Matter of Black v Brenntag N. Am.
2018 NY Slip Op 31870(U)
August 6, 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. 004
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion by 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 - 5
Replying Affidavits	6

Cross-motion YES X NO

Upon a reading of the foregoing cited papers it is ordered that defendant COLGATE-PALMOLIVE COMPANY'smotion pursuant to CPLR §327 [a] to dismiss plaintiffs' complaint, and all claims and cross-claims asserted against it, on the grounds of forum non conveniens, is denied.

Plaintiff Mary Black is 61 years old and claims that she developed mesothelioma as a result of her exposure to asbestos contained in defendant Colgate-Palmolive Company's Cashmere Bouquet Talcum powder from age ten (10) or (11) until the age of seventeen (17), approximately 1967 or 1968 through 1973. During the period of alleged exposure plaintiff resided in the State of Florida, where she continues to reside except for brief periods when she resided with her father in Iowa and Kentucky. At no time has Mary Black resided in the State of New York, nor has she alleged to have been exposed to defendant's asbestos containing product in the State of New York. She was diagnosed with mesothelioma in November of 2016. Mrs. Black's medical treatment (hospital and doctors) has taken place in the State of Florida, where all of her witnesses are located. Plaintiff has not received any medical treatment in the state of New York (see moving papers Exhibit C, and opposition papers Exhibits 1, 3, and 4).

Plaintiffs commenced this action on January 12, 2017 to recover against the defendant Colgate-Palmolive Company- a Delaware corporation with its principal place of business in the City and State of New York-for the injuries allegedly sustained by plaintiff Mary Black as a result of her exposure to asbestos from the defendant's product. Defendant Colgate-Palmolive Company answered on February 22, 2017. Thereafter Plaintiff Mary Black's deposition took place over the course of three days on June 28, 2017, June 29, 2017 and June 30, 2017 in the State of Florida. Plaintiffs served Answers to defendant's interrogatories on June 12, 2017 (moving papers Exh. C). On

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

September 13, 2017 Colgate-Palmolive Company moved to dismiss this case pursuant to CPLR §327 (a) on the grounds of forum non conveniens.

Defendant Colgate-Palmolive Company alleges 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 Mary Black was exposed to asbestos from Cashmere Bouquet in the State of Florida, where she has resided for most of her life and continues to reside; her injury manifested in the State of Florida; her medical treatment took place in the State of Florida, which is the place where her medical witnesses and most of her other witnesses are located. Plaintiff has never resided in the State of New York and has never been exposed to defendant's product in the State of New York. Defendant alleges that the only connection to the state of New York is that defendant 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.

Plaintiffs oppose the motion on multiple grounds. Plaintiffs allege that the action should stay in New York because their choice of forum is entitled to substantial deference; New York is the place where the defendant has corporate headquarters and jurisdiction can be obtained against the defendant; and defendant's witnesses are most likely located. Defendant's asbestos talc litigation is centered in New York because one of its Cashmere Bouquet plants was 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 placed ads 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. Plaintiffs further argue that granting defendants motion would risk unnecessarily splintering this complex litigation and requiring suits to be brought in seriatim in different courts.

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 A.D. 2d 303, 658 N.Y.S. 2d 858 [1st Dept., 1997] and Phat Tan Nguyen v. Banque Indosuez, 19 A.D.3d 292, 797 N.Y.S.2d 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 N.Y. 2d 474, 467 N.E. 2d 245, 478 N.Y.S. 2d 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 militating in favor of a finding of 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 A.D. 3d 192, 971 N.Y.S. 2d 504 [1st Dept., 2013]). A movant's heavy burden remains despite the plaintiff's status as a non-resident (Bank Hapoalim(Switzerland)Ltd., v. Banca Intensa S.P.A., 26 A.D.3d 286, 810 N.Y.S.2d 172 [1st.

Dept. 2006]; Mionis v. Bank Julius Baer & Co., Ltd., 9 A.D.3d 280, 780 N.Y.S.2d 323 [1st. Dept. 2004]; Anagnostou v. Stifel, 204 A.D.2d 61, 611 N.Y.S.2d 525 [1st. Dept. 1994]).

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]).

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, generally the action is properly dismissed on the ground of *forum non conveniens* (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]).

A factor that strongly determines a motion for forum non conveniens is fragmentation, that is whether dismissal on behalf of a defendant while maintaining in the forum other defendants on related claims or the underlying issues in the action would unduly burden the plaintiff and the Court. The plaintiffs would be unduly burdened if the action is fragmented or splintered compelling them to proceed in two different forums, creating a risk of conflicting rulings between courts of different jurisdictions. The potential splintering or fracturing of an action when there are no other pending claims in another jurisdiction, is a factor that carries more weight and requires that the action be kept in New York (see Sturman v. Singer, 213 A.D. 2d 324, 623 N.Y.S. 2d 883 [1st Dept. 1995], Van Deventer v. CS SCF Management Ltd., 27 A.D. 3d 280, 830 N.Y.S. 2d 97 [1st Dept. 2007] and Bacon v. Nygard, 160 A.D. 3d 565, 76 N.Y.S. 3d 27 [1st Dept., 2018] citing to Citigroup Global Mkts., Inc. v. Metals Holding Corp., 45 A.D. 3d 361, 845 N.Y.S. 2d 282 [1st Dept., 2007]).

Weighing all relevant factors, this court is of the opinion that Colgate-Palmolive Company 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. Defendant is correct in asserting that Mrs. Black has resided in Florida most of her life, purchased the product that allegedly exposed her to asbestos in Florida, and received medical treatment in the State of Florida. However, in balancing the interests and convenience of the parties and the Court's, this action should be adjudicated in New York. Plaintiff, Mary Black, alleges that her mesothelioma is a direct result of exposure to asbestos in a variety of ways through the use of multiple cosmetic products

containing talc, including Colgate-Palmolive Company's Cashmere Bouquet. There are other defendants in this action that are subject to jurisdiction in New York as corporations that have their principal place of business in New York, and have maintained manufacturing and research facilities in or near New York. Dismissal of the claims asserted against Colgate-Palmolive Company on forum non conveniens grounds when plaintiffs have no other pending actions in another jurisdiction, would result in splintering or fragmenting the plaintiffs' claims, such that they would be burdened with having to proceed against the corporate defendants in two different forums, creating the possibility of conflicting rulings.

Accordingly, it is ORDERED that defendant Colgate-Palmolive Corporation's motion pursuant to CPLR §327 [a] to dismiss plaintiffs' complaint, and all claims and cross-claims asserted against it, on the grounds of forum non conveniens, is denied.

ENTER:

Dated: August 6, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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