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

STANLEY PETERSON AND DEBBY PETERSON,

Plaintiffs,

-against-

OCCIDENTAL CHEMICAL CORPORATION, et al.,

Defendants.

INDEX NO.	190169/2018
MOTION DATE	01/29/2020
MOTION SEQ. NO.	009
MOTION CAL. NO.	

The following papers, numbered 1 to 10 were read on this motion by defendant Vanderbilt Minerals, LLC , to dismiss for lack of jurisdiction, alternatively, pursuant to CPLR §327(a) to dismiss this action for forum non conveniens and pursuant to CPLR §3212 for summary judgment:

	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 defendant, Vanderbilt Mineral, LLC's (hereinafter referred to as "defendant") motion to dismiss plaintiffs' complaint against them for lack of personal jurisdiction, alternatively pursuant to CPLR §327(a) to dismiss for forum non conveniens, and pursuant to CPLR §3212 for summary judgment, is granted to the extent of dismissing the claims and cross-claims on summary judgment.

Plaintiffs commenced this action seeking to recover for injuries sustained by Stanley Peterson resulting from his alleged exposure to asbestos from defendant's product. Mr. Peterson was diagnosed with malignant pleural mesothelioma in March of 2017 (Mot. Exh. 3). He was deposed over the course of three days on April 24, 25 and 26, 2018, and his de bene esse testimony was taken on October 3, 2018 (Mot. Exhs. 8, 6 and 10, and Opp. Exh. 4). Plaintiffs two sons - Cody and Dusty Peterson - were deposed on November 5, 2018 (Opp. Exhs. 6 and 7). Plaintiff Debby Peterson was deposed on February 13, 2019 (Mot. Exh. 4).

Plaintiffs allege that Mr. Peterson was exposed to asbestos in the defendant's product - NYTAL 100 talc - while assisting his wife, Debby Peterson, when he worked part-time in her business (Lakeside Ceramics) in Watertown, South Dakota between 1980 and 2000. Plaintiffs claim that Mr. Peterson worked at Lakeside Ceramics about twenty hours a week, hosting classes four days a week and sold finished pieces as well as "slip." Mr. Peterson testified at his deposition that "slip" consists of clay, talc, silicate and soda ash mixed with water. He stated that he mixed the ingredients to make the "slip" for all classes and for the finished products, about three times per month, and that Lakeside Ceramics received about four hundred to eight hundred pounds of the talc each month. The talc came in fifty-pound bags that were made out of

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

craft paper (Opp. Exh. 4, pgs. 43-44, 47-55, 60-62, 65, 66-67 and 123-124). He estimated he spent forty percent of his time unloading deliveries of defendant's NYTAL 100 (Mot. Exh. 6, pgs. 61-62 and 64-65). He identified defendant's talc because the word "Vanderbilt" was printed on the bag and there was a distinctive "V" on it (Opp. Exh. 4, pgs. 32 and 61-62).

Mr. Peterson stated he was exposed to asbestos in multiple ways: from cutting bags with a knife and dumping the talc into a mixing tank; carrying bags of talc from the delivery truck to the storage space because they were frequently torn; rolling up the recently-emptied bags; from getting slip spilled on him when pouring it into the ceramic molds; from sanding and cleaning the dried greenware and sweeping up the talc-covered workspace. He stated that when he performed these tasks, it created dust that he breathed in (Opp. Exh. 4, pgs. 66-69, 71, 74, and 76-77).

Plaintiffs commenced multiple actions to recover for Mr. Peterson's asbestos exposures from multiple products. There are currently two other actions pending, one in New Jersey and one in Illinois. Plaintiffs initially sought to assert claims against the defendant in the Illinois action, but the parties stipulated to dismiss without prejudice due to lack of jurisdiction (Reply Exhs. 24 and 25). It is alleged that because jurisdiction cannot be obtained in any one location against all defendants, plaintiffs have multiple actions pending simultaneously against groups of defendants in different jurisdictions. Plaintiffs state that they rely on the same nucleus of facts and the discovery for all of the cases - including depositions - has been exchanged in all of the pending actions (Aff. in Opp., pg. 1, para. 4).

Plaintiffs commenced this action in New York on June 8, 2018 to recover for injuries resulting from Mr. Peterson's exposure to asbestos, naming four defendants: Occidental Chemical Corporation, Pfizer, Inc., Vanderbilt, and Union Carbide Corporation (Mot. Exh. 1 and NYSCEF Doc. # 1). Plaintiffs state that they resolved the claims asserted against Pfizer, Inc., and filed a no opposition to summary judgment stipulation for Union Carbide Corporation and Occidental Chemical Corporation (Bibro Aff. In Opp., para. 8, pg. 2). The only remaining defendant is named as R.T. Vanderbilt Holding Company, Inc. and/or Vanderbilt Minerals, LLC (Mot. Exh. 1). Defendant filed its Verified Answer (Vanderbilt Minerals, LLC) to plaintiffs' complaint on July 13, 2018 (Mot. Exh. 2). This case was assigned to the June 2019 - FIFO cluster and the Transfer Order is dated October 15, 2019 (NYSCEF Doc. No. 182).

Defendant's motion seeks to dismiss the action for lack of personal jurisdiction, alternatively, pursuant to CPLR §327(a), to dismiss this case for forum non conveniens, and pursuant to CPLR §3212 for summary judgment.

At oral argument the defendants withdrew the part of the motion seeking to dismiss this action for lack of personal jurisdiction pursuant to CPLR §302.

Forum non conveniens:

Defendant seeks to have this Court dismiss plaintiffs' complaint against it on the grounds of forum non conveniens. It is argued that there is no nexus between plaintiffs' claims and New York. Defendant argues that plaintiffs are residents of South Dakota that have never resided in New York, Mr. Peterson was never employed in New York, and the defendant is incorporated and doing business in states other than New York. Defendant argues that South Dakota is an adequate alternative forum since

plaintiffs were residents of South Dakota at the time of Mr. Peterson's exposure (1980 through 2000) and any alleged exposure to asbestos occurred outside of New York. Defendant states that Mr. Peterson's diagnosis and medical treatment has been in South Dakota, and that a majority of the potential witnesses are located outside of New York - warranting dismissal for forum non conveniens.

Defendant provides the affidavit of Matthew Stewart, Director of Health, Safety and Environmental Risk at R.T. Vanderbilt Holding Co., Inc., authorized to make an affidavit on behalf of Vanderbilt Mineral, LLC (Mot. Exh. 13). Mr. Stewart states that Gouverneur Talc Company was incorporated in New York in 1947 and operated a mine in Gouverneur, New York. Governeur Talc Company merged with R.T. Vanderbilt Company, Inc. on December 31, 2006 and closed the mining operations in 2008. R.T. Vanderbilt Company, Inc. then merged with Vanderbilt Minerals, LLC in 2012, effective January 1, 2013. Mr. Stewart states that the defendant is the surviving entity with R.T. Vanderbilt Holding Company, Inc. (incorporated in the State of Delaware) as the sole member of the defendant (Mot. Exh. 13). Defendant claims that it is registered in the State of Delaware with a principal place of business in Connecticut (See copy of the Certificate of Formation from the State of Delaware, Reply Exh. 26).

Plaintiffs argue that the defendant's predecessor company did business in New York at least during part of the period relevant to Mr. Peterson's exposure. They claim there has been no showing that South Dakota is available as an alternative forum or that the defendant is subject to that state's jurisdiction. Plaintiffs state that there has been no showing that the defendant is subject to jurisdiction in South Dakota. They argue that a majority of the witnesses, while not residing in New York, are closer to New York than to South Dakota. Defendant does business in Connecticut which is closer to New York than South Dakota. Plaintiffs argue that the choice of forum should be given deference. They state that the defendant has not proven that plaintiffs will be able to obtain a quick trial date in South Dakota. It is argued that Mr. Peterson is still alive but dying from his mesothelioma, and this case is currently scheduled for a March 3, 2020 trial date in New York. They argue that the defendant has waited until after the case was marked trial ready and assigned a trial date, rendering this motion untimely. Plaintiffs claim that a change of forum will potentially prevent Mr. Peterson from living to see his trial.

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 (Smith v. Rapid-American Corp. (Matter of New York City Asbestos Litig.), 239 AD2d 303, 658 NYS2d 858 [1st Dept. 1997] and 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]).

Defendant filed this motion on November 25, 2019, more than nineteen months after Mr. Peterson's deposition when the relevant information and facts to make this motion was obtained, and more than seventeen (17) months after commencement of this action on June 8, 2018. Defendant waited over a year and a half after Mr. Peterson's last deposition on April 26, 2018 - which provided sufficient information for the making of this motion - before seeking this relief. The delay in moving to dismiss on the grounds of forum non conveniens is substantial enough to consider dismissal on this ground waived (See Bussanich v. United States Lines, 74 AD 2d 510, 424 NYS 2d 449, Corines v Dobson, 135 AD2d 390, 521 NYS2d 686 [1st Dept. 1987], and Creditanstalt Investment Bank AG, v Chadbourne & Parke LLP, 14 AD3d 414, 788 NYS2d 104 [1st Dept. 2005]).

Alternatively, weighing all the relevant factors, the moving defendants failed to meet their heavy burden to dismiss this action on forum non conveniens grounds. There are factors that weigh in the moving defendants' favor, but the balance is not so strong as to disturb plaintiffs' choice of forum (Coelho v. Grafe auction Co., 128 AD 3d 615, 11 NYS 3d 13 [1st Dept. 2015]). In balancing the interests and convenience of the parties and the Court's, this action should be adjudicated in New York: a) This is a multi-jurisdictional action with no single forum convenient or amenable to all the parties; b) the defendant did not specifically identify any inconvenienced witnesses; c) the case has been assigned a March 3, 2020 trial date, and d) plaintiff is still living with an alleged asbestos related disease. The relative inconvenience in granting dismissal is greater to the plaintiffs. Under these circumstances, the action should not be dismissed as the "balance is not strong enough to disturb the choice of forum made by the plaintiff"(Elmaliach v. United States Lines, 74 AD 2d 510, supra).

Summary Judgment:

Defendant also moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it. Defendant argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation and there is no basis to sustain the cause of action for punitive damages.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Defendant argues that its experts Mickey Gunther, Ph.D., a doctor of Geological Sciences with a concentration in Optical Mineralogy (Mot. Exh. 19); Drew R. Van Orden, P.E., a professional engineer employed as a senior scientist by RJ Lee Group, Inc. (Mot. Exh. 20) and Linda Dell, an epidemiologist (Mot. Exh. 21), establish lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (Parker v. Mobil Oil Corp.,7 NY3d 434, 448, supra). Defendant argues that its NYTAL 100 and NYTAL 100hr talc products did not contain asbestos, or alternatively, Mr. Peterson's exposure to non-asbestos amphiboles could not cause his mesothelioma. Defendant argues that there is no evidence that Mr. Peterson was exposed to sufficient amounts of asbestos from defendant's NYTAL 100 and NYTAL 100hr products to cause his mesothelioma, eliminating any general causation.

Doctor Gunther's November 14, 2019 Affidavit incorporates his January 8, 2012 and October 2, 2014 reports (Mot. Exh. 19).

The January 8, 2012 report states the results of testing done on a sample of defendant's NYTAL 100hr received in December of 2009. The sample was tested by Powder X-ray Diffraction (XRD), Scanning Electron Microscopy/Energy Dispersive Spectroscopy (SEM/EDS), and Polarized Light Microscopy (PLM). The January 8, 2012 report of the testing concludes that although there is potential asbestos minerals, the sample only contained talc. The talc in the sample is described as being easily confused with chrysotile or anthophyllite (Mot. Exh. 19, Exh. 2).

The October 2, 2014 report states the results of testing on a sample of defendant's NYTAL100 product also received in December of 2009. The sample was tested by Powder X-ray Diffraction (XRD), Scanning Electron Microscopy/Energy Dispersive Spectroscopy (SEM/EDS), and Polarized Light Microscopy (PLM). The October 2, 2014 report of the testing concludes that although there is potential asbestos minerals to be amphibole and serpentine group minerals, the sample only contained talc. The talc in the sample is described as being easily confused with chrysotile or anthophyllite (Mot. Exh. 19, Exh. 3).

Mr. Van Orden's November 22, 2019 affidavit incorporates six reports of testing he performed on November 22, 2000 (two reports), March 9, 2005, March 31, 2005, April 24, 2007, September 16, 2009 and his article from 2016 (Mot. Exh. 20, Exhs. 2 through 8).

Mr. Van Orden prepared two reports dated November 22, 2000. The first assesses dust from sanding green paint similar to that used and sanded by Mr. Peterson, and the second evaluates talc samples (Mot. Exh. 20, Exhs. 2 and 3).

The November 22, 2000 report assessed the dust created from sanding green paint containing defendant's NYTAL 300. The first portion of the sample was assessed by using PLM and a trace amount of non-asbestiform talc was observed with a majority of the particles opaque. It was concluded that any fibrous minerals from sanding were encapsulated into the paint matrix. Testing performed by Computer Controlled Scanning Electron Microscopy (CCSEM) and SEM resulted in the same conclusion: That there was no asbestos, only talc, and to the extent the minerals identified could be

deemed asbestos they were encapsulated and incapable of causing asbestos related disease (Mot. Exh. 20, Exh. 2).

The November 22, 2000 report that is an analysis on seven samples of defendants various NYTAL products. Mr. Van Orden prepared two tables showing a particle ration of 3 to 1, and the concentration of all asbestiform fibers observed in the samples (Mot. Exh. 20, Exh. 3). The April 24,2007 report is from an analysis of a talc sample identified as NYTAL 3X, which had a mixture of talc, transitional fibers, tremolite and anthophyllite (Mot. Exh. 20, Exh. 6). The September 16, 2009 report is for the analysis of a talc sample identified as Mouldene K-100 which after x-ray diffraction, PLM and Transmission Electron Microscopy (TEM) found no asbestos fibers (Mot. Exh. 20, Exh. 7).

Mr. Van Orden's March 9, 2005 and March 31, 2005 reports consist of charts, tables and TEM Count Sheets, with no written statements discussing the test results (Mot. Exh. 20, Exhs. 4 and 5).

Ms. Dell's August 19, 2019 report assesses Mr. Peterson's medical diagnosis, work history and other activities with alleged asbestos exposure (Mot. Exh. 21, pgs. 4-6). She provides an overview of epidemiological principles, measures of association, bias, confounding and chance, and the difference between public health standards and the analysis of causation. Ms. Dell evaluates epidemiological literature and discusses the epidemiology of malignant mesothelioma. She concludes that the main determinant of mesothelioma risk is inhalation exposure to adequately high concentrations of amphibole asbestos for decades prior to the diagnosis (Mot. Exh. 21, pgs. 6-14).

Ms. Dell evaluates the relationship between talc exposure and mesothelioma. She refers to Occupational Health and Safety Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) standards for the determination of what constitutes asbestos containing minerals found in talc. She relies on the International Agency for Research on Cancer (IARC) determination that industrial talc products contain accessory minerals found in talc deposits, which vary depending on the deposits and periodically can include asbestos minerals. She also refers to epidemiology studies of New York mined talc and related cancers to demonstrate that there isn't a high concentration of asbestos fibers in the ore that was mined and processed in defendant's talc (Mot. Exh. 20, pgs. 15-18).

Specific Causation:

Defendant states that its NYTAL talc products did not contain asbestos at a level sufficient to cause Mr. Peterson's mestothelioma and plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate specific causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (Parker v. Mobil Oil Corp., 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 1114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see Parker v.

Mobil Oil Corp., 7 NY3d 434, supra at 448]). In turn, In re New York City Abestos Litigation, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] states that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Dr. Gunther's January 8, 2012 and October 2, 2014 reports did not find any asbestos contamination in defendants NYTAL 100 and NYTAL 100 HR products (Mot. Exh. 19).

Ms. Dell's August 19, 2019 report refers to epidemiological studies of employees in the talc related industries and specifically the ceramic industry. She finds that they do not provide any consistent evidence of an increase in mesothelioma risk. She states that the studies only show a higher risk attributed to firing and kiln repair. Ms. Dell concludes that even to the extent that some talc deposits contain amphibole minerals, the sporadic occurrence of mesothelioma in talc users or talc miners makes it speculative to assume that all talc is contaminated. She further concludes that Mr. Peterson's exposure to defendant's talc products did not cause his mesothelioma (Mot. Exh. 21, pgs. 16-44).

Defendant argues that plaintiffs failed to raise an issue of fact because the opposition papers rely on unsworn expert reports that are hearsay

Plaintiffs provided five expert reports in support of the opposition papers. The reports of Sean Fitzgerald, P.G., a Professional Geologist (Opp. Exh. 12), and James S. Webber, Ph.D, a toxicologist (Mot. Exh. 13), are unsworn and unaffirmed letter reports. Unsworn, unaffirmed letter reports do not meet the test of competent admissible evidence sufficient to defeat a motion for summary judgment (see Lazu v. Harlem Group, Inc., 89 AD 3d 435, 931 NYS 2d 608 [1st Dept. 2011], Migliaccio v. Miruku, 56 AD 3d 393, 869 NYS 2d 24 [1st Dept. 2008] citing to McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]).

Dr. John Coulter Maddox, M.D., a pathologist, whose report dated February 25, 2019 states: "Signed by me this day of February, 2019" but has no signature, and is not sworn. He annexes a Surgical Pathology Report - "Consult Report" - dated April 25, 2019 that is signed but unaffirmed or sworn (Opp. Exh. 21). The February 22, 2019 report of Darrell A. Bevis, an Industrial Hygienist, is signed but also unsworn (Opp. Exh. 22). The reports of Dr. Maddox and Mr. Bevis are not in admissible form, and have no probative value. They fail to raise an issue of fact to defeat summary judgment (Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991]) and Quinones v. Ksieniewicz, 80 AD 3d 506, 915 NYS 2d 70 [1st Dept. 2013]).

The report of Arnold R. Brody, Ph.D., a pathologist/cytologist is signed and affirmed "under the penalties of perjury" but he is not a duly licensed physician and cannot affirm the report, rendering it incompetent evidence (See CPLR 2106(a) and Shinn v. Catanzaro, 1 AD 3d 195, 767 NYS 2d 88 [1st Dept. 2003] applying to chiropractors; Lopez v. Gramuglia, 133 AD 3d 424, 20 NYS 3d 8 [1st Dept. 2015]).

Defendant has stated a prima facie basis to obtain summary judgment. Plaintiffs' expert reports are not in admissible form and do not raise issues of fact on causation warranting summary judgment for the defendant on this motion.

This motion was argued and marked fully submitted on January 29, 2020. Plaintiffs sua sponte uploaded allegedly corrected and sworn expert reports on February 19, 2020, three weeks after this motion was argued and marked fully submitted. Plaintiffs alleged correction of the defects in the expert reports could have been made through oral argument, before the submission of this motion (See Stewart v. Goldstein, 175 AD 3d 1214, 109 NYS 3d 286 [1st Dept. 2019]). The submission of expert reports three weeks after the motion was fully submitted is late and will not be considered in opposition to this motion (Tran Han Ho v. Brackley, 69 AD 3d 533, 894 NYS 2d 391 [1st Dept., 2010] citing to Foitl v. G.A.F. Corp., 64 NY 2d 911, 477 NE 2d 618, 488 NYS 2d 377[1985]).

Accordingly, it is ORDERED that defendant Vanderbilt Mineral, LLC's, motion to dismiss plaintiffs' complaint against them for lack of personal jurisdiction, alternatively pursuant to CPLR §327(a) to dismiss for forum non conveniens, and pursuant to CPLR §3212 for summary judgment, is granted to the extent of dismissing the claims and cross-claims on summary judgment, and it is further,

ORDERED that plaintiff's claims and any cross-claims asserted against Vanderbilt Mineral, LLC, are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED that defendant Vanderbilt Mineral, LLC is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the plaintiff, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly, and it is further,

ORDERED, that the Clerk of this Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 24, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE