Pyle v Pfizer Inc.
2018 NY Slip Op 31971(U)
August 15, 2018
Supreme Court, New York County
Docket Number: 190360/2016
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

DIANA PYLE and BARRY PYLE,
Plaintiffs,

- against -

PFIZER INC., individually *and as sucessor in interest* to COTY, INC, et al,
Defendants.

INDEX NO. 190360/2016
MOTION DATE 07/25/2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion by defendants PFIZER INC. and COTY, INC. pursuant to CPLR to §327[a] and CPLR §3211 to dismiss this action for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -Affidavits Exhibits..	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 10

Cross-motion YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Pfizer Inc. and Coty, Inc.'s (hereinafter referred to as "Defendants") motion pursuant to CPLR §327(a) to dismiss this action on the grounds of *forum non conveniens*, is denied. Defendants' motion filed under Motion Sequence 002, to amend the memorandum of law in support of this motion, is granted.

Plaintiff-Decedent Diana Pyle was diagnosed with mesothelioma on August 11, 2015 and died on April 28, 2017. Plaintiffs commenced this action on November 23, 2016. Barry Pyle is Diana Pyle's husband and seeks to continue this action on her behalf in New York (Mot. Exh. N). Mrs. Pyle was deposed over the course of three days on January 3, 4 and 5 of 2017, and a videotaped deposition took place on April 3, 2017(Opp. Exh. Q). It is alleged that she was exposed to asbestos in a variety of ways and that she contracted mesothelioma as a result of exposure to asbestos contained in defendants' Coty L'Aimont and Emeraude talcum powder over the course of thirty (30) years from about 1953 to 1986.

At her deposition taken on January 5, 2017 Mrs. Pyle remembered that her mother used Coty L'Aimont talcum powder products from approximately 1953 when she was five years old. At the time, her mother's use of the talcum products caused the air to become visibly dusty and Mrs. Pyle would breathe in the dust as a result of being in close proximity to her mother. She began using the Coty L'Aimont product on herself as part of a daily bathing routine starting in 1958, after being taught how to use it by her mother. Mrs. Pyle claimed that the packaging for the Coty L'Aimont talcum powder stated it was from "New York" (Opp. Exh. M, pgs. 24, 27, 33 and 88). Mrs. Pyle began using the Coty Emeraude talcum powder in 1963 and continued to do so through 1986, at various addresses. She recalled that applying the powder was messy and caused air borne dust that she would inhale (Opp. Exh. M, pgs. 47-49)

Coty, Inc. operated a division of Pfizer Inc. in New York from 1963 to 1992 (Opp. Exhibits A, D, and F). Plaintiffs claim that Coty has been manufacturing talcum powder in the United States since 1912 and that Pfizer Inc. acquired Coty, Inc. in 1963. At that time Coty had laboratories, research facilities and executive offices in New York (Opp. Exhibits A, D, and F). The Coty, Inc. division acting out of the New York headquarters is alleged to have distributed products internationally to several European countries that included England, using the

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

same formulas as products distributed in the United States (Opp. Exh. C, pgs 106 - 107). It is alleged that the Defendants' distributor Whittaker, Clark & Daniels, Inc. was also located in New York at the time of Mrs. Pyle's exposure, and later moved to New Jersey (Opp. Exh. R).

Defendants move to dismiss Plaintiff's Complaint against them pursuant to CPLR §327(a) on the grounds of *forum non conveniens*. Defendants contend that even though they have principal places of business in New York, this action should be dismissed on the grounds of *forum non conveniens* because: (i) the Plaintiffs do not allege exposure to talcum powder or any asbestos-containing product in New York, (ii) the witnesses and evidence are located outside of New York, including those that concern potential work related asbestos exposure from ceiling tiles when Mrs. Pyle worked as a secretary at Wimbleton High School, and her application for and receipt of Industrial Injury Benefits in the United Kingdom (Mot. Exh. F, Reply Aff. Exh. A) (iii) litigating here would be a burden to New York courts, (iv) England is a readily available alternative forum, and (v) even if this action were to stay in New York, the laws of England would have to be applied creating a burden on New York Courts, therefore, no nexus exists with the State of New York.

Plaintiffs oppose the motion on multiple grounds. Plaintiffs allege that the action should stay in New York because: (a) their choice of forum is entitled to substantial deference; (b) New York is the Defendants' principal place of business, most likely the location from where the asbestos Mrs. Pyle was exposed to was manufactured and distributed to England; (c) defendants have corporate headquarters in New York; (d) Defendants' expert witnesses are most likely located in New York; and (e) the design and/or development of the product in New York City creates a nexus with the State of New York. Furthermore, Plaintiffs contend that the relevant situs is New York, not England and that Mrs. Pyle was not exposed to asbestos through the ceiling products, only talcum powder. They claim Defendants have not specifically identified the witnesses and documents that are unavailable in New York. It is alleged that the relevant witnesses including Mrs. Pyle's family members, her medical providers and doctors, in all likelihood do not need to be subpoenaed, can be deposed or testify by videotape, and there is no burden on the Defendants or this Court.

Plaintiffs also argue that England is not available as an alternative forum because: (1) no contingency fee cases are permitted there; (2) there are no jury trials or loss of consortium claims allowed; (3) discovery is limited, costly and to be paid out of pocket; (4) discovery from third-party witnesses to refute the Defendants' claims is located in New York; and (5) although there is products liability law in England, non-occupational exposure claims are typically not brought because there are no barristers or solicitor's willing to proceed against a manufacturer or seller. Further, Mr. Pyle who is on a fixed income, would suffer hardship and be unable to proceed if the case is required to be litigated in England. Plaintiffs claim that the application of foreign law, in this case that of England, should be raised in a choice of law motion, and that the application of English law is not determinative of this motion to dismiss for *forum non conveniens*.

CPLR § 327(a) applies the doctrine of *forum non conveniens*, 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 AD2d 303, 658 NYS2d 858 [1st Dept. 1997]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 797 NYS2d 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 NY2d 474, 467 NE2d 245, 478 NYS2d 597 [1984]). "The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by [the] court" (*Id*).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors in favor of dismissing the action based on *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 AD3d 192, 971 NYS2d 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 (Silver v Great American Insurance Company, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 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"(*Id*). As such, on remand in *Silver*, 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 the defendant was a New York corporation (Silver v Great American Insurance Company, 38 AD2d 932, 330 NYS2d 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 NY2d 414, 321 NE2d 777, 362 NYS2d 853 [1974]). Similar decisions followed (Blais v Deyo, 60 NY2d 679, 455 NE2d 662, 468 NYS2d 103 [1983] *affirming the granting of a 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 AD2d 949, 472 NYS2d 637 [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, labeled, 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*).

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 conveniens* (Avery v Pfizer, Inc., 68 AD3d 633, 891 NYS2d 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 AD3d 618, 947 NYS2d 459 [1st Dept. 2012]; Becker v Federal Home Loan Mortgage Corp., 114 AD3d 519, 981 NYS2d 379 [1st Dept. 2014]).

However, when there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted (Travelers Cas. & Sur. Co. v Honeywell Int'l Inc., 48 AD3d 225, 851 NYS2d 426 [1st Dept. 2008] *denying dismissal on forum non conveniens where there was a substantial nexus between the action and New York, as most of the insurance policies at issue were negotiated, issued and brokered in New York*; *see also* Am. BankNote Corp. v Daniele, 45 AD3d 338, 845 NYS2d 266 [1st Dept. 2007] *denying dismissal on forum non conveniens where New York is the place where parties met on a regular basis and where during such meetings false representations and assurances were made and where defendant's bank accounts, a central part of the claimed fraudulent scheme, was located*).

