Mr. Bailen to asbestos while he was employed as an electrician by Union Pacific in Omaha, Nebraska

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1 CPLR 327(a) provides that "[w]hen 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."

2 Plaintiffs cross-moved pursuant to CPLR 3211(f) for an order directing the clerk to enter a default judgment against Union Pacific for failing to interpose an answer. By order dated July 1, 2013, this court granted Union Pacific leave to file their answer by July 15, 2013. Union Pacific's answer was filed on July 12, 2013, rendering plaintiffs' cross-motion moot.

during the late 1950's.

The factors to consider when deciding a motion to dismiss on forum non conveniens grounds include: (i) the residency of the parties; (ii) the jurisdiction in which the underlying transaction occurred; (iii) the location of relevant documents and witnesses; (iv) the availability of a suitable forum; and (v) the interest of the alternative forum in deciding the issues. No one factor is controlling. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). Indeed "the great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case." *Id.* The overall issue is whether there is a "substantial nexus" between the plaintiff's action and the State of New York. *Id.* at 483.

Relying on *Blais v Deyo*, 92 AD2d 998 (3d Dept 1983), Union Pacific contends that because plaintiffs are not New York residents it is their burden to justify why this case should remain in New York.[3] As the First Department noted in *Bank Hapoalim Ltd. v Banca Intesa S.P.A.*, 26 AD3d 286, 288 (1st Dept 2006), however, the "special circumstances" rule articulated in *Blais* only applies to transitory motor vehicle accident cases. In fact, it is Union Pacific that has the heavy burden to demonstrate that the *Pahlavi* factors weigh in favor of dismissal. *See Bank Hapoalim*, *supra*, at 287 (quoting *Mionis v Bank Julius Baer & Co., Ltd.*, 9 AD3d 280, 282 [1st Dept 2004]) ("[A] defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident."); *Homola v Longshore Transp. Sys.*, 204 AD2d 1052, 1052 (4th Dept 1994) ("[A] defendant bears the heavy burden of establishing that New York is an inappropriate forum before plaintiff's choice of forum will be disturbed."); *Sullivan v J.V. McNicholas Transfer Co.*, 93 AD2d 527, 531 (4th Dept 1983) ("The burden of proof on this issue is upon the party who challenges the maintenance and

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[3] "[I]n tort cases, the plaintiff must demonstrate . . .that special circumstances warrant the retention of the action in New York. . . ." *Blais v Deyo*, *supra*, at 999.

continuation of the suit in this State.").

The defendant focuses on Mr. Bailen's exposure while he was employed by Union Pacific in Nebraska even though the record demonstrates that he suffered substantial exposure in New York. Mr. Bailen testified[4] that in 1966 he started his own business which took him all over the country. He specifically recalled exposure to asbestos from joint compound work done in his presence during a month-long job in New York City in 1977 at the New York Library for the Blind. He stated that the sanding of dried joint compound caused asbestos-containing dust to be released into his vicinity (Deposition pp. 340-41, objection omitted):

> A. But actually, I figured probably the majority of this problem with my health is with -- and my mesothelioma came from the asbestos dust from the stuff in the New York library more than anything else. . . .
>
> Q. Why do you think that?
>
> A. Well, it was probably the most visible dust of this white material that, that -- I mean, it covered more stuff, and it seemed to be more dense than any other time. . . .

In *Ackley v A.C.&S.*, 2010 NY Misc. LEXIS 3052 (Sup. Ct. NY Co. Jun. 25, 2010), I held that a "prerequisite to bringing this asbestos case in New York City is the existence of evidence that plaintiff sustained his injury due to asbestos exposure in New York." *Id.* at *5. The plaintiffs have clearly met this standard.

The remaining *Pahlavi* factors also militate against dismissal. In this regard, this court granted plaintiffs a trial preference pursuant to the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO") in light of Mr. Bailen's in-extremis status.[5] Were this case

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[4] Mr. Bailen was deposed on October 16-17, 2012. Copies of his deposition transcripts are submitted as defendant's exhibit C ("Deposition").

[5] To be eligible for a NYCAL trial preference, the plaintiff must be "terminally ill from an asbestos-related disease with a life expectancy of less than one year." CMO § XIII(A)(1).

dismissed, it is unclear whether Mr. Bailen would see his day in court, and there is nothing in the record on this motion to show that Nebraska, which the defendant suggests is a more suitable forum, either maintains an active asbestos calendar or even routinely handles asbestos cases. Also, while the court is mindful that the plaintiff and his treating physicians reside in the midwest, the defendant has not identified any Bailen family member who is unwilling to testify in New York, nor has there been any indication that plaintiffs intend to call any of Mr. Bailen's treating physicians at trial.

The defendant's heavy burden on this motion has simply not been carried.

Accordingly, it is hereby

ORDERED that Union Pacific Railroad Company's motion to dismiss is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: 10·25·13

SHERRY KLEIN HEITLER
J.S.C.