

**Horvath v ACF Indus., LLC**

2014 NY Slip Op 30565(U)

March 5, 2014

Sup Ct, NY County

Docket Number: 190220/2013

Judge: Sherry Klein Heitler

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

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RALPH HORVATH and LORETTA HORVATH,

Plaintiffs,

-against-

ACF Industries, LLC, et al.,

Defendants.

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**SHERRY KLEIN HEITLER, J:**

Index No. 190220/2013  
Motion Seq. 001

**DECISION & ORDER**

In this asbestos personal injury action, defendant CSX Transportation, Inc. ("CSX") moves to dismiss the complaint pursuant to CPLR 327<sup>1</sup> on the ground that New York is an inconvenient forum. As more fully set forth below, the motion is denied.

Plaintiff Ralph Horvath was diagnosed with mesothelioma on or about July 23, 2012. On June 20, 2013 Mr. Horvath and his wife Loretta Horvath commenced this action to recover for personal injuries allegedly caused by his exposure to asbestos-containing products. Plaintiffs designated New York County as the venue of this action based on Mr. Horvath's alleged exposure to asbestos in New York City and on the ground that New York County is the principal place of business of several of the defendants herein. Plaintiffs' allegations concerning CSX recite that it violated the Federal Employer's Liability Act (45 USC § 51, *et seq.*) by negligently exposing Mr. Horvath to asbestos while he worked for CSX as a clerk, car checker, and signal inspector in Michigan during the 1950's and 1960's. At the time this motion was brought, an exchange of

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<sup>1</sup> 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."

interrogatories had not been completed nor had Mr. Horvath been deposed by any of the parties.

In its moving papers, CSX asserts that there is no substantial connection between this action and New York County inasmuch as plaintiffs reside in South Carolina, Mr. Horvath's medical providers reside in Georgia, and insofar as CSX is concerned, all of Mr. Horvath's asbestos exposures occurred in Michigan.<sup>2</sup> Plaintiffs submit an opposing affidavit by Mr. Horvath in which he states among other things that during the 1960's and 1970's he worked as a signal engineer for General Railway Signal in Rochester, New York, and that he was exposed to asbestos on a job in the New York City subway system which lasted between three and four months.<sup>3</sup> At the court's suggestion the parties waited for depositions to conclude before further pursuing this motion.

Mr. Horvath has since been deposed.<sup>4</sup> The transcripts of his deposition have been e-filed with the court. Among other things Mr. Horvath testified to experiencing significant occupational asbestos exposure over the course of many months from wires, cables, and system signal components while working on a subway automation project in New York County and while performing flood inspections and repairs of a subway tunnel near 89th street in New York County.

CSX and plaintiffs supplemented their arguments on the motion by letter briefs dated December 9, 2013 and December 17, 2013, respectively. In this context CSX argues that plaintiffs' case should be dismissed because Mr. Horvath was not employed by CSX while he worked in New York City and because his allegations of asbestos exposure in New York City are *de minimis* at best.

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<sup>2</sup> CSX asserts alternatively that the venue of this action should be changed to another county within New York State because Mr. Horvath never lived or worked in New York City. As discussed herein, this argument is without merit.

<sup>3</sup> Mr. Horvath's affidavit, sworn to August 22, 2013, is submitted as exhibit A to plaintiffs' opposition papers.

<sup>4</sup> Mr. Horvath's deposition took place over six days in September and October of 2013.

Under the doctrine of *forum non conveniens* a court may dismiss an action when it finds that “in the interest of substantial justice the action should be heard in another forum.” CPLR 327. The doctrine is “flexible,” and requires the balancing of many factors bearing on the particular case. *National Bank & Trust Co. v Banco de Vizcaya, S.A.*, 72 NY2d 1005, 1007 (1988). These factors 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.

The facts and circumstances of this case do not support dismissal on *forum non conveniens* grounds. As plaintiffs point out, this litigation involves almost 50 defendants. While plaintiffs do not reside in New York County, several of the defendants do, and there is nothing to indicate that any of the Horvath family members are unable to travel to New York to testify or that plaintiffs intend to call any of Mr. Horvath’s physicians at trial. Moreover, CSX, which has an office in the Bronx, cannot seek dismissal of this case on the mere fact that it employed Mr. Horvath only in Michigan. There is nothing on this motion to show that South Carolina or Michigan, which CSX suggests are more suitable forums, either maintain active asbestos calendars, or in the case of mesothelioma patients, accelerated calendars as found in NYCAL.

In the face of Mr. Horvath’s testimony of his months of asbestos exposure in New York City’s subway system, CSX’s *de minimis* allegations are similarly unsupported and conclusory.

CSX has not submitted any expert testimony to show that such exposure could not have caused or contributed to Mr. Horvath's injuries.

The Court of Appeals has described the undertaking of a *forum non conveniens* motion as a "heavy burden of demonstrating that the forum chosen by [the plaintiff] is an inappropriate one. . . ." *Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, Ltd.*, 62 NY2d 65, 74 (1984). On this record, the defendant's heavy burden has not been met.

Accordingly, it is hereby

ORDERED that CSX Transportation, Inc.'s motion to dismiss is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: 3.5.14



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SHERRY KLEIN HEITLER  
J.S.C.