Defendants that have a substantial presence in New York, as well as "ample resources" do not suffer a hardship for litigating in New York. The burden on New York Courts is also minimal when there is no need to translate documents or witness testimony from a foreign language (Bacon v. Nygard, 160 AD 3d 565, 76 NYS 3d 27 [1st Dept. 2018], plaintiff from the Bahamas). A greater potential hardship is suffered by the plaintiff that is required to litigate in a foreign jurisdiction, like England, that does not recognize trial by jury, or where there is no ability to arrange for contingent fees (Neville v. Anglo American Management Corp., 191 AD 2d 240, 594 N.Y.S. 2d 747 [1st Dept., 1993] and Bacon v. Nygard, 160 A.D. 565 at pg. 566 citing to Wilson v. Dantas, 128 AD 3d 176, 9 NYS 3d 187 [1st Dept., 2015] aff'd 29 NY 3d 1051, 80 NE 3d 1032, 58 NYS 3d 286 [2017]).

The application of the law of a foreign jurisdiction, while a factor, does not necessarily override the plaintiffs choice of forum or create a burden on the Court, since the Courts in New York are frequently called upon to apply the laws of a foreign jurisdiction (Intertec Contracting A/D v. Turner Steiner Intern., S.A., 6 AD 3d 1, 774 NYS 2d 14 [1st Dept. 2004] applying the law of Sri Lanka, citing to Anagnostou v. Stifel, 204 AD 2d 61, 611 NYS 2d 525 [1st Dept. 1994] applying the laws of Greece, and Yoshida Printing Co. Ltd. v. Alba, 213 AD 2d 275, 624 NYS 2d 128 [1st Dept., 1995] applying the laws of Japan).

Weighing all the factors, this court is of the opinion that Pfizer Inc. and Coty, Inc. have failed to meet their heavy burden of showing that this action should be dismissed, in favor of an alternative venue, on the grounds of *forum non conveniens*. Defendants fail to present any facts or evidence that the only nexus either Pfizer Inc. or Coty, Inc. have to New York is that they maintain a principal place of business in this state. Defendants are correct in asserting that Mrs. Pyle resided in England, purchased the Coty L'Aimont and Emeraude talcum powder products that allegedly exposed her to asbestos in England, and received medical treatment in England. However, plaintiffs have established that New York has a substantial nexus with this action by producing evidence that Defendants' products were developed, manufactured, distributed and/or supplied from New York to England, and that the Defendants have "ample resources" to avoid hardship.

Plaintiffs have also shown that the transfer of this action to England - where cases are not taken on contingency fee basis; where there are no jury trials or loss of consortium claims; where necessary discovery is limited, costly and to be paid out of pocket; when discovery from third-party witnesses to refute the Defendants' claims is located in New York; and although there is product's liability law in England, non-occupational exposure claims are typically not brought because there are no barristers or solicitor's willing to proceed against a manufacturer or seller - will create a hardship on Mr. Pyle who is on a fixed income, has limited resources, and would be unable to proceed if the case is required to be litigated in England.

Plaintiffs have demonstrated that there is a lack of alternative forum which warrants keeping the case in New York. Defendants' argument that they would be unable to obtain discovery on Diana Pyle's asbestos exposure during her employment is unpersuasive. They have "ample resources" to obtain the discovery.

The affidavit of Michael Gerald Spencer (defendants' expert) annexed to the Reply papers (Reply Exh. A), that states some of the factors creating a hardship to the defendants in litigating this case in New York that would be circumvented by litigating in England is also unpersuasive and contradicted by Affidavits from plaintiffs' Barrister Harry David Glyn Steinberg (Opp. Exh. P) and Solicitor Richard Green (Opp. Exh. O). Plaintiffs have established a lack of alternative forum which warrants keeping the case in New York. Defendants have not established that applying the laws of England would be a burden on this Court, such that dismissal is warranted. Under these facts the action should not be dismissed as the "balance is not strong enough to disturb the choice of forum made by the Plaintiff" (Elmaliach, *supra*).

Defendants, Pfizer Inc. and Coty, Inc.'s motion to amend their memorandum of law, filed under Motion Sequence 002, is unopposed and granted on default.

Accordingly, it is ORDERED, that Defendants Pfizer Inc. and Coty, Inc.'s motion pursuant to CPLR §327(a)and CPLR §3211 to dismiss this action on the grounds of *forum non conveniens*, is denied, and it is further,

ORDERED that Defendants, Pfizer Inc. and Coty, Inc.'s motion filed under Motion Sequence 002, to amend the memorandum of law, is granted on default.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 15, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
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