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

NEVILLE FREDERICK DeKLERK, Individually and as Administrator and Personal Representative of the Estate of GLYNNIS GALE DeKLERK,

Plaintiffs,

-against-

BLOOMINGDALES, INC., et al.,

Defendant.

INDEX NO.	190212/2018
MOTION DATE	06/01/2020
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to 12 were read on this motion by defendant Estée Lauder Inc., and cross-motion by Whittaker Clark & Daniels, pursuant to CPLR §327(a) to dismiss this action for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 4, 5 - 6
Answering Affidavits — Exhibits	7 - 9
Replying Affidavits	10 - 12

CROSS-MOTION ☐ NO X YES

Upon a reading of the foregoing cited papers, it is Ordered that Defendants, Estée Lauder Inc.'s (hereinafter referred to individually as "ELI") motion and Whittaker Clark & Daniels, Inc.'s (hereinafter referred to individually as "WCD") cross-motion pursuant to CPLR §327(a) to dismiss this action for forum non conveniens, are denied.

Glynnis Gale DeKlerk (hereinafter "decedent") was born in South Africa in 1951 and lived there until 2017, when she and her husband moved to the United Kingdom (England) (Mot. Exhibit 1, A.4.1 – A.4.XI). She was diagnosed with malignant mesothelioma in February of 2018 (Mot. Exhibit 1, A18 (b) and A24 (a) and (e)) and died on January 20, 2019. The Coroner's report states that her mesothelioma was probably due to asbestos exposure, "however the asbestos exposure was not caused during the course of her employment" (Mot. Exhibit 3). Plaintiffs commenced this action on July 27, 2018 while Ms. DeKlerk was still living. After her death the Complaint was amended to substitute the estate (NYSCEF Doc. # 1 and Mot. Exhibit 2). Neville Frederick De Klerk is the decedent's husband and seeks to continue this action on her behalf in New York. Plaintiffs seek to recover for injuries sustained by the decedent resulting from her alleged exposure to asbestos from WCD's and ELI's (hereinafter referred to jointly as "defendants") talc and talcum powder products.

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

It is alleged that the decedent was exposed to asbestos and contracted mesothelioma as a result of exposure to asbestos contained in WCD's talc that was used in ELI's Youth Dew Dusting Powder, Cinnabar Dusting Powder, Translucent Loose Face Powder and later to Lucidity Loose Face Powder over the course of forty-five (45) job related visits and at least one hundred and forty-four days in New York City, New York, from about 1987 through 2005 (Opp. Exhibits R and BB). Decedent was deposed over the course of three days on October 9, 10, and 11, 2018, and her husband was deposed on August 22, 2018 (Mot. Exhibits 4, 5, 6 and 7).

At her deposition decedent testified that she preferred to buy the powder at Macy's or Bloomingdale's Department Store, and she purchased three Cinnabar Dusting Powder containers, three Youth Dew Dusting Powder containers and at least four to six Translucent Face Powder Containers at these stores during her trips to New York. She stated that she usually purchased enough supplies to last her until the next trip and that she made at least two to three trips to New York, for three or four days each visit, over an eighteen-year period. She described the packaging for each product and stated that eventually she switched to ELI's Lucidity Loose Face Powder (Mot. Exhibit 4, pgs. 67-68 and 75-80, Mot. Exhibit 5, pgs. 199, 218, 234-237, 244 and 281-282, and Mot. Exhibit 6, pgs. 355-357, 392, 418-419).

Plaintiff Neville Frederick DeKlerk testified that he was employed in the freight business from graduation from high school until his retirement in 2010, doing mostly paperwork. He stated that he started out as a clerk, then became a chief clerk, export manager and eventually a general manager. He worked for four different companies over the course of his career (Mot. Exhibit 7, pgs. 14-17). Mr. De Klerk stated that the decedent used only one brand of talcum powder, Estée Lauder. He recalled that she bought the ELI products in bulk on her trips to New York and that she used to say, "I'm their best customer." He specifically remembered that the decedent used ELI's Cinnabar talcum powder (Mot. Exhibit 7, pgs. 111-112).

ELI is a corporate affiliate of The Estée Lauder Companies Inc., it is organized under Delaware law, but concedes that it maintains a principal place of business in New York (Mot. Exhibit 8). ELI's corporate representative, Maryann Alfieri, testified at her October 30, 2018 deposition that the company maintained Global Offices in Melville, New York. She stated that ELI maintained a manufacturing facility in Melville, New York from at least the 1960s. She testified that in the early 1980's research and development moved to Melville, New York and remained there for the period relevant to the decedent's exposure. Ms. Alfieri testified that ELI's Youth Dew Dusting Powder was manufactured in Melville, New York from 1980 through 2003 (Opp. Exhibit C, pgs. 44, 96, 112,150-153 and 157). Plaintiffs provide documentation that shows ELI manufactured Youth Dew Dusting Powder using WCD's talc in Melville, New York during the period relevant to decedent's exposure (Opp. Exhibits D, E and F). Plaintiffs provide a Product Material Data Safety Sheet from December 9, 1997 that shows ELI's Cinnabar Dusting Powder was at one time manufactured in Melville, New York (Opp. Exhibit G).

Defendants' motion and cross-motion seek to dismiss this action pursuant to CPLR §327(a) for forum non conveniens. WCD's cross-motion adopts the arguments made by ELI.

It is defendants' contention that even though they have principal places of business in New York, this action should be dismissed on the grounds of forum non conveniens because: (i) the majority of the decedent's exposure to their talc and talcum powder or any asbestos-containing product occurred in South Africa and not New York, (ii) the diagnosis and majority of the decedent's treatment for mesothelioma took place in the United Kingdom (specifically in England); (iii) she applied for and received benefits related to her mesothelioma in the United Kingdom (Mot. Exhibit 11); (iv) witnesses and evidence are located in the United Kingdom or South Africa which is outside of New York, and litigating here would be a burden to New York courts; (v) England or South Africa are readily available as alternative forums, and (vi) even if this action were to stay in New York, the laws of South Africa or England would have to be applied creating a burden on New York Courts, therefore, no nexus exists with the State of New York.

Plaintiffs oppose the motion on multiple grounds. Plaintiffs allege that the action should remain in New York because: (a) their choice of forum is entitled to substantial deference; (b) New York is the defendants' principal place of business, the location from where the asbestos containing talcum powder the decedent was exposed to was distributed and most likely manufactured; (c) defendants have corporate headquarters in New York; (d) defendants' expert witnesses are most likely located in New York; (e) the design and/or development of the product in New York City creates a nexus with the State of New York and (f) this action has proceeded for two years in New York and defendants have waived their forum non conveniens claims.

Furthermore, plaintiffs contend that the relevant situs is New York, not South Africa or the United Kingdom (England) and that the decedent was only exposed to asbestos through bulk purchases in New York of talcum powder and face powder that was manufactured and distributed in New York. They claim defendants have not specifically identified the witnesses, documents or other evidence that are unavailable in New York. It is alleged that the relevant witnesses including the decedent's family members, her medical providers and doctors, can be deposed or testify by videotape or are willing to come to New York, and there is no burden on the defendants or this Court.

Plaintiffs also argue that neither South Africa nor the United Kingdom (England) are available as alternative forums. They state that South Africa is unavailable because the Courts in that country apply "rigid rules of jurisdiction" in claims brought by non-resident plaintiffs against non-resident defendants. Plaintiffs no longer reside in South Africa rendering the exercise of jurisdiction extremely unlikely. In support of their argument, plaintiffs provide the affidavit of Matthew Chaskalson, an advocate from South Africa. Mr. Chaskalson states that South African Courts do not recognize jurisdiction where both parties are non-residents and the fact that plaintiff used the talcum powder products in South Africa is irrelevant to the jurisdictional analysis under the country's laws, in part because the actionable harm occurred in other countries (Opp. Exhibit AA)

Plaintiffs argue that the United Kingdom (England) is unavailable because: (1) no contingency fee cases are permitted there; (2) there are no jury trials or loss of consortium claims allowed; (3) discovery is limited, costly and to be paid out of pocket; (4) discovery from third-party witnesses, to refute the Defendants' claims, is located in New York; and (5) although there is products liability law in England, non-occupational exposure claims are typically not brought because there are no barristers or solicitor's willing to proceed against a manufacturer or seller.

In support of their argument plaintiffs provide the affidavit of Harry David Glyn Steinberg, a barrister, who states : (1) the costs of bringing an action against a talc manufacturer are prohibitive, there are no contingency fees and there is no precedent for bringing such an action; (2) discovery in England is more restricted, it would be difficult for an ordinary individual to find legal representation, and even if it were possible, the costs of obtaining the large amount of discovery needed is beyond the means of most people; (3) in the event the plaintiffs lose the case they are required to pay all of the defendant's legal fees which could be prohibitive in a talc case; and (4) Court costs for bringing an action, which are separate from legal fees, are either 5% of the claim if the damages sought exceed £10,000, or £10,000 if the claim for damages exceeds £200,000, making it very difficult for most individuals to bring an action against a talc manufacturer.

Plaintiffs state that the application of South African or English law is not determinative of this motion to dismiss for forum non conveniens.

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 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], see also Blais v Deyo, 60 NY2d 679, 455 NE2d 662, 468 NYS2d 103 [1983] and Bewers v American Home Products Corporation, 99 AD2d 949, 472 NYS2d 637 [1st Dept. 1984]).

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 conveniens (Avery v Pfizer, Inc., 68 AD3d 633, 891 NYS2d 369 [1st Dept. 2009], 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).

Defendants that have a substantial presence in New York, as well as "ample resources" do not suffer a hardship for litigating in New York. The burden on New York Courts is also minimal when there is no need to translate documents or witness testimony from a foreign language (Bacon v. Nygard, 160 AD 3d 565, 76 NYS 3d 27 [1st Dept. 2018], plaintiff from the Bahamas). A greater potential hardship is suffered by the plaintiff that is required to litigate in a foreign jurisdiction, like England, that does not recognize trial by jury, or where there is no ability to arrange for contingent fees (Neville v. Anglo American Management Corp., 191 AD 2d 240, 594 N.Y.S. 2d 747 [1st Dept., 1993] and Bacon v. Nygard, 160 A.D. 565 at pg. 566 citing to Wilson v. Dantas, 128 AD 3d 176, 9 NYS 3d 187 [1st Dept., 2015] aff'd 29 NY 3d 1051, 80 NE 3d 1032, 58 NYS 3d 286 [2017]).

The application of the law of a foreign jurisdiction, while a factor, does not necessarily override the plaintiffs choice of forum or create a burden on the Court, since the Courts in New York are frequently called upon to apply the laws of a foreign jurisdiction (Intertec Contracting A/D v. Turner Steiner Intern., S.A., 6 AD 3d 1, 774 NYS 2d 14 [1st Dept. 2004] applying the law of Sri Lanka, citing to Anagnostou v. Stifel, 204 AD 2d 61, 611 NYS 2d 525 [1st Dept. 1994] applying the laws of Greece, and Yoshida Printing Co. Ltd. v. Alba, 213 AD 2d 275, 624 NYS 2d 128 [1st Dept., 1995] applying the laws of Japan).

Weighing all the factors, this court is of the opinion that the defendants have failed to meet their heavy burden of showing that this action should be dismissed, in favor of an alternative venue, on the grounds of forum non conveniens. That defendants maintain a principal place of business in New York State is not the only nexus of this action to the State of New York. Although Mrs. DeKlerk resided in South Africa during the majority of her use of defendants' talc and powder products and although she received her medical treatment in the United Kingdom (England), she purchased the Youth Dew Dusting Powder, Cinnabar Dusting Powder and Loose Face Powder that allegedly exposed her to asbestos in New York. Furthermore, plaintiffs have established that New York has a substantial nexus with this action by producing evidence that at least one of ELI's products used by the decedent, Youth Dew Dusting Powder, used talc supplied by WCD and was developed, manufactured, distributed and supplied in New York.

Plaintiffs have also shown that the transfer of this action to South Africa is not possible. Defendants have provided no expert or otherwise refuted the affidavit of Plaintiffs' South African Advocate, Matthew Chaskalson, who explains that because none of the parties reside in South Africa the case would not be permitted in that country on jurisdictional grounds (Opp. Exhibit AA).

Plaintiffs have established that England is not an alternative forum because cases are not taken on contingency fee basis; there are no jury trials or loss of consortium claims; necessary discovery is limited, costly and to be paid out of pocket; and non-occupational exposure claims are typically not brought because there are no barristers or solicitor's willing to proceed against a manufacturer or seller. This will create a hardship for Mr. DeKlerk who is retired, has limited resources, and would be unable to proceed if the case is required to be litigated there.

Plaintiffs have demonstrated that there is a lack of alternative forum and that this lack of alternative forum warrants keeping the case in New York. Defendants' argument that they would be unable to obtain discovery on the decedent's asbestos exposure during her employment is unpersuasive. They have "ample resources" to obtain the discovery and plaintiffs have demonstrated that any delays providing discovery were at least in part related to the Covid-19 pandemic.

The affidavit of Malcolm Peter Sheehan, a Barrister (defendants' expert) annexed to the Reply papers (Reply Exhibit 21), that states some of the factors creating a hardship for the defendants in litigating this case in New York that would be circumvented by litigating in England is also unpersuasive and contradicted by the affidavit from plaintiffs' Barrister Harry David Glyn Steinberg (Opp. Exhibit V). Plaintiffs have established a lack of alternative forum which warrants keeping the case in New York. Defendants have not established that applying the laws of England would be a burden on this Court, warranting dismissal for forum non conveniens. Under these facts the action should not be dismissed for forum non conveniens as the "balance is not strong enough to disturb the choice of forum made by the Plaintiff" (Elmaliach, supra and see Pyle v. Pfizer, Inc., 183 AD 3d 411, 121 NYS 3d 597 [1st Dept. 2011] citing to Bacon, supra).

Alternatively, the parties have waived dismissal on forum non conveniens grounds. ELI filed this motion on February 25, 2020, more than fourteen (14) months after the decedent's last deposition was conducted on October 11, 2018, when the relevant information and facts to make this motion was obtained, and more than sixteen (16) months after the commencement of this action on July 27, 2018. WCD filed its cross-motion on March 5, 2020, resulting in almost the same period of delay. The substantial delay in defendants' moving to dismiss on grounds of forum non conveniens is enough to consider dismissal on this ground waived (See Bussanich v. United States Lines, 74 AD 2d 510, 424 NYS 2d 449, Corines v. Dobson, 135 AD 2d 390, 521 NYS 2d 686 [1st Dept. 1987] and Creditanstalt Investment Bank AG v. Chadbourne & Park LLP, 14 AD 3d 414, 788 NYS 2d 104 [1st Dept. 2005]).

Accordingly, it is ORDERED, that Defendant, Estée Lauder Inc.'s motion pursuant to CPLR §327(a) to dismiss this action for forum non conveniens, is denied, and it is further,

ORDERED that and Whittaker Clark & Daniels, Inc.'s cross-motion pursuant to CPLR §327(a) to dismiss this action for forum non conveniens, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 1, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE