Ward v Colgate-Palmolive Co.
2018 NY Slip Op 31751(U)
July 25, 2018
Supreme Court, New York County
Docket Number: 190091/16
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SHARON WARD,

Plaintiff,

- against -

COLGATE-PALMOLIVE COMPANY,

Defendant(s).

INDEX NO. 190091 /16

MOTION DATE 06-20-2018

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion by COLGATE PALMOLIVE COMPANY pursuant to CPLR to §327[a] to dismiss this action for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause —Affidavits Exhibits	1- 2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-motion YES X NO

Upon a reading of the foregoing cited papers it is ordered that defendant, COLGATE-PALMOLIVE COMPANY's motion pursuant to CPLR §327 [a] to dismiss this action on the grounds of forum non conveniens is granted and the action is dismissed without prejudice, on condition that within 60 days from the date of entry of this order the defendant stipulates (1) to accept service of process in a new action to be commenced by plaintiff in the State of Texas; and (2) waive any defenses, including that of statute of limitations and jurisdictional defenses, which were not available in New York at the time of the commencement of this action, all provided that the new action is commenced within 90 days after service of the stipulation upon the plaintiffs. If the defendant fails to so stipulate then the motion is denied.

Plaintiff Sharon Ward claims that she developed mesothelioma as a result of her exposure to asbestos contained in defendant's Cashmere Bouquet Talcum powder during a sixteen (16) year period from approximately the late 1940s through the early 1960s. During the period of exposure plaintiff resided in the State of Texas, where she resided and continues to reside except for a brief residence of approximately two to three years starting in 1971, when she lived in Richmond, Virginia. Plaintiff claims there was no exposure while she resided in Virginia. At no time has plaintiff resided in the State of New York, or has plaintiff alleged to have been exposed to defendant's asbestos containing product in the State of New York. Plaintiff moved back to the State of Texas around 1974, where she and her family currently reside. She was diagnosed with mesothelioma in October of 2015. Plaintiff's medical treatment (hospital and doctors) has taken place in the State of Texas, where all her witnesses are located. Plaintiff has not received any medical treatment in the state of New York (see moving papers Exhibits C and E).

Plaintiff commenced this action on April 1, 2016 to recover against the defendant Colgate-Palmolive Company- a Delaware corporation with its principal place of business in the City and State of New York-for the injuries allegedly sustained by plaintiff Sharon Ward as a result of her exposure to asbestos from the defendant's product. Defendant answered on May 6, 2016. Thereafter Plaintiff Sharon Ward's videotaped deposition was taken on June 14, 2016 in the State of Texas. On August 15, 2017 Defendant moved to dismiss this case pursuant to CPLR §327 (a) on the grounds of forum non conveniens.

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

Defendant alleges that, even though it has its corporate headquarters in the City and State of New York, this case should be dismissed on the grounds of forum non conveniens because this case has no nexus with the state of New York. It is alleged that plaintiff was exposed to asbestos in the State of Texas, where she has resided for approximately 70 years; her injury manifested in the State of Texas where she currently resides; her medical treatment took place in the State of Texas, which is the place where her medical witnesses and most of her other witnesses are located. Plaintiff has never resided in the State of New York and has never been exposed to defendant's product in the State of New York. Defendant alleges that the only connection to the state of New York is that defendant has its corporate headquarters here, that merely having its corporate headquarters in New York is an insufficient nexus, and therefore the action should be dismissed on the grounds of forum non conveniens.

Plaintiff opposes the motion on multiple grounds. Plaintiff alleges that the action should stay in New York because this is the place where defendant has its corporate headquarters, where jurisdiction can be obtained against the defendant and where it is possible defendant's witnesses are located. Defendant's asbestos talc litigation is centered in New York because one of its Cashmere Bouquet plants was located near New York- just across the Hudson River in Jersey City, New Jersey- and its Research and Development Center is also located near New York in Piscataway, New Jersey. Defendant was a member of the Cosmetic Toiletry & Fragrance Association during the 1970s and regularly attended meetings in New York City. Defendant further placed ads in the New York times in New York City to counter negative publicity from a study performed in the 1970s at Mt. Sinai Hospital in New York that found Cashmere Bouquet Talc was contaminated with 20 percent asbestos. Finally plaintiff argues that defendant has taken advantage of this forum in this litigation for over 16 months before moving to dismiss on the grounds of forum non conveniens.

