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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice PART 55

Mahon

- v -

Pfizer, Inc.

INDEX NO. 110511/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for forum non conveniens

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7-9; 10-11

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided per attached memorandum decision and order.

P.C. January 23, 2012 at 10 AM. Part 55

Counsel: Watch e-courts for location/judge for Part 55 in 2012 in view of my retirement

Dated: 12-1-11

J.S.C.
JANE S. SOLOMON

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

BRETT MAHON, individually and as Parent and Natural Guardian of GRAYSON MAHON, an infant,

Index No. 110511/10

Plaintiffs,

DECISION & ORDER

-against-

PFIZER, INC,

Defendant.

----------X

SOLOMON, J.:

This is an action to recover damages for birth defect injuries, seeking recovery on the theories of negligence, premises liability, strict liability, ultrahazardous activity, willful and wanton misconduct, and loss of services. Defendant Pfizer, Inc. (Pfizer), a New York corporation, moves to dismiss the complaint on the grounds that it fails to state a cause of action (CPLR 3211[a][7]) and for forum non conveniens (CPLR 327[a]). At oral argument on February 28, 2011, the court issued an Interim Order directing limited discovery on the forum non conveniens issue. Further argument was held on July 25, 2011.

Brett Mahon (Brett) is the father of Grayson Mahon (Grayson), an infant (together, the Mahons). Jenn Mahon (Jenn), Brett's wife and Grayson's mother, was a senior associate scientist employed by Pfizer. Jenn became pregnant in December 2007. During her pregnancy, she worked at Pfizer's research and development facility in Groton, Connecticut. The facility

included a test laboratory wherein several hazardous materials were tested. The Mahons allege that, while pregnant, Jenn was regularly exposed to a hazardous compound known by Pfizer to be a "High Reproductive Hazard," but which was labeled as a "Least Hazardous" compound. Grayson was born with severe physical and mental disabilities.

Subsequent to the limited discovery, it was learned that on January 8, 2007, Pfizer employees drafted a Material Safety Data Sheet (Data Sheet) regarding the compound, which warned: "DANGER . . . Suspected of damaging fertility or the unborn child" (Engman Affirmation, Ex. 5).

The Mahons argue that Pfizer employees at its New York corporate headquarters were in charge of day to day health and safety matters for the entire company (*see, e.g.* Emails attached to Engman Affirmation, Ex. 19 & 20). Their responsibilities included designing and implementing Pfizer's work safety policies (*Id.*, Ex. 6, 12, 16-18, 22), which would require the review of such documents as the Data Sheet in order to implement proper safety guidelines for the company. The Mahons argue that, at the time of Jenn's pregnancy, ten months after learning of the hazard, Pfizer had not yet acted on the Data Sheet report by assigning the High Reproductive Hazard designation to the compound. They claim that the delay was a substantial contributing cause of Grayson's injuries.

FORUM NON CONVENIENS

Pfizer moves to dismiss the complaint for forum non conveniens under CPLR 327(a) on the ground that the complaint lacks a substantial nexus with New York.

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 . . . 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.

A plaintiff's choice of forum is entitled to deference. To establish inconvenience, the defendant carries the burden 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" (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 479 [1984]). Factors for courts to consider include: "(1) the burden on the New York courts, (2) the potential hardship to the defendant . . . (3) the unavailability of an alternative forum in which plaintiff may bring suit . . . (4) that both parties to the action are nonresidents, and (5) that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction" (Id., at 479).

Pfizer argues that New York courts have held that the

allegation that its executives in New York establish health and safety standards is insufficient to establish a substantial nexus with New York. In support, it cites to *Wilson v. Pfizer, Inc.*, 20 Misc3d 1104(A) (Sup. Ct., NY County, 2008), *aff'd* in *Avery v. Pfizer, Inc.*, 68 AD3d 633 (1st Dept., 2009). In *Wilson*, the plaintiff was a Georgia resident who took Lipitor (a drug manufactured by Pfizer in Michigan) exclusively in Georgia and was treated by Georgia doctors. Pfizer moved for dismissal based on forum non conveniens. The court found no nexus with New York and granted Pfizer's motion. In upholding the decision, the Appellate Division noted: "Plaintiffs' bare assertion[s] of fraud . . . allegedly committed at defendant's corporate headquarters in New York, are insufficient to create a substantial nexus with New York outweighing the compelling reasons for dismissal" (*Avery*, 68 AD3d at 634 [citation & internal quotations omitted]).

Wilson/Avery is not persuasive here. First, because, unlike in *Wilson* (where a non-affiliated individual elected to take a Pfizer drug prescribed by a non-affiliated physician), the injury alleged here arises from an employee's exposure to a dangerous substance in a Pfizer facility, under the safety guidance of Pfizer employees in New York. Moreover, the Mahons do not only allege "bare assertions of fraud," they allege specific, tangible delays and errors in Pfizer's internal operations, stemming from decisions made by its employees at its

New York Headquarters. These allegations are sufficiently supported by the limited discovery this court allowed on the subject. The alleged actions directly affected how the compound was labeled in Connecticut, and have a direct relationship to the injuries pleaded. Accordingly, there is a substantial nexus with New York sufficient to survive this motion.

Pfizer next argues that it would be exposed to undue hardship because it would be unable to subpoena several of Jenn and Grayson's physicians, who are located in Connecticut, outside of this Court's subpoena power. This argument is also unpersuasive. The cases Pfizer cited found New York to be an inconvenient forum where out-of-jurisdiction witnesses were in England, India, and states a significant distance from New York (Georgia and California); not Connecticut. Moreover, Pfizer does not establish that any of the Mahons' witnesses are unwilling to appear in New York. Finally, its argument that it is unduly burdensome to require it to obtain a commission for subpoenas is entirely meritless.

FAILURE TO STATE CAUSE OF ACTION

Pfizer moves to dismiss the third and fourth causes of action for strict liability and ultrahazardous activity. These causes of action are duplicative of one another--a cause of action for ultrahazardous activity is one for strict liability (*see, e.g., Doundoukalis v. Town of Hempstead*, 42 NY2d 440, 445

[1977]). Accordingly, the strict liability cause of action is dismissed, but the allegations made therein are incorporated into the ultrahazardous activity cause of action.

One who engages in an ultrahazardous or abnormally dangerous activity may be held strictly liable for any harm to persons or property resulting from that activity. Determining whether an activity is abnormally dangerous involves multiple factors. New York utilizes the factors found in the Restatement (2nd) of Torts § 520 as guidance (*Doundoukalis*, 42 NY2d, at 448). No one factor is determinative (*Id.*).

Pfizer argues that the Mahons have failed to sufficiently plead facts in support of the cause of action. It cites to several Connecticut cases to bolster this argument. However, unlike New York, Connecticut is a fact pleading state (Connecticut Practice Book § 10-1; *Reichenbach v. Kraska Enterprises, LLC.*, 105 Conn App 461, 470 [2008]). Accordingly, this argument is unpersuasive under New York procedural laws.

Pfizer also argues that the Mahons' allegations are conclusory. Again, it cites only to Connecticut caselaw in support. Once again, in a fact pleading state, a cause of action may be dismissed where the facts alleged are nothing more than legal conclusions (*see, Novametrix Med. Systems, Inc. v. BOC Group, Inc.*, 224 Conn. 210, 215 [1992][dismissal is proper if "the complaint alleges mere conclusions of law that are

unsupported by the facts alleged"][emphasis added]). Such is not the procedure in New York.

Next, Pfizer argues that the Mahons have failed to allege that the risk could not have been eliminated by the exercise of the utmost care, which it claims is a required element of the cause of action. In support, it materially misquotes the Restatement (2nd) of Torts § 520.[1] Accordingly, this argument is unpersuasive. Moreover, for its

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[1] Pfizer's reply memorandum of law states:

"Section 520 provides:

> An activity is ultrahazardous if it
> (a) necessarily involved a risk of serious harm to the person . . . which cannot be eliminated by the exercise of the utmost care, and
> (b) is not a matter of common usage.

Restatement (Second) of Torts § 520. Parts (a) and (b) are both essential elements. *See* Restatement (Second) of Torts § 520, cmt. g ('In order that an activity may be ultrahazardous it is necessary that it satisfy the conditions stated in both Clauses (a) and (b)'). Section 520 also provides for additional factors that courts may consider in making a determination whether a particular activity is ultrahazardous. But the failure to allege either factors (a) or (b) is fatal to a claim of abnormally dangerous activity."

(Defendant's Reply Memorandum, p. 5[footnote omitted]).

Notably, the passages represented as quotes from the Restatement (Second) of Torts § 520, and from comment g to that section, cannot be found in the cited text. In fact, the indented portion of the text quoted above is a reformatted case commentary describing a 1977 Arkansas Supreme Court decision. The actual text of § 520 and comment g are materially different from the quoted words and do not support defendant's argument.

misrepresentations to this court, costs should be awarded to the plaintiffs.

Finally, Pfizer moves to dismiss the fifth cause of action for willful and wanton misconduct, which seeks punitive damages. Again, it cites to Connecticut law which references that state's fact pleading nature. It also argues that to allege a claim for willful and wanton negligence, the Mahons must allege that there was intentional conduct that was designed to do harm. This is incorrect, as "conduct warranting an award of punitive damages need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness" (*Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 81 [2nd Dept., 2007]). The Mahons have made such allegations. Accordingly, the motion to dismiss is denied.

In light of the foregoing, it hereby is

ORDERED that the motion of defendant Pfizer, Inc. is granted to the extent that the third cause of action is dismissed as duplicative, and is otherwise denied, with costs to the plaintiffs in the amount of $100.

FILED

DEC 02 2011

COUNTY CLERK'S OFFICE
NEW YORK

Dated: Dec. 1, 2011

Enter:

J.S.C

JANE S. SOLOMON