

**Wagner v Aerco Intl., Inc.**

2022 NY Slip Op 32061(U)

June 28, 2022

Supreme Court, New York County

Docket Number: Index No. 190233/2020

Judge: Adam Silvera

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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 13

Justice

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GERALD WAGNER,

Plaintiff,

- v -

INDEX NO. 190233/2020
MOTION DATE 02/25/2021
MOTION SEQ. NO. 002

AERCO INTERNATIONAL, INC., AIR & LIQUID SYSTEMS CORPORATION, BUFFALO PUMPS DIVISION, AMERICAN OPTICAL CORPORATION, AMERON INTERNATIONAL CORPORATION, ARMSTRONG INTERNATIONAL, INC., AURORA PUMP COMPANY, BALTIMORE AIRCOIL COMPANY INC., BMCE INC., IN ITSELF AND AS SUCCESSOR TO UNITED CENTRIFUGAL PUMP CO., BW/IP, INC., CBS CORPORATION, A DELAWARE CORPORATION F/K/A VIACOM INC. SUCCESSOR-BY-MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CHICAGO PNEUMATIC TOOL COMPANY LLC, CLEAVER-BROOKS, INC., COPES-VULCAN, INC., CRANE CO., CROWN CORK & SEAL COMPANY, INC., CUMMINS, INC., DEZURIK, INC., FLOWSERVE CORPORATION AS SUCCESSOR TO DURIRON INC. AND DURCO INTERNATIONAL INC., FLOWSERVE US INC., SOLELY AS SUCCESSOR TO EDWARD VALVES INC., ROCKWELL MANUFACTURING COMPANY, NORDSTROM VALVES INC. AND MCCANNA CORPORATION, FLSMIDTH INC., FORMERLY KNOWN AS FULLER COMPANY, FMC CORPORATION, FOSTER WHEELER ENERGY CORPORATION, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INCORPORATED, GREENE TWEED & CO. INC., GRINNELL LLC, HERCULES, LLC, INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, ITT LLC, J-M MANUFACTURING COMPANY, INC., JENKINS BROS., JOHN CRANE, INC., METSO MINERALS INDUSTRIES, INC., MILWAUKEE VALVE COMPANY INC., MORSE TEC LLC, F/K/A BORGWARNER MORSE TEC LLC, AND SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, MW CUSTOM PAPERS LLC, NASH ENGINEERING COMPANY, SPIRAX SARCO, INC., SPX COOLING TECHNOLOGIES, INC., STERLING FLUID SYSTEMS (USA) LLC, THE GOODYEAR TIRE & RUBBER COMPANY, UNION CARBIDE CORPORATION, UNITED STATES STEEL CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS, LLC, WEIR VALVES & CONTROLS USA, INC., D/B/A ATWOOD & MORRILL, WILLIAM POWELL COMPANY, YORK INTERNATIONAL

DECISION + ORDER ON MOTION

CORPORATION, JOHN DOE 1 THROUGH JOHN DOE 100  
(FICTITIOUS)

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 115, 116, 117, 118, 119, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 140, 141, 142, 143, 144 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is hereby ordered that Defendant United States Steel Corporation's (hereinafter referred to as U.S. Steel) motion to dismiss based upon *forum non conveniens* is denied for the reasons set forth below.

In the instant matter, Gerald Wagner (hereinafter referred to as Plaintiff) is 84 years old and has been diagnosed with mesothelioma. Plaintiff alleges that he was exposed to asbestos traceable to U.S. Steel during his career in the Navy from 1954-1957. Plaintiff was assigned to the U.S.S. Kankakee that sailed the Mediterranean Sea, where he served as a fireman's apprentice. Plaintiff was allegedly exposed to asbestos while working in the engine room and maintaining pumps, valves, and steam traps until the ship's decommissioning at the Brooklyn Navy Yard in June of 1955. As the ship was decommissioned, Plaintiff stayed on the ship during June of 1955 until December of 1955. Plaintiff alleges exposure to asbestos during this time. From 1955 to 1957, Plaintiff was assigned to the U.S.S. Alstede and sailed the Mediterranean Sea again working as a Machinist Mate. The U.S.S. Alstede was docked for three to four months in Staten Island. During this time, Plaintiff stayed on the ship. Plaintiff alleges further asbestos exposure during his stay at Staten Island. While on the U.S.S. Alstede, Plaintiff had similar duties working within the engine room, maintaining the pumps, valves, turbines, oilers, and steam traps. Subsequently in 1959, Plaintiff worked onboard a U.S. Steel freighter named the Myron C. Taylor, again working in the engine room. Finally, Plaintiff worked at Michigan

Limestone in Rogers City, Michigan as a painter, assistant repairman, pump man, and millwright. Michigan Limestone is a subsidiary of U.S. Steel. Plaintiff was diagnosed with mesothelioma at Northern Michigan Hospital in June of 2020. Plaintiff brings suit against U.S. Steel claiming exposure to asbestos resulting in his mesothelioma, and U.S. Steel moves to dismiss on the basis of *forum non conveniens*. Plaintiff opposes.

Plaintiff contends that U.S. Steel has not met its heavy burden to demonstrate that a motion to dismiss on the basis of *forum non conveniens* is warranted. First, Plaintiff argues that “dismissal on forum grounds is not warranted where, as here, there is a substantial nexus between a plaintiff’s claims and New York.” Plaintiffs’ Memorandum Of Law In Opposition To Defendant United States Steel Corporation’s Motion To Dismiss Plaintiff’s Complaint On The Basis Of Forum Non Conveniens, p. 7 (internal emphasis omitted). Further, Plaintiff argues that “U.S. Steel’s contention that New York is an inconvenient forum based on the location of the evidence is unavailing.” *Id.* at p. 9.

Conversely, U.S. Steel argues that the motion to dismiss based upon *forum non conveniens* should be granted “because: (1) Plaintiff is not and was never a New York resident and his alleged injury lacks a substantial nexus to New York; (2) all of the witnesses and evidence are located outside New York; (3) the already overburdened NYCAL court system should not be compelled to hear a case that is wholly devoid of any nexus to New York; (4) there is an adequate alternative forum in the State of Michigan; and (5) the courts in the State of Michigan are more equipped to handle claims under the Jones Act, 46 U.S.C. §30104, as maritime claims are frequently litigated in Michigan.” Memorandum Of Law In Support Of Motion To Dismiss Plaintiff’s Complaint On The Basis Of Forum Non Conveniens On Behalf Of Defendant United States Steel Corporation, p. 6.

CPLR 327(a) states that “[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 domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.” “The common-law doctrine of *forum non conveniens*, also articulated in CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere. 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.” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 (1984) (internal citations omitted).

In the instant matter, it is clear that there is a nexus between the Plaintiff’s claim and New York. U.S. Steel argues that “the uncontroverted evidence is that Mr. Wagner has never been a resident of New York; was never employed in New York; and even if he handled alleged asbestos-containing products, such as gaskets and packing, on ships docked briefly in New York, such contacts were so trivial and isolated compared to the entirety of his claims.” U.S. Steel’s Memorandum In Support, *Supra*, at p. 7. However, “[a]s U.S. Steel concedes, Mr. Wagner was exposed to asbestos in New York during several periods—including while working for U.S. Steel. Plaintiff’s experts will opine that Mr. Wagner’s exposures in New York contributed to causing his mesothelioma.” Plaintiff’s Memorandum of Law in Opposition, *Supra*, at p. 7. It is

within the sound discretion of the Court to determine whether there is a nexus between New York and the Plaintiff's claim. As Plaintiff was working for U.S. Steel within New York on several occasions, wherein Plaintiff was exposed to asbestos within the state, a nexus has been established between Plaintiff's claim and New York.

Furthermore, U.S Steel contends that New York would be an inconvenient forum, as no witnesses residing in New York have been identified, and the treating physicians are located in Michigan. Conversely, Plaintiff argues that "significant discovery has already taken place in New York. Mr. Wagner has already appeared for a 13- volume discovery deposition. Plaintiff will tender any other fact witness for discovery depositions in New York and all will appear live for trial." *Id.* at p. 9. The Appellate Division, First Department in *Yoshida Printing Co., Ltd. v Aiba*, 213 AD2d 275, 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*, U.S. Steel has failed to establish any undue hardship regarding availability of witnesses to testify in New York. In addition, *forum non conveniens* "rests upon justice, fairness and convenience and . . . when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court". *Islamic Republic of Iran v Pahlavi, supra*, 62 NY2d at 479. Considering all of the relevant factors and the totality of the circumstances, New York is an appropriate forum. Necessary witnesses may appear in New York for trial, and any pertinent records or documentation may be accessed in New York as well. Discovery has taken place in New York, as well as Mr. Wagner's deposition.

Finally, U.S. Steel contends that Michigan is a more suitable alternative forum, as Michigan courts hear cases under the Jones Act, 46 U.S.C. §30104, which protect seaman.

Further, U.S. Steel argues that Michigan has a fast-paced asbestos docket. In contrast, Plaintiffs argue that “New York is where a portion of Mr. Wagner’s exposure (and, thus, injury) took place and where U.S. Steel had a headquarters which directed worker health and safety.” Plaintiff’s Memorandum of Law in Opposition, *supra*, at p. 10. As there is a substantial nexus between Plaintiff’s claim and New York, a portion of Plaintiff’s alleged exposure occurred in New York and U.S. Steel has wholly failed to establish that New York is an inconvenient forum for any of the witnesses, the fact that Michigan might be a possible alternative forum does not satisfy U.S. Steel’s burden to change venue.

Thus, U.S. Steele has failed to meet its burden and their motion to dismiss on the basis of *forum non conveniens* is denied.

Accordingly, it is

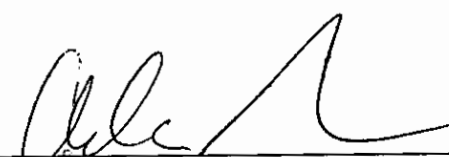
ORDERED that U.S. Steel’s motion to dismiss based upon the doctrine of *forum non conveniens* is hereby denied in its entirety; and it is further

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.

6/28/2022

DATE



ADAM SILVERA, J.S.C.

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