

<b>Kiselovski v A.O. Smith Water Prods. Co.</b>
2012 NY Slip Op 32449(U)
September 18, 2012
Supreme Court, New York County
Docket Number: 115520/05
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HEITLER  
Justice

PART 30

KISECOUSKI, WLADIMIR,  
ETAL.

INDEX NO.

115520/05

MOTION DATE

- v -

MOTION SEQ. NO.

02

A.O. SMITH WATER PRODUCTS,  
ETAL.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the memorandum decision dated 8/18/12

**FILED**  
SEP 24 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9-18-12

[Signature]  
J.S.C.

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 30

----- X  
WLADIMIR KISELOVSKI and SUSAN KISELOVSKI,

Index No. 115520/05  
Motion Seq. 002

Plaintiffs,

**DECISION AND ORDER**

-against-

A.O. SMITH WATER PRODUCTS Co., et al.,

**FILED**

Defendants.

SEP 24 2012  
X

----- X  
SHERRY KLEIN HEITLER, J.:

**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendant Ford Motor Company ("Ford") moves pursuant to CPLR 327<sup>1</sup> to dismiss this action on the ground of forum non conveniens. For the reasons set forth below, Ford's motion is denied.

**BACKGROUND**

Plaintiffs Wladimir Kiselovski and his wife Susan Kiselovski filed a summons and complaint venued in this court on November 7, 2005 based on the principal place of business of several of the named defendants. In or about February, 2012, plaintiffs served interrogatory responses which indicate that Mr. Kiselovski was exposed to asbestos throughout his career as an auto mechanic as well as a sign installer in Rochester, New York. Mr. Kiselovski was deposed on May 9, 2012 and May 10, 2012 near Las Vegas, Nevada. At his deposition, the plaintiff

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<sup>1</sup> CPLR 327(a) provides 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."

[\* 3]  
expounded upon his background and alleged exposure in detail.

Mr. Kiselovski immigrated to the Rochester, New York area from Germany in 1956. From 1962 to 1964, Mr. Kiselovski worked as a sign installer for Rochester Coca Cola, installing various Coca Cola signs on billboards, in restaurants, and in other public places. From 1964-1965 he served in the army as an auto mechanic at Fort Eustis, Virginia. When he returned to Rochester from the army, Mr. Kiselovski was married and was rehired in his former job by Rochester Coca-Cola. In 1970, Mr. Kiselovski began to work as an auto mechanic, also in the Rochester area. In this capacity he identified manufacturers of brakes, clutches, gaskets, trucks, and automobiles whose products he believed caused him to be exposed to asbestos in connection with his work. The plaintiffs continued to live in Rochester until approximately 2001, when they moved to Henderson, Nevada, a suburb of Las Vegas, where Mr. Kiselovski was diagnosed with and is being treated for lung cancer.

Ford submits that this matter should be dismissed pursuant to CPLR 327 on the ground of forum non conveniens insofar as plaintiffs have never resided in New York County and none of the alleged asbestos exposure took place here. Since Rochester is located in Monroe County, Ford suggests that it is a more suitable forum for the trial of this action, and presents the Monroe County Supreme Court as the more economical, efficient, and less burdensome alternative. Plaintiffs oppose on the ground that this matter is governed by CPLR 510 insofar as the defendant is actually requesting a change of venue to Monroe County, New York. Plaintiffs argue that whether under a forum non conveniens analysis or a change of venue analysis Ford has failed to establish any basis for the requested relief. Plaintiffs submit evidence that establishes that some of the named defendants, including Ford, have either their principal place of business

in New York County, designate their principal office to be in New York County, or have registered a New York County entity for service of process with the New York Secretary of State. In reply Ford asserts that plaintiffs have misread its motion as one to change venue to within New York State and, contrary to its moving papers, suggests Nevada is a more suitable forum since that is where Mr. Kiselovski is being treated.

### DISCUSSION

Relying on CPLR 327, Ford submits that Monroe County, New York (wherein Rochester is located), is a more suitable alternative forum. But as plaintiffs note, both Monroe County and New York County represent individual venues within the same court system in New York State, which is a single unified forum. It is error to rely on CPLR 327 to request either a transfer or dismissal of a case in favor of another New York State venue.

A change of venue may however be effectuated pursuant to CPLR 510, which permits such a change where: (1) the county designated is not a proper county; (2) an impartial trial cannot be had in the designated county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change. On this motion Ford has not shown that it is entitled to a change of venue either as a matter of right or in the interests of justice. Plaintiffs' choice of New York County as the venue of this action was plainly proper insofar as several of the defendants reside here. *See* CPLR 503. There is no indication by Ford that an impartial trial cannot be had in New York County, nor does Ford provide the basic details necessary to justify a discretionary change in venue in the interests of justice, which include: (1) the names, addresses and occupations of the nonparty witnesses who are expected to be called; (2) the nature of the anticipated testimony and the manner in which it is material to the issues raised in the case; (3)

[\* 5]

that the witnesses have been contacted and are available and willing to testify for the movant; and (4) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced. See *Cardona v Aggressive Heating*, 180 AD2d 572 (1st Dept 1992); *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172 (2d Dept 1995).

Even under a CPLR 327 analysis, Ford's motion must fail. In this regard, the burden lies with the defendant to show "relevant private or public interest factors" that militate against retention of the action in New York. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). These factors include: (i) the residency of the parties; (ii) the jurisdiction in which the underlying transaction occurred; (iii) the location of relevant documents and witnesses; (iv) the availability of a suitable forum; and (v) the interest of the alternative forum in deciding the issues. *Id.* at 479. No one factor is controlling. Indeed "the great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case." *Id.* The overall issue is whether there is a "substantial nexus" between the plaintiff's action and the State of New York." *Id.* at 483.

Contrary to the defendant's assertions, New York clearly has a substantial nexus to this matter to warrant this court retaining jurisdiction. Plaintiffs were New York residents for approximately 45 years before moving to Nevada. Their cause of action plainly arises from activities which occurred within New York State over the course of Mr. Kiselovski's long career.

In addition, Ford has not shown that either it or the plaintiffs will suffer any burden from having to litigate in New York. The court is mindful that the plaintiffs live in Nevada and that Mr. Kiselovski's medical treatment was initiated and continues to occur in that state. But there is no reason given why either the plaintiffs or any of Mr. Kiselovski's treating physicians who

might be called to testify cannot travel to New York. Moreover, while Ford is a Delaware corporation, it is licensed to do business in New York.

The totality of circumstances, and in particular the fact that Mr. Kiselovski's exposure occurred in New York State, militates against dismissal in favor of an alternative forum in Nevada. This court's prior decision in *Ackley v A.C. & S.*, Index No. 110943/01 (Sup. Ct. NY Co. 2010), is not to the contrary. In *Ackley*, the decedent served in the United States Navy where he was assigned to naval stations in Pennsylvania, Rhode Island, and New York. He then worked as an oil mechanic in New Jersey, Pennsylvania, and Delaware. I granted the defendant's motion to dismiss for forum non conveniens because the plaintiff provided no evidence that any of the decedent's alleged underlying exposure occurred while he was in New York.

Accordingly, and in light of the foregoing, is hereby

ORDERED that Ford Motor Company's motion to dismiss this action whether on the ground of forum non conveniens or on the ground of improper venue is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 9.18.12

**FILED**

SEP 24 2012

NEW YORK  
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER

J.S.C.