Matter of Lindsey v Colgate-Palmolive Co.
2018 NY Slip Op 31752(U)
July 25, 2018
Supreme Court, New York County
Docket Number: 190145/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
GERALD LINDSEY, Individually and as Administrator of the Estate of VENUS L. LINDSEY,
Plaintiff(s),

- against -

COLGATE-PALMOLIVE COMPANY,

Defendant.

INDEX NO. 190145/2016
MOTION DATE 06/20/2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion by Defendant COLGATE PALMOLIVE COMPANY pursuant to CPLR to §327(a) to dismiss this action for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause —Affidavits Exhibits ...	1- 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-motion ☐ YES X NO

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, COLGATE-PALMOLIVE COMPANY's ("Colgate") motion pursuant to CPLR §327(a) to dismiss this action on the grounds of forum non conveniens is granted and this action is dismissed without prejudice, on condition that within sixty (60) days from the date of entry of this Order, Colgate stipulates (1) to accept service of process in a new action to be commenced by Plaintiff, at his choice, in either the State of Indiana, the State of Ohio, or the State of Illinois; (2) waive any defenses, including that of statute of limitations and jurisdictional defenses, which were not available in New York at the time of the commencement of this action, all provided that the new action is commenced within ninety (90) days after service of the stipulation upon the Plaintiff. If Colgate fails to so stipulate, then the motion is denied.

Plaintiff's deceased, Venus L. Lindsey, was diagnosed with pleural mesothelioma on December 10, 2015 and passed away on December 24, 2015 (Opposition Papers Exs. 2, 4). Plaintiff alleges Mrs. Lindsey was exposed to asbestos through the daily use of Colgate's Cashmere Bouquet talcum powder from 1965 through 1983 (Id at Exs. 3, 4). Mrs. Lindsey would routinely apply talcum powder daily after showering (*Id*). Mrs. Lindsey's brief medical treatment (hospital and doctors) took place in the State of Indiana (*Id* at Ex. 2). Mrs. Lindsey was born and raised in Puerto Rico, moved to the United States in 1961, and subsequently resided in New Jersey, Illinois, Ohio, and Indiana. Mrs. Lindsey never lived or worked in New York. Plaintiff commenced this action on May 5, 2016 to recover for injuries resulting from Mrs. Lindsey's exposure to asbestos (Moving Papers Ex. 1).

Defendant Colgate is a Delaware corporation with its principal place of business in the City and State of New York (Opposition Papers Exs. 8, 9). Colgate's Cashmere Bouquet plants were located in Jersey City, New Jersey (*Id* at Exs. 35, 36).

Colgate now moves to dismiss Plaintiff's Complaint against it pursuant to CPLR §327(a) on the grounds of forum non conveniens. Colgate contends that even though it has its corporate headquarters in the City and State of New York, this case should be dismissed on the grounds of forum non conveniens because this case has no nexus with the state of New York. It is alleged that Mrs. Lindsey was exposed to asbestos in the States of Indiana, Illinois, Ohio, and the Grand Bahama Island, where she resided at various points in her life; her injury manifested in the State of Indiana where

she was diagnosed; her medical treatment took place in the State of Indiana, which is the place where her medical witnesses and other witnesses are located. Mrs. Lindsey has never resided in the State of New York and has never been exposed to Colgate's product in the State of New York. Colgate alleges that the only connection to the state of New York is that it has its corporate headquarters here, that merely having its corporate headquarters in New York is an insufficient nexus, and therefore the action should be dismissed on the grounds of forum non conveniens.

Plaintiff opposes the motion on multiple grounds. The Plaintiff alleges that the action should stay in New York because their choice of forum is entitled to substantial deference, New York is the place where Defendant has its corporate headquarters, where jurisdiction can be obtained against the Defendant and where it is possible Defendant's witnesses are located. Defendant's asbestos talc litigation is centered in New York because one of its Cashmere Bouquet plants is located near New York- just across the Hudson River in Jersey City, New Jersey- and its Research and Development Center is also located near New York in Piscataway, New Jersey. Defendant was a member of the Cosmetic Toiletry & Fragrance Association during the 1970s and regularly attended meetings in New York City. Defendant further placed advertisements in the *New York Times* in New York city to counter negative publicity from a study performed in the 1970s at Mt. Sinai Hospital in New York that found Cashmere Bouquet Talc was contaminated with 20 percent asbestos. Finally, Plaintiff contends that Colgate has taken advantage of this forum in this litigation for nearly sixteen (16) months before moving to dismiss on the grounds of forum non conveniens.

CPLR § 327(a) applies the doctrine of forum non conveniens flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case (Matter of New York City Asbestos Litig., 239 AD2d 303, 658 NYS2d 858 [1st Dept. 1997]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 797 NYS2d 89 [1st Dept. 2005]). In determining a motion seeking to dismiss on forum non conveniens grounds, "no one factor is controlling" and the Court should take into consideration any or all of the following factors: (1) residency of the parties; (2) the jurisdiction in which the underlying claims occurred; (3) the location of relevant evidence and potential witnesses; (4) availability of bringing the action in an alternative forum; and (5) the interest of the foreign forum in deciding the issues (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 467 NE2d 245, 478 NYS2d 597 [1984]). "The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by [the] court" (*Id*).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors in favor of dismissing the action based on forum non conveniens. It is not enough that some factors weigh in the defendants' favor. The motion should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs (Elmaliach v Bank of China Ltd., 110 AD3d 192, 971 NYS2d 504 [1st Dept. 2013]).

The Court of Appeals rule that prevented the application of the doctrine of forum non conveniens when one of the parties, or a corporation, was a resident of the state of New York was relaxed by the Court of Appeals in 1972 (Silver v Great American Insurance Company, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398 [1972]). After *Silver*, "although residence of one of the parties still remained an important factor to be considered, forum non conveniens relief [would] be granted when it plainly appeared that New York is an inconvenient forum and that another is available which will best serve the ends of justice and convenience of the parties, and New York courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York. Flexibility, based on the facts and circumstances of a particular case is severely, if not completely, undercut when our courts are prevented from applying [the doctrine of forum non conveniens] solely because one of the parties is a New York resident or corporation"(*Id*). As such, on remand in *Silver*, the Appellate Division First Department dismissed the action on grounds of forum non conveniens where the only New York contact with the action was

that the defendant was a New York corporation (Silver v Great American Insurance Company, 38 AD2d 932, 330 NYS2d 156 [1st Dept. 1972]).

In keeping with the holding in *Silver*, the Court of Appeals reversed the Appellate Division First Department and dismissed a case on the grounds of forum non conveniens holding that "the mere happening of an accident within the state does not, alone, constitute a substantial nexus with the state so as to mandate retention of jurisdiction by New York courts over an action arising out of such accident (Martin v Mieth, 35 NY2d 414, 321 NE2d 777, 362 NYS2d 853 [1974]). Similar decisions followed (Blais v Deyo, 60 NY2d 679, 455 NE2d 662, 468 NYS2d 103 [1983] *affirming the granting of a New York defendant's motion to dismiss on forum non conveniens where the accident occurred in Quebec, the plaintiffs were residents of Quebec and all witnesses and relevant documents were located in Quebec*; Bewers v American Home Products Corporation, 99 AD2d 949, 472 NYS2d 637 [1st Dept. 1984] *dismissing action brought by United Kingdom plaintiffs against New York corporation defendant where the drugs complained of were prescribed, purchased and ingested in England, and the [drugs] were manufactured, tested, labeled, marketed and distributed in England by or on behalf of English company, furthermore, the vast majority of witnesses and documentation respecting medical treatment of plaintiffs were in England*; Mollendo Equipment Co,Inc., v Sekistan Trading Co., Ltd., 56 AD2d 750, 392 NYS2d 427 [1st Dept. 1977] *dismissing on forum non conveniens an action instituted by a New York Corporation against a Japanese Company, which maintained neither an office nor an agent for the conduct of business within the United States*).

When the only nexus with the State of New York is that the corporate defendant is either registered or has its principal place of business in New York, the action is properly dismissed on the ground of forum non conveniences (Avery v Pfizer, Inc., 68 AD3d 633, 891 NYS2d 369 [1st Dept. 2009] *dismissing action on grounds of forum non conveniens where plaintiff was resident of Georgia, his physician who recommended and prescribed drug lived in the state of Georgia, plaintiff ingested drug in Georgia, suffered his injuries in Georgia and all of his treating physicians and witnesses were in Georgia*; *see also* Farahmand, v Dalhousie University, 96 AD3d 618, 947 NYS2d 459 [1st Dept. 2012]; Becker v Federal Home Loan Mortgage Corp., 114 AD3d 519, 981 NYS2d 379 [1st Dept. 2014]).

This court is of the opinion that in balancing the interests and convenience of the parties and the court's, this action could better be adjudicated in either the court of the State of Indiana, the State of Ohio, or the State of Illinois. The only nexus this action has with the State of New York is that the corporate defendant has its principal place of business in New York. Mrs. Lindsey resided in the State of Indiana, Ohio, and Illinois for a majority of her life and was exposed to Colgate's product while residing in these states. The medical treatment and her medical doctors are in the State of Indiana. Under these facts the action should be dismissed without prejudice on the grounds of forum non conveniens.

Finally, an eight month delay from Plaintiff Gerald Lindsey's deposition- where Colgate obtained information to conclude that the only nexus to the State of New York is that it is the place where Colgate has its principal place of business- to the making of this motion to dismiss on grounds of forum non conveniens is not such a substantial delay so as to constitute a waiver and deny the motion. These are complex cases where information is not obtained, sufficient for the making of a motion to dismiss for lack of jurisdiction or for forum non conveniens, until substantial discovery is complete. In this particular action, it took the service and answer of interrogatories, and Plaintiff's deposition over four months, before sufficient information was obtained for the making of this motion. Given the complexity of the subject matter and difficulty in obtaining information, an eight month delay in moving to dismiss on the grounds of forum non conveniens is not such a substantial delay as to consider dismissal on this ground waived (Corines v Dobson, 135 AD2d 390, 521 NYS2d 686 [1st Dept. 1987] *21 months after commencement of action and after discovery substantial delay waiving*

dismissal on ground of forum non conveniens; Anagnostou v Stifel, 204 AD2d 61, 611 NYS2d 525 [1st Dept. 1994] ***three years after commencement of action substantial delay waiving dismissal on ground of forum non conveniens***; Creditanstalt Investment Bank AG, v Chadbourne & Parke LLP, 14 AD3d 414, 788 NYS2d 104 [1st Dept. 2005] ***20 months substantial delay waiving dismissal on ground of forum non conveniens***).

Defendant moved fifteen (15) months after commencement of the action and eight (8) months after obtaining sufficient discovery information for the making of the motion.

Accordingly, it is ORDERED, that Defendant COLGATE-PALMOLIVE COMPANY's motion pursuant to CPLR §327(a) to dismiss this action on the grounds of forum non conveniens is granted, and it is further,

ORDERED, that the action is dismissed without prejudice on condition that within sixty (60) days from the date of entry of this Order Defendant COLGATE-PALMOLIVE COMPANY stipulates (1) to accept service of process in a new action to be commenced by the plaintiff, at his choice, in either the State of Indiana, the State of Ohio, or the State of Illinois; (2) waive any defenses, including that of statute of limitations and jurisdictional defenses, which were not available in New York at the time of the commencement of this action, all provided that the new action is commenced within ninety (90) days after service of the stipulation upon the Plaintiff, and it is further

ORDERED, that if Defendant COLGATE-PALMOLIVE COMPANY fails to so stipulate within sixty (60) days from the date of entry of this order, then the motion is denied, and it is further

ORDERED, that Defendant COLGATE-PALMOLIVE COMPANY serve a copy of this order upon the Trial support clerk, located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B) in accordance with e-filing protocol, and it is further

ORDERED, that the clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 25, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE