

McKim v A.O. Smith Water Prod. Co.

2014 NY Slip Op 31028(U)

April 16, 2014

Sup Ct, New York County

Docket Number: 190225/12

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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BRUCE McKIM, as Executor for the Estate of ROBERT
McKIM, and DONNA McKIM, Individually,

Index No. 190225/12
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

-----X
SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendants Williams & Davis Boiler, Inc., Columbia Boiler Company of Pottstown, and Paker Boiler Company (collectively, "Defendants") move to dismiss the complaint pursuant to CPLR 327¹ on the ground that New York is an inconvenient forum. The motion is granted to the extent set forth below.

Plaintiffs' decedent Robert McKim was diagnosed with mesothelioma on December 7, 2011. He died on January 30, 2012 before he could be deposed. Bruce McKim, the decedent's son, and Donna McKim, the decedent's wife, commenced this action on April 30, 2012. Plaintiffs' interrogatory responses indicate that the decedent was exposed to asbestos throughout his life, to wit: from 1943 through 1945 as a laborer for U.S. Steel in Ellwood City, Pennsylvania; from 1945 through 1949 as an electrician's mate aboard the USS Roosevelt at sea and at the Brooklyn and Norfolk Naval Shipyards; from 1949 through 1950 as a laborer for National Tube Co. in Ellwood City, Pennsylvania; from 1952 through 1959 as a laborer for the Lily Tulip Cup Corp. in

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."

Springfield, Missouri; and from 1959 through 1980 as a self-employed electrician and boiler installer in Pennsylvania, Tennessee, and Mississippi.

In their moving papers the Defendants argue that dismissal on *forum non-conveniens* grounds is appropriate because there is no admissible evidence linking the decedent's asbestos exposure to New York. In this regard, the Defendants point out that plaintiffs' interrogatory responses and Bruce McKim's testimony regarding his father's alleged asbestos exposure while at the Brooklyn Navy Yard are inadmissible hearsay.²

Plaintiffs sought additional time to locate Mr. McKim's co-workers so as to adduce testimony of his exposure in New York. I adjourned the Defendants' motion to give plaintiffs time to locate such witnesses. With the court's permission, the Defendants and plaintiffs supplemented their arguments on this motion by letter briefs dated November 27, 2013 and December 18, 2013, respectively. Their submissions indicate that plaintiffs had located and deposed Mr. Nicholas Fricchione, a former U.S. Navy electrician who served aboard the USS Roosevelt with Mr. McKim.³ Mr. Fricchione testified that in either 1946 or 1947 he and Mr. McKim were in New York City where the USS Roosevelt was docked for a period of 2-3 weeks during Fleet Week. However, he could only generally recall the scope of Mr. McKim's duties during that time period and could not definitively state whether Mr. McKim's work exposed him to asbestos while their ship was docked in New York.⁴

New York courts "need not entertain causes of action lacking a substantial nexus with New

² Defendant's exhibit G, pp. 735-36.

³ A copy of Mr. Fricchione's deposition transcript is annexed to the Defendants' supplemental brief ("Fricchione Deposition").

⁴ Fricchione Deposition pp. 37-40.

York.” *Martin v Mieth*, 35 NY2d 414, 418 (1974). The doctrine of *forum non conveniens*, codified in CPLR 327(a), provides that the court may stay or dismiss an action “[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum.” *Id.* 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 residence 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; (v) the interest of the alternative forum in deciding the issues; and (vi) the burden on the New York courts. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). The “great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case.” *Id.* However, where there is no substantial connection to this state dismissal based upon *forum non conveniens* is warranted. *Blueye Navigation v Den Norske Bank*, 239 AD2d 192, 192 (1st Dept 1997).

On the facts of this case I find that New York is not a convenient forum for this dispute. Plaintiffs do not reside in New York, nor have plaintiffs been able to produce admissible evidence which shows that the decedent was exposed to asbestos in New York. Specifically, plaintiffs’ witnesses could only testify to Mr. McKim’s presence in New York during Fleet Week, but could not testify to any duties performed by him during that time that exposed him to asbestos. Other than the fact that only a few of the many defendants in this case reside or do business here, plaintiffs’ evidence is devoid of any New York connections.

Notably, the deposition testimonies of Bruce and Donna McKim indicate that the decedent sustained daily occupational asbestos exposure for almost 30 years while living and working in

Tennessee and in Mississippi. It may be that such forums are available to plaintiffs to litigate their claims. *See Shin-Etsu Chem. Co. v ICICI Bank Ltd.*, 9 AD3d 171, 179 (1st Dept 2004); *BFI Group Divino Corp. v JSC Russian Aluminum*, 481 F. Supp. 2d 274 (SDNY 2007).

Accordingly, it is hereby

ORDERED that this CPLR 327 motion by defendants Williams & Davis Boiler, Inc., Columbia Boiler Company of Pottstown, and Paker Boiler Company is granted on condition that within 60 days from the date of service of a copy of this order with notice of entry on all parties, all of the defendants to this action stipulate in writing to waive any jurisdictional and statute of limitations defenses in any action commenced by plaintiffs in a different more suitable forum other than New York; and it is further

ORDERED that plaintiffs shall have 120 days from the date of service of a copy of this order with notice of entry on all parties within which to file such action; and it is further

ORDERED that pending the filing of such action by plaintiffs the within action is stayed, and it is further

ORDERED that upon defendants and plaintiffs respectively filing proofs of compliance with the above conditions with the Clerk of Part 30 and the Clerk of the Court, together with proof of service thereof on all parties and a copy of this order with notice of entry, the within stay shall be deemed lifted and the Clerk of the Court shall enter judgment dismissing this action.

This constitutes the decision and order of the court.

ENTER

DATED:

4.16.14


SHERRY KLEIN HEITLER, J.S.C.