Conaway v ABB, Inc.
2019 NY Slip Op 33262(U)
October 30, 2019
Supreme Court, New York County
Docket Number: 190332/2018
Judge: Manuel J. Mendez
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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

PRESTON CONAWAY, JR. and GLENDA CONAWAY,
Plaintiffs,
- against -
ABB, INC., *et al.*,
Defendants.

INDEX NO. 190332/2018
MOTION DATE 10/23/2019
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion pursuant to CPLR §3211(a)(8), to dismiss for lack of jurisdiction, alternatively, pursuant to CPLR § 327(a) to dismiss for forum non conveniens by Champlain Cable Corporation and Hercules, LLC:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 4
Answering Affidavits — Exhibits	5 - 6
Replying Affidavits	7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Champlain Cable Corporation and Hercules, LLC's (hereinafter referred to as "moving defendants") motion pursuant to CPLR §3211(a)(8), CPLR §301 and CPLR §302(a)(1), (2) and (3) to dismiss plaintiffs' complaint against them for lack of personal jurisdiction alternatively pursuant to CPLR §327(a) to dismiss for forum non conveniens, is denied.

Plaintiff, Preston Conaway Jr., was diagnosed with malignant mesothelioma on July 24, 2018 (Mot. Exh. E). Mr. Conaway was deposed over the course of three days on September, 24, 25 and 26, 2018, and his de bene esse testimony was given on December 6, 2018 (Mot. Exh. F and Opp. Exh. A). It is alleged that Mr. Conaway's exposure to asbestos was from being in the vicinity of workers sawing and fitting defendants' encapsulated anthophyllite asbestos containing Haveg pipe during his work as an electrician at the Olin Corporation's chemical plant in New Jersey for three or four years in the early 1970's, and at the Pennwalt Corporation's chemical plant in New Jersey for one or two years in the mid-1970's (Mot. Exh. F, pgs. 46-48, 130-132, 135, 138-139, 141-143, 317 and 319-326).

Plaintiffs commenced this action on August 15, 2018 to recover for injuries resulting from Mr. Conaway's exposure to asbestos (Mot. Exh. A and NYSCEF Doc. # 1). Champlain Cable Corporation filed its Verified Answer with cross-claims on October 8, 2018 (Mot. Exh. B). On April 25, 2019 plaintiffs filed the Fourth Amended Verified Complaint adding Hercules LLC as a defendant (Mot. Exh. C). On May 9, 2019 Herclules LLC filed a Verified Answer (Mot. Exh. D).

The moving defendants now seek to dismiss the action pursuant to CPLR §3211 (a)(8), CPLR §301, CPLR §302(a)(1), (2) and (3), and §327(a), for lack of personal jurisdiction and forum non conveniens.

The moving defendants allege that Champlain Cable Corporation is a Delaware Corporation with its principal place of business in Vermont since 1964, and Hercules LLC is a Delaware Corporation with its principal place of business in Delaware since 1912. In support of their allegations, the moving defendants provide the affidavits of Timothy A. Lizotte, Champlain Cable Corporation's Vice President and Chief Financial Officer since 2012, and Jennifer I. Henkel, Hercules LLC's Secretary since 2017. The moving defendants allege that they are not New York residents, they have no offices in New York, nor do they own or lease property in New York, they are not registered to do business in

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

New York and have no New York address or bank account. Moving defendants further allege that at the time of Mr. Conaway's alleged exposure to asbestos they did not manufacture, research, develop, design or test their asbestos containing Haveg pipe in New York, and have never sued anyone in New York.

The moving defendants argue that this Court does not have personal jurisdiction over them because Mr. Conaway's exposures occurred outside of the State of New York, Mr. Conaway has never resided in the State of New York and is currently a resident of Florida. The moving defendants further argue they are not incorporated in New York and do not maintain their principal places of business here, and there is no general jurisdiction. Furthermore, the moving defendants contend that Plaintiffs' claims do not arise from any of the moving defendants' New York transactions, and that the moving defendants did not commit a tortious act within the State of New York or without the state of New York that caused an injury to person or property within the State of New York, and therefore, there is no specific jurisdiction (CPLR §302(a)(1), (2) and (3)).

Plaintiffs oppose the motion arguing that moving defendants sought summary judgment pursuant to CPLR §3212 under Motion Sequence 001 without seeking relief on the affirmative defense of lack jurisdiction, and have waived the right to seek relief on this CPLR §3211(a)(8) motion. It is plaintiffs' contention that the moving defendants sought to obtain substantive relief on summary judgment and voluntarily participated in this action, waiving the affirmative defense of lack of jurisdiction as stated in their answer and the relief sought in this motion. Plaintiffs state that at best this motion would be treated as a second motion for summary judgment and it is untimely.

Moving defendants in seeking to dismiss the complaint pursuant to CPLR §3211(a)(8) are required to make the motion "before service of the responsive pleadings." Moving defendants may otherwise preserve the objection to jurisdiction by stating it as an affirmative defense in their answer. The use of a jurisdictional affirmative defense in the answer is a signal that the defendant is willing to wait for a later point in the case - including the trial - for resolution of that issue. A motion that relies on an affirmative defense of lack of jurisdiction after being asserted in the defendants' answer must be made pursuant to CPLR §3212 or, if made pursuant to CPLR §3211(a)(8) must be considered by the Court on notice to the parties as summary judgment (See CPLR §3211(a)(8), (c) and (e), Calloway v. National Services Industries, Inc., 93 AD 2d 734, 461 NYS 2d 280 [1st Dept. 1983], and Rich v. Lefkovits v. 56 NY 2d 276, 437 NE 2d 260, 452 NYS 2d 1 [1982]). Moving defendants did not seek summary judgment pursuant to CPLR §3212 on the issue of personal jurisdiction or to have this motion pursuant to CPLR §3211(a)(8) considered by this Court as one for summary judgment pursuant to CPLR §3211(c), if they had sought summary judgment it would amount to successive motions.

Generally successive summary judgment motions are not entertained, unless the movant has newly discovered evidence or states sufficient cause for the subsequent motion (Rotante v. Advance Transit Co., Inc., 148 AD 3d 423, 49 NYS 3d 391 [1st Dept. 2017] and Varsity Transit, Inc. v. Board of Education of the City of New York, 300 AD 2d 38, 752 NYS 2d 603 [1st Dept. 2002]). The moving defendants did not state sufficient cause or that they possessed newly discovered evidence to warrant treating this motion as seeking summary judgment.

An affirmative defense of lack of jurisdiction is waived and forfeited by the defendants, in the same manner as a counter-claim, when one of the parties moves for summary judgment on the merits and the issue of jurisdiction is not raised either as part of the motion or in a cross-motion. Moving defendants voluntarily submitted to the jurisdiction of this New York Court for the purpose of the affirmative relief of obtaining a judgment in their favor. They demonstrated an intention to make this New York Court the forum, waiving the pleaded jurisdictional objections (See McKinney's Consolidated Laws of New York Annotated, CPLR 3211, Siegel, Practice Commentaries C3211:55 "Waiving

Objection Contained in Paragraph 8 or 9 of 3211(a)," citing to 33 Siegel's Practice Review 1 "Does Defendant Who Asserts Jurisdictional Defense In Answer Waive It By Proceeding On The Merits?," Biener v. Hystron Fibers, Inc., 78 AD 2d 162, 434 NYS 2d 343 [1st Dept. 1980] and Flaks, Zaslow & Co., Inc. v. Bank Computer Network Corp., 66 AD 2d 363, 413 NYS 2d 1 [1st Dept. 1979]).

Moving defendants annex this Court's decision in *Gibson v. Air & Liquid Systems Corp.*, 190187/2017, 2018 NY Misc. Lexis 2603 [Sup. Ct., NYC, 2018], in support of their arguments that they did not waive or forfeit their affirmative defense of lack of personal jurisdiction by first seeking summary judgment on the merits. This Court's decision in *Gibson v. Air & Liquid Systems Corp.*, 2018 NY Misc. Lexis 2603, stated the standard applying to preservation of an affirmative defense of lack of personal jurisdiction asserted in the answer - including up to the time of trial - as the parties proceeded with discovery in the litigation on the merits of the case. The *Gibson* decision did not refer to seeking to obtain summary judgment on the merits which, if successful, would result in a judgment dismissing all of the plaintiffs' claims while allowing the defense of personal jurisdiction to remain.

Moving defendants argue that if plaintiffs' wanted an earlier decision, before the case was assigned a trial date, they could have made a motion to dismiss the affirmative defense of lack of personal jurisdiction pursuant to CPLR §3211(b), that is not the basis for the waiver (McKinney's Consolidated Laws of New York Annotated, CPLR 3211, Siegel, Practice Commentaries C3211:59). The basis for the waiver is the moving defendants' seeking summary judgment and failing to assert their affirmative defense of lack of personal jurisdiction as part of the relief sought. This results in waiver and forfeiture, not the plaintiffs' failure to seek earlier relief by moving to dismiss the affirmative defense of lack of personal jurisdiction.

Moving defendants waived and forfeited the affirmative defense of lack of personal jurisdiction by moving for summary judgment and not raising the issue, warranting denial of the CPLR §3211(a)(8) and CPLR§301, §302(a)(1), (2) and (3) relief. There is no need to address the remainder of plaintiffs' arguments on this issue.

Forum non conveniens:

Moving defendants, alternatively seek to have this Court dismiss plaintiffs' complaint against them on the ground of forum non conveniens. They argue that there is no nexus between plaintiffs' claims and New York and that the relevant factors - specifically that plaintiffs are residents of Florida, Mr. Conaway's alleged exposure to asbestos occurred outside of New York, Mr. Conaway's diagnosis and medical treatment is in Florida, and all documents and potential witnesses are located outside of New York - warrant dismissal.

Plaintiffs argue that the moving defendants by proceeding in this action, obtaining and completing discovery - including Mr. Conaway's depositions - approximately eleven months prior to seeking forum non conveniens relief, and waiting until after the case has been assigned a trial date, warrants denial of the relief sought on the theory of laches. They further argue that the moving defendants failed to significantly tip the balance of the factors to warrant dismissal on the grounds of forum non conveniens.

The approximately eleven month delay from plaintiff Preston Conaway Jr.'s last deposition, prior to his de bene esse deposition in December of 2018 - where the moving defendants alleged they obtained information to conclude that there is no nexus to the State of New York - 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 due to laches and deny the motion. These are complex cases where information is not obtained, sufficient for the making of a motion to dismiss for forum non conveniens, until substantial discovery is completed. In this particular action, the moving defendants waited until the

completion of all discovery, and until sufficient information was obtained before making of this motion. Given the complexity of the subject matter and difficulty in obtaining information, here the 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*).

Moving Defendants seeking relief approximately eleven (11) months after commencement of the action and after obtaining sufficient discovery information for the making of the motion have not waived forum non conveniens relief.

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" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, *supra*).

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]).

Weighing all relevant factors, the moving defendants failed to meet their heavy burden to dismiss this action on forum non conveniens grounds. There are factors that weigh in the moving defendants' favor, but the balance is not so strong as to disturb plaintiffs' choice of forum (Coelho v. Grafe auction Co., 128 AD 3d 615, 11 NYS 3d 13 [1st Dept. 2015]). In balancing the interests and convenience of the parties and the Court's, this action should be adjudicated in New York: a) This is a multi-jurisdictional action with no single forum convenient or amenable to all the parties. There are other defendants that are New York Corporations and have their principal place of business in New York; b) Moving defendants did not specifically identify any inconvenienced witnesses or that they are unavailable to testify in New York; c) the case has been assigned a November 12, 2019 trial date and plaintiff is still living with an alleged asbestos related disease. The relative inconvenience in granting dismissal is greater to the plaintiffs. Under these circumstances, 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*).

Plaintiffs have not stated a basis to obtain the costs of opposing the moving defendants motion for summary judgment filed under Motion Sequence 001.
The moving defendants motion for summary judgment was timely and the relief sought was not frivolous.

Accordingly, it is ORDERED, that Defendants Champlain Cable Corporation and Hercules, LLC's motion pursuant to CPLR §3211(a)(8), CPLR §301 and §302(a)(1), (2) and (3) to dismiss plaintiffs' complaint against them for lack of personal jurisdiction alternatively pursuant to CPLR §327(a) to dismiss for forum non conveniens, is denied.

ENTER:

Dated: October 30, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
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