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

THOMAS M. STEWART,

Plaintiff,

-against-

BRISTOL-MYERS SQUIBB CO. and PFIZER, INC.,

Defendants.

Index No.: 155012/2017

DECISION/ORDER

Motion Seq. 003

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memos of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.:

Ohio resident Plaintiff Thomas M. Stewart ("Plaintiff") brought this pharmaceutical product liability action against New York-based Defendants Bristol-Myers Squibb Co. ("Bristol-Myers") and Pfizer, Inc. ("Pfizer") (collectively "Defendants") to recover damages for alleged severe gastrointestinal bleeding allegedly caused by taking the prescription drug Eliquis. Eliquis, or apixaban, is an oral anticoagulant that thins the blood and is meant to prevent blood clots and reduce the risk of stroke in patients with atrial fibrillation. Defendants market Eliquis as a more attractive alternative to Coumadin, or warfarin, because Eliquis does not require a patient to undergo frequent blood tests to monitor medication levels, it does not limit a patient's diet because of adverse interactions with certain foods and medications, there is one standard dose for

all patients which does not need to be individually tailored to the needs of each patient and it reduces the risk of cerebral hemorrhaging.

Defendants move to dismiss Plaintiff's complaint, as well as four other similar complaints, pursuant to CPLR 327(a), based on forum non conveniens as there is little to no nexus to New York. For the reasons set forth herein, the court grants Defendants' motion to dismiss to the extent set forth herein. The court dismisses Plaintiff's complaint against Defendants with leave for Plaintiff to re-file in his home state jurisdiction or as part of the federal court's multidistrict litigation (MDL) on the condition that Defendants stipulate to accept service in Plaintiff's home forum, waive the defense of lack of personal jurisdiction, and deem any new action regarding this matter that is re-filed within 120 days of the date of this Order to have been filed as of the date of the original action for statute of limitations purposes.

Plaintiff alleges that Defendants designed, researched, manufactured, tested, advertised, promoted, marketed, sold, distributed and dealt with the government regulatory bodies for Eliquis. Plaintiff's allegations are based on product liability for design defect and failure to warn, negligence, fraudulent misrepresentations and breach of express and implied warranty. Plaintiff further alleges in substance that Defendants are liable for Plaintiff's injuries because they failed to adequately disclose the risks of the drug, including that there was no antidote or reversal agent available in case of excessive bleeding or that such risk could have life-threatening and fatal consequences; negligently and fraudulently represented to medical and healthcare personnel that the drug was safe and effective for its indicated use; conducted faulty clinical trials and studies in China; concealed a death and the drug's defects; falsified records; and conducted a pattern of inadequate supervision.

Numerous actions were previously filed in various federal court districts and the federal court MDL panel assigned the actions to the Southern District of New York where one judge coordinated all of the pre-trial proceedings, including discovery and motions. The MDL judge has the authority to compel depositions and act on behalf as the home district judge for pre-trial purposes. Once the pre-trial matters are complete and if a case is not resolved, the court will remand the action to its home district for trial.

Here, the MDL judge issued two rulings and determined that the plaintiffs' warning and design defect claims were preempted by federal law, that the warnings on the Eliquis label were adequate as a matter of law, that the risk of excessive bleeding and the lack of an antidote were clearly disclosed to the Food & Drug Administration (FDA) when it approved Eliquis and that such risks were prominently disclosed on the FDA-approved label (*Utts v Bristol-Myers Squibb Co.*, 226 F Supp 3d 166 [SDNY 2016] and *Utts v Bristol-Myers Squibb Co.*, 251 F Supp 3d 644, 651 [SDNY 2017]. Therefore, the court directed all other MDL plaintiffs to serve an amended complaint and that all current and future complaints include a memorandum stating why the complaints should not be dismissed based on the court's rulings.

Plaintiff argues in substance that since Defendants chose the Southern District of New York as the most convenient district for the MDL actions, they should be bound by their arguments and essentially precluded from challenging jurisdiction based on forum non conveniens. Defendants argue in substance that the purposes and considerations for choosing an MDL forum differ greatly from those in this matter because the MDL is only meant to coordinate pre-trial proceedings and the cases are remanded to the Plaintiff's home district for trial. Defendants also argue that based on the MDL rulings, Plaintiffs chose to file actions in New York and other states to attempt to avoid being bound by the adverse MDL rulings.

CPLR 327(a) codifies the doctrine of forum non conveniens and grants the court the discretion to stay or dismiss an action in whole or in part on any conditions that may be just on the motion of any party when the court finds that in the interest of substantial justice the action should be heard in another forum (CPLR 327[a]). It is warranted when there are no significant New York contacts. The defendant challenging the forum has the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]; *Bader & Bader v Ford*, 66 AD2d 642, 647 [1st Dept 1979]).

The court, after considering and balancing the competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not (62 NY2d at 479). The relevant factors include 1) the burden on New York's courts; 2) the potential hardship to the defendant; 3) the unavailability of an alternate forum in which the plaintiff may bring suit; 4) the residency of the parties; 5) where the transaction out of which the cause of action arose primarily occurred; and 6) the location of the majority of the witnesses; (*id.*; *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [1st Dept 2006]). The need to apply foreign law is also an appropriate factor for the court to consider (*Fox v Fusco*, 4 AD3d 313, 313 [1st Dept 2004]). No one factor is controlling since the great advantage of the doctrine of forum non conveniens is its flexibility based on the facts and circumstances of each case (26 AD3d at 287).

In the instant matter it is undisputed that Ohio is the location where Plaintiff resides; where he was prescribed Eliquis; where he purchased Eliquis; where he ingested Eliquis; where his injuries occurred; where he was treated; where his prescribing physician, treating physicians and most of his fact witnesses are located; and where his medical records are located. New York is the location of Defendants' headquarters, where most of the defense witnesses are located and

it is where most of the relevant defense records regarding the design, testing, manufacturing, regulatory approval and marketing of Eliquis are located.

When considering the relevant factors, the court is persuaded by the majority of the cases cited by Defendants and agrees that in the interest of substantial justice this action should be heard in Ohio state court or as part of the federal court's MDL should Plaintiff choose to re-file in federal court. The significant events giving rise to this law suit primarily arose in Ohio since Plaintiff was prescribed Eliquis in Ohio, he took it in Ohio, he sustained his injuries in Ohio and he was treated in Ohio. As such, Defendants would suffer a hardship if this matter were to be tried in New York because Plaintiff's prescribing and treating physicians are located in Ohio and are beyond New York's subpoena power. Even though there are discovery mechanisms in place to obtain the deposition of non-party out-of-state residents and video-taped testimony is an option, such alternatives are not ideal or viable alternatives. Particularly here, when comparing the significance of the Ohio physicians and other fact witnesses versus New York executives and record custodians who have no knowledge of Plaintiff's injuries and treatment.

Additionally, the parties agree that Ohio substantive law applies in this action and such law may be different than New York law. Therefore, this court also considers that an Ohio judge may be in a better position to apply Ohio substantive law than a New York judge.

As such, the court finds that in the interest of substantial justice the state or federal court in Plaintiff's home jurisdiction is an available and much better alternative forum than New York with leave for Plaintiff to re-file on the conditions set forth herein.

Accordingly, it is hereby

ORDERED that the court grants Defendants Bristol-Myers Squibb Co.'s and Pfizer, Inc.'s motion to dismiss Plaintiff Thomas M. Stewart's complaint based on forum non

conveniens; the court dismisses Plaintiff's complaint in this jurisdiction and grants leave for Plaintiff to re-file in his home state jurisdiction or as part of the federal court's multidistrict litigation (MDL) on the condition that Defendants stipulate to accept service in Plaintiff's home forum, waive the defense of lack of personal jurisdiction and deem any new action regarding this matter that is re-filed within 120 days of the date of this Order to have been timely filed as of the date of the original action for statute of limitations purposes; and the court directs the Clerk to enter judgment accordingly in favor of Defendants without costs.

Date: January 23, 2018

HON. ERIKA M. EDWARDS