Woissol v Bristol-Myers Squibb Co.
2015 NY Slip Op 31982(U)
October 23, 2015
Supreme Court, New York County
Docket Number: 161229/2014
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice PART 22

Index Number : 161229/2014
WOISSOL, KAYLA MARIE
vs.
BRISTOL-MYERS SQUIBB COMPANY
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for DISMISS

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

~~Upon the foregoing papers, it is ordered that this motion is~~

Defendants Bristol-Myers Squibb Company and Otsuka America Pharmaceutical, Inc.'s motion to dismiss this action on the grounds of forum non conveniens is granted on the condition that defendants enter into a stipulation as discussed at the conference.

Plaintiffs allege that the minor plaintiff (plaintiff) suffered personal injuries after taking the prescription medicine Abilify and that the defendants failed to adequately warn the prescribing physicians of the possibility of the injury claimed.

The following facts are not disputed: Plaintiffs currently reside out of state and have resided there at all times relevant to the events at issue here. All of the Abilify that plaintiff was prescribed or obtained was prescribed and ingested out of state. The physicians who allegedly prescribed Abilify to the plaintiff are all located in out of state. Plaintiff was allegedly diagnosed

[redacted] (PAGE 1 OF 5) [redacted]

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

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

with type 2 diabetes while residing out of state and all evaluation and treatment for this diagnosis took place out of state. All of plaintiff's doctors, other medical providers and medical records are located out of state. Defendant Bristol-Myers Squibb Company (BMS) has its principal place of business at 345 Park Avenue New York, NY and defendants BMS and Otsuka America Pharmaceutical, Inc. (Otsuka) co-promote and co-market Abilify in the United States.

As the Court of Appeal stated in *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597 (1984):

> The common-law doctrine of forum non conveniens, also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (citations omitted). The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (citations omitted) and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among 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 (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted). No one factor is controlling (citations omitted).

Parties' Contentions

In support, defendants assert that seven (7) factors militate in favor of dismissing this action. First, all events giving rise to plaintiff's action occurred out of state, where the plaintiff purchased and ingested the drug, citing *In re New York County DES Actions*, 237 AD2d 194 (1st Dept 1997). Second, the key witnesses, plaintiff's treating doctors, are located outside of New York, and none of plaintiff's medical care took place in New York. Third, this state's choice-of-analysis in a products liability action turns on where plaintiff's injuries occurred, which means

that state's law will apply. Fourth, plaintiff's home state is an available, alternative forum. Fifth, defendants face hardship because they may be unable to compel the out-of-state doctors to appear at trial. They claim that deposing the doctors on video and compelling the use of that video at trial would be prejudicial; and even if the doctors agreed to come for the trial, traveling to New York would be a burden. Sixth, neither plaintiff nor defendant Otsuka is a New York resident. Finally, defendants argue that New York does not have a significant interest in lawsuits brought by out-of-state residents over the use of a drug that was tested, developed, prescribed and ingested outside of New York, and that allegedly caused injuries for which plaintiff was treated out of state.

In opposition, plaintiff asserts that defendants' witnesses are located in or close to New York and the fact that plaintiff's witnesses reside in another state does not require transfer to that forum. Additionally, plaintiff contends that defendants have not demonstrated that the out-of-state witnesses will not be willing to testify at trial, and even if they do not testify in person, video depositions are an adequate substitute for live testimony. Further, plaintiff argues that defendants' counsel being located in New York militates in favor of keeping the litigation here, and conclusorily asserts that "New York has an interest in hearing this case, and this Court is fully capable of applying another state's law if it becomes necessary". Finally, plaintiff argues that the fact that Abilify "generates the most revenue for a corporation maintaining its headquarters in New York compels a ruling [on this motion] in Plaintiff's favor".

Discussion

This case involves a prescription drug, and must be distinguished from other cases alleging a failure to warn. As the Court of Appeals stated in *Martin v Hacker,* 83 NY2d 1, 9,

607 NYS2d 598 (1993):

> Warnings for prescription drugs are intended for the physician, whose duty it is to balance the risks against the benefits of various drugs and treatments and to prescribe them and supervise their effects. The physician acts as an "informed intermediary" (see, Wolfgruber, supra, 72 A.D.2d at 61, 423 N.Y.S.2d 95; Lindsay, supra, at 91) between the manufacturer and the patient; and, thus, the manufacturer's duty to caution against a drug's side effects is fulfilled by giving adequate warning through the prescribing physician, not directly to the patient (see, Wolfgruber, supra, 72 A.D.2d at 61, 423 N.Y.S.2d 95; Glucksman v. Halsey Drug Co., 160 A.D.2d 305, 307, 163 A.D.2d 163, 553 N.Y.S.2d 724). The warning must provide sufficient information to that category of prescribing physicians who may be expected to have the least knowledge and experience with the drug (see, Lindsay, supra, at 91–92; see also, Guevara v. Dorsey Labs., 845 F.2d 364 [1st Cir.1988] [PR law]).

In this action, where the sufficiency and nature of the warnings are at issue, plaintiff's prescribing and treating doctors' testimony is crucial. However, New York courts lack the authority to subpoena out-of-state nonparty witnesses. *See* Judiciary Law §2-b[1]. In *Nicholson v Pfizer, Inc.*, 278 AD2d 143, 717 NYS2d 593 (1st Dept 2000), which involved a prescription drug, the Appellate Division, First Department reversed the trial court's denial of a motion to dismiss on the grounds of forum non conveniens due to the uncontroverted fact that plaintiff's treating physicians were beyond the reach of New York's subpoena power. *See also Matter of OxyContin II,* 76 AD3d 1019, 908 NYS2d 239 (2d Dept 2010) (trial court's denial of defendant's motion to dismiss reversed).

Clearly, the testimony of the doctors is central to the issues in this case. Courts have long held that videotaped deposition testimony is no substitute for live testimony. None of the parties should be denied an opportunity to have a crucial witness testify in court in front of the jury. *See Gulf Oil v Gilbert,* 330 US 501, 511 (1947) ("... to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury, or most litigants").

Accordingly, it is

ORDERED that defendants Bristol-Myers Squibb Company and Otsuka America Pharmaceutical, Inc.'s motion to dismiss this action on the grounds of forum non conveniens is granted on the condition that defendants enter into a stipulation as discussed at the conference. Counsel are directed to submit a stipulation for so-ordering within 30 days. If an agreement cannot be reached, kindly notify the Court and a conference will be scheduled.

This is the Interim Decision and Order of the Court.

Dated: October 23, 2015
New York, New York

HON. ARLENE P. BLUTH, JSC