

Matter of Crist v Amchem Prods., Inc.

2015 NY Slip Op 32819(U)

May 12, 2015

Supreme Court, Erie County

Docket Number: 800096/2014

Judge: Jeremiah J. Moriarty II

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SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In the Matter of the Eighth Judicial District Asbestos Litigation

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JERRY L. CRIST and JOYCE CRIST,

Plaintiffs,

-v-

DECISION
Index No. 800096/2014

AMCHEM PRODUCTS, INC., et al.,

Defendants.

BEFORE: HON. JEREMIAH J. MORIARTY II
Supreme Court Justice

APPEARANCES: WEITZ & LUXENBERG, P.C.
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Chris Romanelli, Esq.

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By: Michael J. Morrison, Esq.

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Attorneys for Defendant VWR International, Inc.
By: Joshua S. Lichtenstein, Esq.

The Court has considered the following papers: notice of motion to dismiss, dated April 30, 2014, by defendant Fisher Scientific Company, L.L.C.; supporting affirmation of Matthew J. Rice, Esq., dated April 30, 2014, with annexed exhibits; affirmation in opposition of Pierre Ratzki, Esq., dated May 15, 2014, with annexed exhibits; notice of cross-motion to dismiss, by defendant VWR International, LLC, dated May 19, 2014; supporting affirmation of Joshua S. Lichtenstein, Esq., dated May 19, 2014, with annexed exhibits; reply affirmation of Matthew J. Rice, Esq. May 21, 2014, with annexed exhibit; reply memorandum of law in support of Fisher Scientific Company, L.L.C. motion to dismiss dated May 21, 2014; supplemental affirmation in further opposition of Chris Romanelli, Esq., dated May 27, 2014, with annexed exhibits; affirmation in response to supplemental affirmation of Richard P. O'Leary, Esq., dated June 2, 2014; reply affirmation of Joshua S. Lichtenstein, Esq., dated June 11, 2014.

This is an action for damages arising from exposure to asbestos. At the time the motion was argued, plaintiff Jerry Crist was living with mesothelioma at age 71.¹ At the time

¹Plaintiff died on September 4, 2014

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of diagnosis, June - August, 2013, he was a Professor of Chemistry/ Department Chair at Lawrence Technical University (Lawrence) (formerly known as Lawrence Institute of Technology) in Southfield, Michigan. His claimed asbestos exposure is related solely to his career at Lawrence where he began as an assistant professor in 1968 and "rose through the ranks". He retired on December 31, 2013.

Defendant Fisher Scientific Company, L.L.C. (Fisher), later joined by defendant VWR International, LLC (VWR) in what it calls a "cross-motion", moves for dismissal of the complaint herein on the ground that the courts in New York present an inconvenient forum, citing CPLR 327 (a). Fisher and VWR seek to try this case in plaintiff's home forum, Michigan. Fisher is even more precise and seeks to try the case in Oakland County, Michigan.

In support of its motion, Fisher relies on the following undisputed facts: plaintiff never resided in New York; the three manufacturers, distributors or sellers of asbestos-containing materials identified by plaintiff at his deposition and in his answers to interrogatories are not New York corporations; plaintiff was not exposed to asbestos in New York; and he did not receive medical treatment in New York. Further defendant maintains all product identification and exposure witnesses, employment and purchase records and other evidence are in Michigan. Further, Fisher argues, it can not implead Lawrence, or other third parties, in New York, because the University lacks the "minimum contacts" with New York necessary for jurisdiction.

In support of its' cross-motion², defendant VWR echoes Fisher's arguments and makes two additional and unrelated contentions: first, that the distribution center for asbestos-containing equipment used by plaintiff, as he testified at his deposition, the Sargent-Welch Scientific Company (Sargent-Welch), was not located in Buffalo, New York, but Buffalo Grove, Illinois, at the time in question. Second, VWR claims that it is not a successor to Sargent -Welch and is not liable for any Sargent- Welch product sold before 1989. VWR maintains that a corporation called the Artra Group, not VWR, assumed Sargent-Welch's pre 1978 asbestos - related liabilities. According to defendant, Artra Group declared bankruptcy in 2007 and established an asbestos-related claims trust. Defendant VWR, claims that this trust would be the proper source of remuneration for plaintiff, because plaintiff's last exposure to a Sargent-Welch product was 1983, and VWR did not come into the picture as a purchaser of "certain" Sargent-Welch assets until 1989. In its supplemental affirmation opposing VWR's cross-motion, allowed by the court because of timing considerations, plaintiff points out that VWR is sued not only as a successor to Sargent-Welch, but also for its own products. In addition, plaintiff contends that the relationship between Artra Group and VWR in not susceptible of resolution in this motion to dismiss. Finally, plaintiff requests that if these motions are granted, the forum be one with experience in asbestos cases..

Plaintiff contends that there is sufficient connection to New York for it to retain this

² Since the cross-motion was made after plaintiff's opposition to Fisher's motions was filed, VWR also addresses plaintiff's contentions.

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case because asbestos-containing laboratory equipment was purchased in New York, i.e. Buffalo, from Sargent-Welch, and that defendants have not met the "heavy burden" required for the motion to be granted. Nor has it shown that Michigan would be a convenient forum. In addition, plaintiffs analyzed Michigan law and determined that Lawrence could not be impleaded in Michigan either. Plaintiff relies heavily on a recent First Department case, *Elmaliach v Bank of China Ltd.*, 110 AD3d 192 (1st Dept 2013).

In its reply, Fisher claims that *Elmaliach* is inapposite; that this court should apply the six factors set forth by the Court of Appeals in *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984) and follow the Fourth Department in *Emslie v Recreative Indus., Inc.*, 105 AD3d 1335 (4th D ept 2013). It also emphasized the prejudice to it by its inability to depose or subpoena for trial Michigan witnesses or to have the jury view the laboratory. Fisher also takes issue with plaintiffs' view of Michigan impleader.

In *Herman v Spartinelli*, 176 AD2d 1238 (4th Dept 1991), the Appellate Division, Fourth Department offered the following guidance:

In determining a motion to dismiss an action on the ground of forum non conveniens, the court must consider and balance the various competing factors, including the burden on the New York Courts, the potential hardship to defendant, the fact that the transaction giving rise to the action occurred in a foreign jurisdiction, as well as the residence of plaintiff. No one factor is controlling (see, *Islamic Republic v Pahlavi*, 62 NY2d 474, 478-479, cert denied 469 US 1108). While the residence of plaintiff is not a controlling factor, it is a significant factor which must be given due consideration (*Silver v Great Am. Ins. Co.*, 29 NY2d 356; *Sullivan v McNicholas Transfer Co.*, 93 AD2d 527, 531).

Another factor, cited in *Elmaliach v Bank of China Ltd.* (at 208) includes the location of potential witnesses and documents.

To prevail on a forum non conveniens motion, defendant must “demonstrate relevant private or public interests which militate against accepting the litigation” (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 (1st Dept 1991) citing *Islamic Republic of Iran Pahlavi*. It is fundamental that “‘unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed’ (*Gulf Oil Corp. v Gilbert*, 330 US 501, 508[1947]; *Bata v Bata*, 305 NY 51, 56 [1952]; *Hacohen v Bolliger Ltd.*, 108 AD2d 357, 360 [1st Dept 1985]).”

Applying the factors to the case here, there is very little, if anything, connecting this case to this forum. For example, plaintiff is not, and never has been, a resident of New York. His exposure to asbestos occurred entirely in Michigan. His employment at the university, associated with this exposure, was in Michigan. The laboratory where plaintiff worked and all the records connected therewith are in Michigan. The only fact in plaintiff’s favor is that he may have purchased asbestos-containing equipment that was shipped from New York³. The balance is clearly in favor of defendants.

Elmaliach v Bank of China Ltd. is not to the contrary. There, in fact, the court notes the “heavy burden” requirement includes that movant show not only that New York is an inconvenient forum, but that a substantial nexus between New York and the action is lacking.

³ That allegation is in dispute.

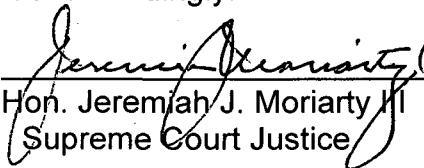
[* 7]
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Defendants have met their heavy burden and plaintiffs' choice of forum is overruled.

In accordance with CPLR 327 (a) which empowers courts to stay or dismiss the action on any conditions that may be just, this action is dismissed on the condition that defendants accept service of the new complaint and waive their rights to assert defenses of based on lack of jurisdiction or based upon the statute of limitations. Plaintiff has ninety (90) days from the date of service of this court's order to commence a new action in Michigan (*Emslie*, 105 AD3d 1335; *Menash v Moxley*, 235 AD2d 910 [3rd Dept 1997]; *Dawson v Seenardine*, 232 AD2d 521 [2nd Dept 1996]).

Defendant's motion is granted, submit order accordingly.

Dated: Buffalo, New York
May 12, 2015


Hon. Jeremiah J. Moriarty II
Supreme Court Justice