

Unger v A.W. Chesterton Co.
2022 NY Slip Op 31462(U)
May 3, 2022
Supreme Court, New York County
Docket Number: Index No. 190098/2020
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190098/2020

EDWARD UNGER, LISA UNGER,

MOTION DATE 10/01/2021

Plaintiff,

MOTION SEQ. NO. 014

- v -

A.W. CHESTERTON COMPANY, ABB, INC., ALL ACQUISITION CORPORATION, LLC, AIR & LIQUID SYSTEMS CORPORATION, ALFA LAVAL, INC., ALLEN-BRADLEY COMPANY, INC., AMTROL, INC., ARMSTRONG INTERNATIONAL, INC., ATWOOD & MORRILL CO., INC., AURORA PUMP COMPANY, BLACKMER PUMP, BURNHAM CORPORATION, BW/IP INTERNATIONAL CO., CARRIER CORPORATION, CATERPILLAR INC., CBS CORPORATION, CLARK RELIANCE CORPORATION, CLEAVER-BROOKS COMPANY, CRANE CO., CROWN BOILER CO., CUMMINS ENGINE COMPANY, INC., CUMMINS INC., CUMMINS NORTHEAST, INC., DEZURIK, INC., EATON CORPORATION, ELECTROLUX HOME PRODUCTS, INC., ELLIOTT TURBOMACHINERY CO., INC., FLOWSERVE US, INC., FMC CORPORATION, FOSTER WHEELER, LLC, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, GOULD ELECTRONICS, INC., GOULDS PUMPS, INC., GREENE, TWEED & CO., INC., GRINNELL CORPORATION, HENRY TECHNOLOGIES, INC., HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., I.T.T. INDUSTRIES, INC., INGERSOLL RAND, INC., JENKINS BROS., LENNOX INDUSTRIES, INC., LIGHTOLIER INCORPORATED, METROPOLITAN LIFE INSURANCE COMPANY, MORSE TEC LLC, NAPA AUTO PARTS, NASH ENGINEERING COMPANY (THE), NEW ENGLAND INSULATION CO., PNEUMO ABEX CORPORATION, PNEUMO-ABEX LLC, PROGRESS LIGHTING, INC., RHEEM MANUFACTURING COMPANY, INC., ROCKWELL AUTOMATION, INC., SCHNEIDER ELECTRIC USA, INC., SPENCE ENGINEERING COMPANY, INC., SPIRAX SARCO, INC., SPX COOLING TECHNOLOGIES, INC., SUPERIOR LIDGERWOOD MUNDY CORP., THRUSH CO., INC., TUTHILL CORPORATION, UNION CARBIDE CORPORATION, VELAN VALVE CORP., WARREN PUMPS LLC, WEIL MCLAIN, WILLIAM POWELL COMPANY (THE), YORK INTERNATIONAL CORPORATION, BARNES & JONES, INC., MUELLER CO., O.C. KECKLEY COMPANY, SKIDMORE PUMP, WATTS REGULATOR COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO WARREN

**DECISION + ORDER ON
MOTION**

WEBSTER, WATTS WATER TECHNOLOGIES, INC., CAMERON INTERNATIONAL CORPORATION INDIVIDUALLY AND AS SUCCESSOR TO PENNSYLVANIA PUMP & COMPRESSOR COMPANY AND COOPER BESSEMER, SID HARVEY INDUSTRIES, INC., SID HARVEY SUPPLY, INC., SIEMENS CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO MURRAY & FURNAS, DISTRIBUTOR CORPORATION OF NEW ENGLAND, EMERSON SWAN, INC., HAJOCA CORPORATION, HAJOCA PLUMBING SUPPLY COMPANY, PEABODY SUPPLY CO., ECR INTERNATIONAL, INC., INDIVIDUALLY AND AS SUCCESSOR TO DUNKIRK, DUNKIRK BOILERS AND UTICA BOILERS, KOHLER CO., HUBBELL INCORPORATED (DELAWARE), GRUNDFOS CBS INC., INDIVIDUALLY AND AS SUCCESSOR TO PACO PUMPS AND PACIFIC PUMPS, PACO PUMPS, INC., PCC FLOW TECHNOLOGIES, INC., F/K/A PCC FLOW TECHNOLOGIES LP, INDIVIDUALLY AND AS SUCCESSOR TO PACO PUMPS AND PACIFIC PUMPS, PCC FLOW TECHNOLOGIES LP, AS SUCCESSOR IN INTEREST TO PACO PUMPS, INC., PRECISION CASTPARTS CORP., INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC PUMPS AND PACO PUMPS, SULZER PROCESS PUMPS (US), INC., INDIVIDUALLY AND AS SUCCESSOR TO PACO PUMPS AND SULZER PUMPS, HOUSTON, INC., SULZER PUMPS (US), INC., INDIVIDUALLY AND AS SUCCESSOR TO JOHNSTON PUMP AND AHLSTROM PUMPS AND PACO PUMPS AND SULZER PUMPS, HOUSTON, INC., SIEMENS INDUSTRY, INC., SUCCESSOR IN INTEREST TO SIEMENS ENERGY & AUTOMATION, INC., AERMOTOR PUMPS, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUELLER PUMP AND WEINMAN PUMP, AMW PUMP COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUELLER PUMP, AERMOTOR, AND WEINMAN, GRINNELL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO MUELLER PUMP AND WEINMAN PUMP, JIM WALTER CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO MUELLER CO., MUELLER WATER PRODUCTS AND MUELLER PUMP, MUELLER PUMP COMPANY, MUELLER WATER PRODUCTS INC., INDIVIDUALLY AND AS SUCCESSOR TO MUELLER PUMP COMPANY, AMW PUMPS, AND WEINMAN PUMP, MUELLER STEAM SPECIALTY, I.G. MARSTON CO., INC., COOPER CAMERON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO PENNSYLVANIA PUMP & COMPRESSOR COMPANY AND COOPER BESSEMER AND GROVE REDUCER VALVES, PRATT & WHITNEY POWER SYSTEMS, INC., UNITED TECHNOLOGIES CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO PRATT & WHITNEY (PRATT & WHITNEY/AIRCRAFT DIVISION), RAYTHEON TECHNOLOGIES CORPORATION F/K/A UNITED TECHNOLOGIES CORPORATION, BLAKE

GROUP HOLDINGS, INC., F.W. WEBB COMPANY,
 INDIVIDUALLY AND AS SUCCESSOR TO BERGEN
 INDUSTRIAL SUPPLY CO., FORT KENT HOLDINGS, INC.
 F/K/A DUNHAMBUSH, INC., GRUNDFOS PUMPS
 CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-
 IN-INTEREST TO PACIFIC PUMP COMPANY, JOMAR
 DISTRIBUTORS, INC., MCMASTER-CARR SUPPLY
 COMPANY, TACO, INC., TOTAL AIR SUPPLY INC., VIKING
 PUMP, INC., A UNIT OF IDEX CORPORATION, W. W.
 GRAINGER, INC., BALTIMORE AIRCOIL COMPANY,
 INC., NASH ENGINEERING HOLDINGS LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 014) 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 720, 721

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is hereby ordered that defendant Watts Water Technologies, Inc.'s and Watts Regulator Co.'s (hereinafter collectively referred to as the Watts defendants) motion pursuant to CPLR §327 to dismiss plaintiff's complaint under the doctrine of *forum non conveniens* is denied for the reasons set forth below.

The Watts defendants move to dismiss this action on the grounds of *forum non conveniens*, arguing that New York is an inconvenient forum given the facts and circumstances of the case. Moving defendants argue that the majority of plaintiff's alleged exposure took place in New Hampshire. According to the Watts defendants, "none of plaintiffs, Watts Water or Watts Regulator was a resident of New York at any relevant time, no witness or evidence is located in New York, Mr. Unger's injuries arose and his treatment has taken place entirely in New Hampshire". Affirmation In Support Of Defendants Watts Water Technologies, Inc. And Watts Regulator Co.'s Motion To Dismiss Under The Doctrine Of Forum Non Conveniens, p. 2, ¶ 5. Plaintiffs oppose the motion arguing that "[d]efendants are guilty of laches [*sic*] and inexcusable delay. . . seeking dismissal on forum non conveniens grounds, as they waited 14 months after the

completion of Mr. Unger's deposition to seek this relief, which warrants the outright denial of this motion under controlling law." Affirmation In Opposition To Defendants Watts Regulator Co. And Watts Water Technologies, Inc.'s Joint Motion To Dismiss Based On Forum Non Conveniens, p.1-2, ¶ 4 (internal emphasis omitted). Further, Plaintiffs argue that "there are more than sufficient connections to New York to maintain Plaintiffs' choice of forum, and a balancing of the relevant factors weighs in favor of retaining this action." *Id.* ¶ 5.

Under CPLR §327(a), "[w]hen 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 burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984) (internal citations omitted).

First, there is no burden imposed on this court. Watts contends that "[t]here is no reason to burden the New York courts with time-consuming asbestos claims arising from out-of-state activity involving out-of-state parties that require the application of foreign law." The Watts defendants' Affirmation In Support, *supra*, at p. 8, ¶ 22. However, following the commencement of this action, time consuming and extensive discovery has been conducted in the state of New

York, the note of issue has already been filed, a transfer order was already issued, numerous virtual and in person conferences have been held, countless motions decided, and a final trial date has been scheduled. At this stage, it would place more of an onus on this court to transfer the case to a different forum, as this court's significant resources would have been wasted.

Second, the Watts defendants have failed to proffer evidence to demonstrate that they would suffer undue hardship. Watts contends that “[w]itnesses and documents related to Mr. Unger’s medical treatment for mesothelioma are in New Hampshire, as his treatment occurred entirely in that state.” Watt’s Affirmation In Support, *supra*, at p. 9, ¶ 25. Nevertheless, the Appellate Division, First Department in *Yoshida Printing Co., Ltd. v Aiba*, 213 AD2d 275 (1st Dept 1995), held that “defendant failed to make any showing with respect to the materiality of the testimony of certain potential witnesses and could not demonstrate that their testimony would be unavailable here.” (internal citations omitted). As in *Yoshida*, the Watts defendants have failed to establish any undue hardship regarding availability of their witnesses to testify in New York.

Third, the Watts defendants contend that New Hampshire is an alternative forum since the case coincides with New Hampshire law, and that New Hampshire has a greater interest. However, plaintiffs argue that “considering that Mr. Unger is terminally ill and he has been granted in extremis status, as well as the late procedural posture of this case, there are no real alternative forums. If Plaintiffs were forced to re-file this action in New Hampshire, Mr. Unger would undoubtedly die prior to seeing his day in Court, which would be in derogation of the spirit and letter of CPLR article 34 and the NYCAL CMO’s accelerated trial provisions.” Affirmation In Opposition, *supra*, at p.15, ¶ 41 (internal emphasis omitted). If this case is transferred to New Hampshire under the doctrine of *forum non conveniens*, it is a genuine

possibility that Plaintiff will expire prior to the case's completion. Therefore, the court finds that there is no other real alternative forum that is capable of providing plaintiff with the opportunity to have his day in court during his lifetime.

Finally, it is undisputed that both plaintiff and the Watts defendants are not residents of New York. However, it has already been determined that this court has personal jurisdiction over the Watts defendants based upon their significant contacts to New York State, and Plaintiffs alleged exposure to asbestos in Governor's Island. Thus, although the Watts defendants argue that "Mr. Unger's alleged exposure to asbestos from Watts-brand products took place as a result of two decades of hands on work with such products in New Hampshire", The Watts defendants' Affirmation In Support, *supra*, at p.2, ¶ 4 (internal emphasis omitted), plaintiff's exposure in Governor's Island is one of the situs of plaintiff's injury. The court declines to ignore one of the locations where plaintiff's cause of action arose. Here, the factors to be considered for *forum non conveniens* weigh heavily against the Watts defendants, and thus, the instant motion is denied.

Furthermore, the Watts defendants are barred by laches. "Laches is 'an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party'. The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches. Prejudice may be demonstrated 'by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay'". *In re Linker v Martin*, 23 AD3d 186, 189 (1st Dept 2005) (internal citations omitted). In the instant matter, "Watts Defendants waited 14 months after the completion of Mr. Unger's depositions to make this motion, meaning they waited 14 months after having all the information they needed to seek the instant relief. This motion was also made well after the Note of Issue had been filed and the Transfer Order had

been issued.” Affirmation in Opposition, *supra*, at p. 9-10, ¶ 27. The Watts defendants proffer no evidence to the contrary of prejudice even after extensive discovery, the filing of the note of issue, and the transfer order being issued. The Appellate Division, First Department, heard a strikingly similar matter, where “[t]he case had been pending in New York for 18 months where significant activity, including discovery and pretrial conferences took place. The note of issue and certificate of readiness had been filed without objection and the matter placed on the Trial Calendar before defendant eventually moved to dismiss on forum non conveniens grounds. Under these circumstances, even if warranted, dismissal for forum non conveniens should not have been granted. The defendant having taken advantage of the resources of the New York courts should not, at such late point in time, be allowed to remove the action.” *Corines v Dobson*, 135 AD2d 390, 392-93 (1st Dept 1987) (internal emphasis omitted). Laches applies to the instant matter, and as such, the Watts defendants’ motion to dismiss on the basis of *forum non conveniens* is denied.

Accordingly, it is hereby

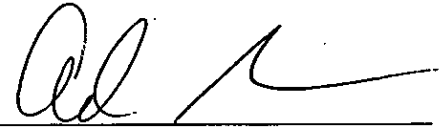
ORDERED that defendants Watts Water Technologies, Inc. / Watts Regulator Co.’s motion to dismiss under the doctrine of *forum non conveniens* is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the court.

5/03/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: