

Connors-Dohse v Avon Prods., Inc.

2020 NY Slip Op 32008(U)

June 23, 2020

Supreme Court, New York County

Docket Number: 190305/2017

Judge: Manuel J. Mendez

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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

JOCELYN CONNORS-DOHSE, Individually,
and as Personal Representative for the Estate
of SCOTT M. DOHSE,

INDEX NO. 190305/2017
MOTION DATE 06/01/2020
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Plaintiffs,

-against-

AVON PRODUCTS, INC., et al.,

Defendants.

The following papers, numbered 1 to 10 were read on this motion by defendant Avon Products, Inc., pursuant to CPLR §327(a) to dismiss this action for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-6</u>
Replying Affidavits _____	<u>7</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Avon Products, Inc.'s (hereinafter "Avon") motion pursuant to CPLR § 327(a) to dismiss plaintiffs' complaint against them on the grounds of *forum non conveniens*, is denied.

Plaintiffs commenced this action seeking to recover for injuries sustained by Scott Dohse resulting from his alleged exposure to asbestos from defendant's products. Mr. Dohse was diagnosed with mesothelioma on January 19, 2015 and died on May 17, 2015. Mr. Dohse's wife, Jocelyn Connors-Dohse, was deposed on August 14, 2019 and his sister, Geri Marie Dohse, was deposed on August 13, 2019.

Plaintiffs allege that Mr. Dohse was exposed to asbestos in a variety of ways over the course of his entire life starting from the 1970's. Mr. Dohse's mother was an Avon representative when he was a child and applied Avon powder regularly when she was around him into the mid 1980's. (Moving papers, Exh. D at 18:2-5). Mr. Dohse's mother wore Unforgettable, Skin So Soft, Odyssey, and Candid powders. (Moving papers, Exh. D at 130:8-131:3; 132:11-133:4; 144:10-14; 149:3-9; 158:17-20). Mr. Dohse's sister, Geri Marie Dohse, used Sweet Honesty in his presence and would chase him around the house spraying him with the powders from approximately 1978 to 1985. (Moving papers, Exh. D at 150:24-151:2; 172:8-

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

173:5). Mr. Dohse's wife, Jocelyn Connors-Dohse, testified that she used Skin So Soft and Haiku powders in Mr. Dohse's presence. (Moving papers, Exh. C at 45:24-46:2; 225:5-8). She also testified that she saw Mr. Dohse primarily use Wild Country, Black Suede, and Core Elements powders until the summer of 2015. (Moving papers, Exh. C at 218:22-219:13; 243:16-23).

Plaintiffs claim that Mr. Dohse developed mesothelioma as a result of his exposure to asbestos contained in defendant's talcum powders from approximately the 1970's to 2015. During the period of exposure plaintiffs resided in the State of Wisconsin. At no time have plaintiffs resided in the state of New York, or have plaintiffs alleged to have been exposed to defendant's asbestos-containing products in the State of New York. Mr. Dohse's medical treatment (hospital and doctors) took place in the State of Wisconsin, where all of plaintiffs' witnesses are located.

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 Wisconsin and have never resided in New York, Mr. Dohse was never employed in New York, and that while defendant is a New York corporation, its headquarters are located in Rockland County, New York and not within New York City. Defendant argues that Wisconsin is an adequate alternative forum since plaintiffs were residents of Wisconsin at the time of Mr. Dohse's exposure, are still currently residing there, and any alleged exposure to asbestos occurred outside of New York. Defendant states that Mr. Dohse's diagnosis and medical treatment was in Wisconsin, and that a majority of the potential witnesses are located outside of New York, warranting dismissal for forum non conveniens.

Plaintiffs oppose the motion on multiple grounds. Plaintiffs allege 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 defendant, and plaintiffs' witnesses have already been deposed or can be deposed or testify by videotape. Defendant's manufacturing plants are located in Suffern, New York since 1987. (Opposition papers, Exh. 1). Plaintiffs argue that the specific talc powders used by the Dohse family, Unforgettable and Wild Country, could have been manufactured in New York. (Opposition papers, Exh. 16). Defendant also has a research and development lab with approximately 250 employees located in Suffern, New York. (Opposition papers, Exh. 5 and 13). All of the documents and witnesses defendant will be required to produce in this case can be done in New York through video or telephone. Furthermore, Defendant was a member of the Cosmetic Toiletry & Fragrance Association during the 1970's and regularly attended meetings in New York City. (Opposition papers, Exh. 25, 26, and 27). Defendant further placed ads in the New York Times in New York City to counter negative publicity from a study performed in the 1970's at Mt. Sinai Hospital in New York that found talc powder was contaminated with asbestos. (Opposition papers, Exh. 30).

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]). 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 AD3d 286, 810 NYS2d 172 [1st Dept. 2006]; *Mionis v. Bank Julius Baer & Co., Ltd.*, 9 AD3d, 280, 780 NYS2d 323 [1st Dept. 2004; *Anagnostou v. Stifel*, 204 AD2d 61, 611 NYS2d 525 [1st Dept. 1995]).

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 NY2d 414, 321 NE2d 777, 362 NYS2d 853 [1974]).

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]).

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 (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).

Defendants have a substantial presence in New York, as well as “ample resources” and 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 AD3d 565, 76 NYS3d 27 [1st Dept. 2018]). A greater potential hardship is suffered by the plaintiff that is required to litigate in a foreign jurisdiction. (*Id.*).

Weighing all relevant factors, this Court is of the opinion that in balancing the interests and convenience of the parties and the Courts, this action should be adjudicated in New York because: (a) The defendant is a New York corporation and has its principal place of business in New York; (b) The defendant has its manufacturing and research facilities in New York; (c) Their corporate witnesses,

documents, and potential evidence are located in New York, which is also the center of defendant's asbestos litigation defense; (d) In other out of state asbestos litigation defendant's witnesses have had to be deposed in New York; and (e) there would be no hardship on the Courts in New York. 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 the plaintiffs' 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 Avon Products, Inc.'s motion pursuant to CPLR § 327(a) to dismiss this action on the grounds of forum non conveniens is denied.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



**MANUEL J. MENDEZ
J.S.C.**

Dated: June 23, 2020

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