

English v Avon Prods., Inc.

2019 NY Slip Op 33410(U)

November 18, 2019

Supreme Court, New York County

Docket Number: 190346/18

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION:

LINDA ENGLISH and PATRICIA RASSO,
Plaintiffs

INDEX NO. 190346 / 18

MOTION DATE 11-06-2019

- Against-

AVON PRODUCTS, INC., et al.,
Defendants.

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion by defendant SHULTON, INC., to dismiss for forum non conveniens.

	<u>PAPERS NUMBERED</u>
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 Shulton, Inc.'s (hereinafter "Shulton") motion to dismiss Plaintiffs' claims and all cross-claims asserted against it, pursuant to CPLR§327(a) for Forum non-conveniens is denied.

Plaintiff, Linda English, was diagnosed with Peritoneal Mesothelioma, which is alleged to have resulted from her exposure to asbestos from the use of cosmetic talc products. It is alleged that Plaintiff was exposed to asbestos contaminated powder manufactured by Shulton from approximately 1950 through 2006. Plaintiffs allege that Ms. English was exposed to asbestos from the talc contained in Shulton's Desert Flower cosmetic talcum powder. Ms. English stated at her deposition that from 1963 until approximately 1984 she used Cashmere Bouquet and Desert Flower talcum powder every day after she showered and before she went out. In 1966, Ms. English began a thirty-three-year career as a flight attendant for Delta Airlines. From 1966 to 1984 she flew exclusively domestic routes to cities across the United States, including New York. She frequently staffed flights in and out of New York City where she would frequently find herself on a one or two-night layover. She further testified that

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

during this period she spent so many nights in New York that she could not count them. She further testified that she used Colgate's Cashmere Bouquet and Shulton's Desert Flower, alternately, every day she was in New York City from 1966 through 1984.

Ms. English is not a New York resident, having lived her entire life in Texas. She has never lived in New York, although she traveled and brought Shulton's Desert Flower talcum powder with her to New York. Plaintiffs bring this action in New York to recover against Shulton for the injuries that Ms. English has sustained. At all relevant times Ms. English has resided in the State of Texas, which is the place where she purchased and mostly used the product, where she was mostly exposed, where the injury manifested itself, where she has received medical treatment and where her witnesses are located.

Shulton now moves to dismiss the action pursuant to CPLR § 327(a) for Forum non conveniens. It argues that Ms. English is a life-long resident of Texas, that Texas is the place where she used the product most of the time, where the disease manifested itself, where she received medical treatment and where her witnesses are located. Finally, they argue that Texas courts can preside over the litigation of this suit and have the most interest in doing so.

Plaintiffs opposes dismissal on Forum non conveniens grounds arguing that her choice of forum should not be disturbed, the moving defendants have not shown they are inconvenienced by litigating in New York as key defense witnesses and documents are located in New York, which is the place where Shulton is incorporated and has its principal place of business, where facts that gave rise to this litigation occurred, and where at least two laboratories that have tested and found asbestos in Shulton's Desert Flower talcum powder product are located. Further plaintiff argues that her witnesses, including those who reside in Texas, have no objection to this case continuing in New York, will appear live for trial and have already appeared for discovery depositions in New York without issue. Furthermore, the risks and consequences suffered by consumers using Shulton's Desert Flower talcum powder products in the State of New York are of interest to the State of New York.

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]). A movant's heavy burden remains despite the plaintiff's status as a non-resident (*Bank Hapoalim(Switzerland)Ltd., v. Banca Intensa S.P.A.*, 26 A.D.3d 286, 810 N.Y.S.2d 172 [1st.Dept. 2006]; *Mionis v. Bank Julius Baer & Co., Ltd.*, 9 A.D.3d 280, 780 N.Y.S.2d 323 [1st. Dept. 2004]; *Anagnostou v. Stifel*, 204 A.D.2d 61, 611 N.Y.S.2d 525 [1st. Dept. 1994]).

When there is a substantial nexus between the action and New York, dismissal on forum non conveniens grounds is not warranted (see *Travelers Casualty and Surety Company v. Honeywell International, Inc.*, 48 A.D.3d 225, 851 N.Y.S.2d 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; *American Bank Note Corporation v. Daniele*, 45 A.D.3d 338, 845 N.Y.S.2d 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).

Weighing all relevant factors, this court is of the opinion that in balancing the interests and convenience of the parties and the court's, this action should be adjudicated in New York because there is a substantial nexus between this action and New York: a) Shulton is a New York Corporation with its principal place of business in New York; b) Shulton's corporate witnesses are located in New York; c) documents related to the use by Shulton of asbestos contaminated talc are located in New York; d) Ms. English used Shulton's products in New York; e) Shulton had its talcum powder products tested by at least one New York based laboratory; f) There are other New York-based defendants in the action.

The balance of factors weighing in defendant's favor is not strong enough to overcome its heavy burden on a motion to dismiss for forum non conveniens and to overturn plaintiff's choice of forum, which must be given great weight. Under these facts the motion to dismiss on the grounds of forum non conveniens should be denied.

Accordingly, it is ORDERED that defendant Shulton Inc.'s motion, pursuant to CPLR § 327 [a] to dismiss the complaint and all cross-claims asserted against it on the grounds of forum non conveniens is denied.

Enter:

Dated: November 18, 2019

MANUEL J. MENDEZ
J.S.C.


Manuel J. Mendez
J.S.C.

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