

**Ruiz v Revlon Consumer Prods. Corp.**

2020 NY Slip Op 33825(U)

November 16, 2020

Supreme Court, New York County

Docket Number: 190068/2018

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

-----X INDEX NO. 190068/2018

ANGELA BROWN RUIZ MOTION DATE 09/18/2020

Plaintiff, MOTION SEQ. NO. 004

- v -

REVLON CONSUMER PRODUCTS CORPORATION, DECISION + ORDER ON

Defendant. MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral arguments, it is ordered that Defendant Revlon Consumer Products Corp.'s motion to dismiss the instant action pursuant to CPLR §3211(a)(4) is hereby denied for the reasons stated below.

Here, defendant moves to dismiss this action arguing that there is an identical action pending in Illinois and on the grounds of *forum non conveniens*. Defendant argues that plaintiff commenced an identical action in Madison County, Illinois against it and a host of other defendants. As a result, defendant argues that it is being forced to defend the same action in two different venues which extremely prejudices it, and further contends that there is a risk of inconsistent verdicts. According to defendant, at all relevant times, plaintiff resided in Virginia, potential alternative sources of exposure are in Virginia, and relevant witnesses to exposure are also in Virginia. Defendant also contends that plaintiff's claims bear no nexus to New York. Plaintiff opposes and defendant replies.

In opposition, plaintiff argues that in 2018 defendant filed a motion in the Illinois case challenging personal jurisdiction. As a result of such motion, plaintiff commenced the instant

action in New York as defendant has its principal place of business within the State and personal jurisdiction would not be an issue. In August 2020, plaintiff voluntarily discontinued the Illinois action as against defendant such that plaintiff argues there is no identical pending action against defendant in any other jurisdiction. Plaintiff further argues that defendant has failed to meet its burden under the doctrine of *forum non conveniens*.

In reply, defendant argues that plaintiff's voluntary dismissal of defendant in the Illinois action does not render the instant motion moot as such dismissal was without prejudice.

Defendant further contends that dismissal of the Illinois action does not affect the *forum non conveniens* argument herein as plaintiff is attempting to forum shop.

Preliminarily, the Court notes that personal jurisdiction is not at issue herein and is, in fact, conceded by defendant in their moving papers as their principal place of business is located within the State. Pursuant to CPLR §3211(a), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such other as justice requires". Here, it is uncontested that there currently is no pending action against defendant for the same cause of action. The Appellate Division, First Department has held that "at present it is undisputed that there is no longer 'another action pending'...and plaintiff finds itself without any forum in which to litigate its claim. Accordingly, because the premise of [defendant's] motion to dismiss pursuant to CPLR 3211(a)(4)...has now been eliminated, this factor weighs heavily against dismissal here in order to preserve plaintiff's claims." *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8 (1<sup>st</sup> Dep't 2007). Notably, CPLR §3211(a)(4) explicitly states that even if there are two identical pending actions, dismissal is not required. Presently, there is no

other action pending in any jurisdiction regarding these parties and the instant claims. Thus, defendant's motion is denied.

As for defendant's *forum non conveniens* argument, it is undisputed that venue was properly designated as defendant's principal place of business is in the State of New York. As to defendant's request for dismissal, CPLR 327(a) provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Factors to be considered on a *forum non conveniens* motion are: (1) the residency of the parties; (2) the availability of an alternative forum in which the other party may bring suit; (3) whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction; (4) the location of a majority of the witnesses; (5) the burden on the New York courts; (6) the potential hardship to the movant if the case is kept in New York; and (7) whether the applicable law is that of a foreign jurisdiction. *See Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). No one factor has been held controlling. Rather, the determination is in the sound discretion of the court, based upon all the facts and circumstances of the case at hand. *See id.*

In support of the instant motion, defendant argues that the cause of action arose in Virginia, the witnesses are in Virginia, that defendant is suffering hardship in having to defend two identical actions, and there is a risk of inconsistent verdicts. Of note, both plaintiff and defendant argue that the timing of each other's filings in the instant action, as well as in the Illinois action, give rise to arguments regarding the motives of such filings. Specifically, plaintiff argues that defendant filed the instant motion to dismiss only one day after the Special Master ruled that defendant was required to submit to substantial discovery. As such, according to

plaintiff, the instant motion, which was filed nearly two and a half years after the commencement of this action, was made solely to avoid discovery. Likewise, defendant argues that plaintiff's filing of a voluntary discontinuance in the Illinois action in August 2020 was done solely to defeat the instant motion. Both such arguments fail. While the parties may speculate as to each other's motives in filing motions or other litigation strategy, such actions are merely that; litigation strategy, of which are not determinative of motions to dismiss. Rather, there are specific factors, as stated above, in which to consider.

The Court notes that there is currently no other pending action thus defendant need only defend one action. Here, although the cause of action may not have arisen in the state of New York, and while most witnesses may not reside here, after considering all the circumstances, the interests of substantial justice weigh against dismissal of this action. Defendant resides in New York and defendant has failed to establish any hardship in defending one action in the state of its residence. The instant action was commenced in March 2018, over two and a half years ago. In such time, the parties have filed motions and conducted discovery. Plaintiff has even appeared for a deposition in New York. To dismiss this action, which both parties have been litigating for over 2 and a half years, in which no prejudice to defendant has been established, and no hardship has been shown to defendant or any potential witnesses who may have to testify at trial, just for plaintiff to commence a new action in another jurisdiction would be a substantial waste of time and resources not just for the parties but also for the Court. This clearly is not in the interests of substantial justice. As such, defendant failed to meet its burden such that the motion is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss the instant action, pursuant to CPLR §3211(a)(4) and for *forum non conveniens*, is denied in its entirety; and it is further

ORDERED that the parties shall continue discovery expeditiously as per the Case Management Order, and any and all orders of the Special Master; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties to this action a copy of this decision and order, together with notice of entry.

This constitutes the Decision/Order of the Court.

11/16/2020  
DATE

\_\_\_\_\_  
ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	