SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

EUGENE STRANK and JOAN STRANK :

Index No.: 101324/05

Plaintiffs, :

Cal. No.: 102 of 9/19/05

-against- :

:

C.B. FLEET HOLDING COMPANY, INCORPORATED
C.B. FLEET COMPANY, INC., WALGREEN CO. :
and WALGREEN EASTERN CO., INC.

:

Defendants. :

DeGRASSE, J.:

In this personal injury action defendants C.B. Fleet Holding Company, Incorporated ("FHC"), C.B. Fleet Company, Inc. ("FC"), Walgreen Co. ("WC"), and Walgreen Eastern Co., Inc. ("WEC") move for an order, pursuant to CPLR 327 and 3211, dismissing the complaint on the grounds of forum non conveniens.

Plaintiff Eugene Strank and his spouse commenced this action by the filing of a summons with notice on January 28, 2005, to recover for personal damages allegedly suffered by Strank as a result of his ingesting an oral laxative known as Fleet Phospho-soda. Plaintiffs are New Jersey residents, FHC and its owner FC are residents of Virginia. WC is a resident of Illinois. WEC is incorporated in New York, with its principal place of business in Illinois. Plaintiffs claim that after ingesting the laxative on January 1 and 2, 2003, Strank was caused to suffer from acute kidney failure which forced him to undergo a kidney transplant. The complaint which seeks to recover compensatory and punitive damages alleges, inter alia, causes of action in strict products liability, negligence, breach of warranty, fraud and loss of consortium.

Defendants argue that New Jersey would be a more appropriate forum than New York for resolution of this action because the laxative complained of was prescribed, purchased and ingested in New Jersey. Defendants further argue that the injuries allegedly suffered by Strank all occurred in New Jersey, and Strank sought medical treatment in New Jersey. Defendants next argue that the only New York resident in this action is WEC who is connected to New York by way of its state of incorporation. As such, defendants contend that WEC's connection to New York is an insufficient basis to retain jurisdiction inasmuch as the evidence is centered in New Jersey and potential witnesses may not be subject to New York's subpoena power. In opposition, plaintiffs, relying on the affidavit of their counsel, argue that this action has a substantial connection to New York because Strank's condition was diagnosed at Columbia Presbyterian Hospital in New York. Plaintiffs' counsel further argues that Strank received most of his medical treatment at several hospitals located in New York. Additionally, plaintiffs' counsel argues that New Jersey is not an available forum in which to litigate this case inasmuch as their primary causes of action are now time-barred by New Jersey's statute of limitations.

CPLR 327 (a) provides that a court may grant a motion to dismiss "if it finds that in the interest of substantial justice the action should be heard in another forum." Although a New York court may have jurisdiction over a claim, it is not compelled to retain jurisdiction if the claim has no substantial nexus with New York (*Wentzel v Allen Mach., Inc.*, 277 AD2d 446 [2002]). The doctrine of forum non conveniens rests upon the principles of justice, fairness and convenience (*id.*). In determining if dismissal is warranted, the court examines whether the action has a substantial nexus to New York (*Banco Ambrosiano S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 73 [1984]). The court also balances various factors, including the residence of the parties, the burden the case

places on New York courts, the potential hardship to defendant in litigating the claim in this state, the location of the transaction out of which the cause of action arose, and the unavailability of an alternative forum in which plaintiff may bring suit (*id.*). The court also considers whether another forum's laws will be applied (*Avnet, Inc. v Aetna Cas. and Sur. Co.*, 160 AD2d 463 [1990]). No single element is controlling and all factors are to be taken into account (*id.*; *Irrigation & Indus. Dev. Corp. v Indag S.A.*, 37 NY2d 522, 525 [1975]). The strength of the rule is its flexibility with respect to the distinct circumstances of each case (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied*, 469 US 1108 [1985]; *Martin v Mieth*, 35 NY2d 414, 418 [1974]). Although nonresidents of New York State are allowed to bring an action in the state to litigate their disputes as a matter of comity, "[a] nonresident plaintiff in a tort case must demonstrate special circumstances which warrant the retention of the action in New York or risk dismissal of the action pursuant to the doctrine of forum non conveniens" (*Economos v Zizikas*, 18 AD3d 392, 393 [2005]; *Blais v Deyo*, 92 AD2d 998, 999 [1983]; *affd* 60 NY2d 679 [1983]). The burden, however, rests on the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (*Islamic Republic of Iran*, 62 NY2d at 479).

Weighing the relevant factors presented here in light of the above-cited principles, the court concludes that defendants have sustained their burden of establishing that forum non conveniens dismissal is appropriate. The evidence establishes that the action will be "better adjudicated" in New Jersey (*Avnet*, 160 AD2d at 464). The defective product was purchased in New Jersey and Strank's injuries were sustained in New Jersey. Thus, New Jersey law applies. Moreover, it is alleged in the complaint that Strank was diagnosed with acute kidney failure at a New Jersey hospital where he remained hospitalized from January 30, 2003 to February 27, 2003. It is further alleged that Strank

underwent a kidney transplant at a New Jersey hospital on October 14, 2003. Thus, the record indicates that the action concerns events, witnesses and parties that either took place or are located in New Jersey. It is undisputed that Strank's treating physicians located in New Jersey would be beyond the reach of New York's subpoena power (*see Nicholson v Pfizer, Inc.*, 278 AD2d 143 [2000]).

As to plaintiffs' counsel's claim that plaintiffs' primary causes of action are now time-barred by New Jersey's statute of limitations, defendants concede that the statute of limitations is a "non-issue." Since defendants have evinced a willingness to waive the statute of limitations, there is an alternative forum available to plaintiffs. The fact that one of the defendants is incorporated in New York does not compel a contrary conclusion (*see Sunoco, Inc. v Home Ins. Co.*, 300 AD2d 19, 20 [2002]). New Jersey, which provides a viable alternative forum, clearly has a greater interest in this litigation than New York. While plaintiffs' counsel alleges that "most if not all of plaintiffs' medical and other expert witnesses are located in New York," plaintiffs do not substantiate this allegation. The affidavit of plaintiffs' counsel who has no personal knowledge of the medical treatment rendered to Strank is of no probative value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Matter of Johnson v Sharpe*, 66 AD2d 955, 956 [1978]). Further, it is significant that there is nothing in the record by way of a hospital record to establish that most of Strank's medical treatment was provided by the doctors in New York.

Accordingly, the motion is granted and the complaint is hereby dismissed. As a condition of the foregoing relief, defendant shall agree in writing to waive any applicable statute of limitations defenses not available in New York at the time this action was commenced (*see Hudson's Bay New York v United States Fid. & Guar. Co.*, 246 AD2d 389, 390 [1998]; *Dawson v Seenardine*, 232

AD2d 521 [1996]). Defendants shall serve plaintiffs with the written agreement provided for herein within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

DEC 2 2005

DATED:

DEC 12 2005

J.S.C.

Duplicate original

HON. LELAND DeGRASSE

JSC December 23, 2005

FILED
DEC 27 2005
COUNTY CLERK'S OFFICE
NEW YORK