CPLR § 327[a] applies the doctrine of forum non conveniens flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case (Matter of New York City Asbestos Litig., 239 A.D. 2d 303, 658 N.Y.S. 2d 858 [1st Dept., 1997] and Phat Tan Nguyen v. Banque Indosuez, 19 A.D.3d 292, 797 N.Y.S.2d 89 [1st. Dept. 2005]). In determining a motion seeking to dismiss on forum non conveniens grounds, "no one factor is controlling" and the Court should take into consideration any or all of the following factors: (1) residency of the parties; (2) the jurisdiction in which the underlying claims occurred; (3) the location of relevant evidence and potential witnesses; (4) availability of bringing the action in an alternative forum; and (5) the interest of the foreign forum in deciding the issues (Islamic Republic of Iran v. Pahlavi, 62 N.Y. 2d 474, 467 N.E. 2d 245, 478 N.Y.S. 2d 597 [1984]).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors militating in favor of a finding of forum non conveniens. It is not enough that some factors weigh in the defendants' favor. The motion should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs (Elmaliach v. Bank of China Ltd., 110 A.D. 3d 192, 971 N.Y.S. 2d 504 [1st Dept., 2013]).

The Court of Appeals rule that prevented the application of the doctrine of forum non conveniens when one of the parties, or a corporation, was a resident of the state of New York was relaxed by the Court of Appeals in 1972 (see Silver v. Great American Insurance Company, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 [1972]). After Silver, "although residence of one of the parties still remained an important factor to be considered, forum non conveniens relief [would] be granted when it plainly appeared that New York is an inconvenient forum and that another is available which will best serve the ends of justice and convenience of the parties, and New York courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York. Flexibility, based on the facts and circumstances of a particular case is severely, if not completely, undercut when our courts are prevented from applying [the doctrine of forum non conveniens] solely because one of the parties is a New York resident or corporation."(see Silver,

Supra). As such, on remand in Silver v. Great American Insurance Company, the Appellate Division First Department dismissed the action on grounds of forum non conveniens where the only New York contact with the action was that defendant was a New York corporation (see Silver v. Great American Insurance Company, 38 A.D.2d 932, 330 N.Y.S.2d 156 [1st. Dept. 1972]).

In keeping with the holding in Silver the Court of Appeals reversed the Appellate Division First Department and dismissed a case on the grounds of forum non conveniens holding that "the mere happening of an accident within the state does not, alone, constitute a substantial nexus with the state so as to mandate retention of jurisdiction by New York courts over an action arising out of such accident (Martin v. Mieth, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853[1974]; Blais v. Deyo, 60 N.Y.2d 679, 455 N.E.2d 662, 468 N.Y.S.2d 103 [1983] affirming the granting of New York defendant's motion to dismiss on forum non conveniens where the accident occurred in Quebec, the plaintiffs were residents of Quebec and all witnesses and relevant documents were located in Quebec; Bewers v. American Home Products Corporation, 99 A.D.2d 949 [1st. Dept. 1984] dismissing action brought by United Kingdom plaintiffs against New York corporation defendant where the drugs complained of were prescribed, purchased and ingested in England, and the [drugs] were manufactured, tested, labelled, marketed and distributed in England by or on behalf of English company, furthermore, the vast majority of witnesses and documentation respecting medical treatment of plaintiffs were in England; Mollendo Equipment Co,Inc., v. Sekistan Trading Co., Ltd., 56 A.D.2d 750, 392 N.Y.S.2d 427 [1st. Dept. 1977] dismissing on forum non conveniens an action instituted by a New York Corporation against a Japanese Company, which maintained neither an office nor an agent for the conduct of business within the United States.

As can be seen, when the only nexus with the State of New York is that the corporate defendant is either registered or has its principal place of business in New York, the action is properly dismissed on the ground of forum non conveniences (see Avery v. Pfizer, Inc., 68 A.D.3d 633, 891 N.Y.S.2d 369 [1st. Dept. 2009] dismissing action on grounds of forum non conveniens where plaintiff was resident of Georgia, his physician who recommended and prescribed drug lived in the state of Georgia, plaintiff ingested drug in Georgia, suffered his injuries in Georgia and all of his treating physicians and witnesses were in Georgia; see also Farahmand, v. Dalhousie University, 96 A.D.3d 618, 947 N.Y.S.2d 459 [1st. Dept. 2012]; Becker v. Federal Home Loan Mortgage Corp., 114 A.D.3d 519, 981 N.Y.S.2d 379 [1st. Dept. 2014]).

This court is of the opinion that in balancing the interests and convenience of the parties and the court's, this action could better be adjudicated in the courts of the State of Texas. The only nexus this action has with the State of New York is that the corporate defendant has its principal place of business in New York. The plaintiff is a resident of the State of Texas and Plaintiff Sharon Ward was exposed to the defendant's product while she resided in the State of Texas. The medical treatment, her medical doctors and almost all of her witnesses are in the State of Texas. Under these facts the action should be dismissed without prejudice on the grounds of forum non conveniens.

Finally, a seven month delay from plaintiff's deposition- where defendant obtained information to conclude that the only nexus to the State of New York is that it is the place where defendant has its principal place of business- to the making of this motion to dismiss on grounds of forum non conveniens is not such a substantial delay so as to constitute a waiver and deny the motion. These are complex cases where information is not obtained, sufficient for the making of a motion to dismiss for lack of jurisdiction or for forum non conveniens, until substantial discovery is complete. In this particular case it took the service and answer of interrogatories, and plaintiff's deposition over many months before sufficient information was obtained for the making of this motion. Given the complexity of the subject matter and difficulty in obtaining information, a seventh month delay in moving to dismiss on the grounds of forum non conveniens is not such a substantial delay as to consider dismissal on this ground waived (see Corines v. Dobson, 135 A.D.2d 390, 521 N.Y.S.2d 686 [1st. Dept. 1987] 21

months after commencement of action and after discovery substantial delay waiving dismissal on ground of forum non conveniens; Anagnostou v. Stifel, 204 A.D.2d 61, 611 N.Y.S.2d 525 [1st. Dept. 1994] three years after commencement of action substantial delay waiving dismissal on ground of forum non conveniens; Creditanstalt Investment Bank AG, v. Chadbourne & Parke LLP, 14 A.D.3d 414, 788 N.Y.S.2d 104 [1st. Dept. 2005] 20 months substantial delay waiving dismissal on ground of forum non conveniens).

Defendant moved at most 15 months after commencement of the action and after obtaining sufficient discovery information for the making of the motion.

Accordingly, it is ORDERED that defendant Colgate-Palmolive Corporation's motion pursuant to CPLR §327 [a] to dismiss this action on the grounds of forum non conveniens is granted, and it is further,

ORDERED that the action is dismissed without prejudice on condition that within 60 days from the date of entry of this order the defendant stipulates (1) to accept service of process in a new action to be commenced by the plaintiff in the State of Texas; and (2) waive any defenses, including that of statute of limitations and jurisdictional defenses, which were not available in New York at the time of the commencement of this action, all provided that the new action is commenced within 90 days after service of the stipulation upon the plaintiffs, and it is further,

ORDERED that if the defendant fails to so stipulate within 60 days from the date of entry of this order, then the motion is denied, and it is further,

ORDERED that the moving party serve a copy of this order upon the Trial support clerk, located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B) in accordance with e-filing protocol, and it is further,

ORDERED that the clerk enter judgment accordingly.

ENTER:

Dated: July 25, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE