Black v Brenntag N. Am.
2018 NY Slip Op 31850(U)
August 2, 2018
Supreme Court, New York County
Docket Number: 190016/2017
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

MARY BLACK and DAVID BLACK,

Plaintiffs,

- against -

BRENNTAG NORTH AMERICA, *et al*,

Defendants.

INDEX NO. 190016/2017
MOTION DATE 06/20/2018
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion by defendant AVON PRODUCTS, INC. pursuant to CPLR to §327[a] to dismiss for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -Affidavits Exhibits..	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6

Cross-motion YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Avon Products, Inc.'s motion pursuant to CPLR §327(a) to dismiss the Plaintiffs' Fourth Amended Complaint ("Amended Complaint") against it on the grounds of *forum non conveniens*, is denied.

Plaintiff Mary Black is 61 years old and claims she was exposed to asbestos in a variety of ways through talc products. Plaintiffs allege Mary Black was exposed to Avon Products, Inc.'s ("Avon") asbestos-containing talcum powder from 1971 when her mother began selling the product and stopped using it approximately in 1975. Mary Black claims that as a young girl she used Avon talcum powder with her sister Karen in her mother's bedroom or bathroom shaking it directly onto her body and rubbing it in, and that she could see and smell the powder as she breathed it in (Opposition Papers, Exhs. 1, 3 and 4). Mrs. Black has never had any contact with New York. She has lived and worked in various towns and cities in Kentucky (with no exposure), Iowa, and Florida (Opposition Papers, Exhs. 1, 2, 3 and 4). The Plaintiffs commenced this action on January 12, 2017 to recover for injuries resulting from Mrs. Black's exposure to asbestos. Her husband, David Black asserts a claim for loss of consortium (Opposition Papers, Exh. 5).

Avon is a New York corporation with its principal place of business in New York (Opposition Papers Ex. 17). Avon has maintained a manufacturing facility in Suffern, New York since 1897 (*Id* at Ex. 19). Avon's research and development labs are also located in Suffern, New York and another facility is listed at a location in Rye, New York (*Id* at Exhs. 18, 19 and 20). Avon is the manufacturer and supplier of the alleged asbestos-containing talcum powders used by Mrs. Black.

Avon now moves to dismiss Plaintiffs' Amended Complaint against it pursuant to CPLR §327(a) on the grounds of *forum non conveniens*. Avon contends that even though it is a New York corporation with its principal place of business in New York, this action should be dismissed on the grounds of *forum non conveniens* because: (i) Mary Black does not allege exposure to talcum powder or any

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

asbestos-containing product in New York and plaintiffs are not residents of New York, (ii) potentially all of the witnesses and evidence are located outside of New York, (iii) litigating here would be a burden to New York courts, and (iv) the State of Florida is an alternative forum that is readily available. Therefore, an insufficient nexus exists with the State of New York. Avon also argues that if any defendant is dismissed from this action, pursuant to CPLR §1601, Avon will be prejudiced by the deprivation of the ability to argue apportionment of damages.

Plaintiff opposes the motion on multiple grounds. The Plaintiff alleges that the action should stay in New York because the Plaintiff's choice of forum is entitled to substantial deference, New York is the place where Avon has its corporate headquarters, manufacturing plants since 1897, and its research and development lab, where jurisdiction can be obtained against Avon and where it is possible Avon's witnesses are located. Plaintiff further contends that Avon's asbestos litigation defense is centered in New York. Avon was a member of the Cosmetic Toiletry & Fragrance Association during the 1970s and regularly attended meetings in New York City. Avon also allegedly placed ads in the *New York Times* to counter negative publicity from a study performed in the 1970s at Mt. Sinai Hospital in New York that found talc powder was contaminated with asbestos.

CPLR § 327(a) applies the doctrine of *forum non conveniens*, 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]).

However, when there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted (Travelers Cas. & Sur. Co. v Honeywell Int'l Inc., 48 AD3d 225, 851 NYS2d 426 [1st Dept. 2008] *denying dismissal on forum non conveniens where there was a substantial nexus between the action and New York, as most of the insurance policies at issue were negotiated, issued and brokered in New York*; *see also* Am. BankNote Corp. v Daniele, 45 AD3d 338, 845 NYS2d 266 [1st Dept. 2007] *denying dismissal on forum non conveniens where New York is the place where parties met on a regular basis and where during such meetings false representations and assurances were made and where defendant's bank accounts, a central part of the claimed fraudulent scheme, was located*).

Weighing all the factors, this court is of the opinion that Avon has failed to meet its heavy burden showing that this action should be dismissed in favor of an alternative venue on the grounds of *forum non conveniens*. Avon is a New York Corporation with its principal place of business in New York. Avon has its manufacturing facilities, and its research and development labs in New York. Its corporate witnesses and documents are located in New York, which is also the center of Avon's asbestos litigation defense. Other out-of-state witnesses have already been deposed in New York. Avon has failed to demonstrate that New York does not have a substantial nexus with this action. Under these facts, the action should not be dismissed as the "balance is not strong enough to disturb the choice of forum made by the Plaintiff" (Elmaliach, *supra*).

Avon's argument that if any defendant is dismissed from this action, pursuant to CPLR §1601 it will be prejudiced by the deprivation of the ability to argue apportionment of damages, does not warrant a different result. Avon fails to shown that there is no

discovery that can otherwise be utilized to establish apportionment from any dismissed defendant.

Accordingly, it is ORDERED, that Defendant Avon Products, Inc.'s motion pursuant to CPLR §327(a) to dismiss the Plaintiffs' Fourth Amended Complaint against it on the grounds of *forum non conveniens*, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 2, 2018

MANUEL J. MENDEZ
J.S.C.

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