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

HANNAH LOUISE FLETCHER AND DUNCAN FLETCHER,

Plaintiffs,

-against-

AVON PRODUCTS, INC., et al.,

Defendants.

INDEX NO. 190045/2019
MOTION DATE 03/18/2020
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to 19 were read on this motion by defendants Clinique Laboratories, LLC, Estée Lauder Inc., Estée Lauder International, Inc., and The Estée Lauder Companies Inc., 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 - 10
Replying Affidavits	11-12,13-15,16-19

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Clinique Laboratories, LLC, Estee Lauder Inc., Estee Lauder International, Inc., and The Estee Lauder Companies, Inc.'s (hereinafter referred to jointly as "defendants") motion pursuant to CPLR §327(a) to dismiss the second amended complaint on the grounds of *forum non conveniens*, is denied.

Plaintiff, Hannah Louis Fletcher, was diagnosed with peritoneal mesothelioma on August 11, 2015. Plaintiffs commenced this action on February 20, 2019 (NYSCEF Doc. No. 1). Defendant Macy's Inc. filed a Verified Answer on March 14, 2019 (NYSCEF Doc. No. 10). The Second Amended Summons and Complaint were filed on May 31, 2019 adding additional defendants (Mot. Exh. 1). Defendants answered the Second Amended Complaint on July 1, 2019 (NYSCEF Doc. Nos. 18 19, 20 and 21). Defendant, Avon Products, Inc. answered the Second Amended Summons Complaint on June 7, 2019 (NYSCEF Doc. No. 17).

Mrs. Fletcher was deposed over the course of four days on June 11, 12, 13 and 14 of 2019, and a videotaped deposition took place on August 19, 2019 (Mot. Exhs. 3, 4, 5, 6 and 7). It is alleged that she was exposed to asbestos in a variety of ways and that she contracted mesothelioma as a result of exposure to asbestos contained in defendants' Estee Lauder Youth Dew and Beautiful talcum powder, Estee Lauder face powder and Clinique loose face powder, from about 1976 through 2001.

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

At her deposition Mrs. Fletcher remembered that her mother used Estee Lauder's Youth Dew talcum powder. Mrs. Fletcher testified that she played with her mother's Youth Dew powder creating a cloud of dust with the puffer approximately three or four times a week from about 1976 through 1981. At between the ages of twelve and thirteen Mrs. Fletcher recalled using her mom's Estee Lauder face powder. She stated that between the ages of fifteen and sixteen, around 1998, she started using the Clinique loose face powder two times a week, twice a day (Mot. Exh. 5, pgs. 393-394, 402, 406, 444 and 513). Mrs. Fletcher stated that on a trip to New York in 1997 she bought her mom a container of Estee Lauder translucent face powder. She also bought two containers of Clinique face powder for herself. Mrs. Fletcher testified that a majority of the face powder she used was from New York (Mot. Exh. 3, pgs. 61-63 and Mot. Exh. 5, pgs. 315-316 and 518-519, and Mot. Exh. 7 at pg. 797). Mrs. Fletcher's mom took a trip to New York in 2000 and purchased Clinique face powder for her daughter. Plaintiff testified that one container of Clinique face powder would last about six months (Mot. Exh. 5, pgs. 35, 377-378, 380, 513 and 526). On a trip to the United States in 2001 Mrs. Fletcher recalled purchasing Estee Lauder Beautiful talcum powder for her mother because she had shifted away from using the Youth Dew talcum powder as frequently (Mot. Exh. 4, pgs. 299).

Plaintiffs' provide the testimony of Estee Lauder's Corporate representative, Maryann Alfieri, she testified that Estee Lauder Companies' global manufacturing was located in Long Island City in 1946. The company moved to Melville, New York in the 1960's and remains there to this day. The Research and Development Laboratory of Estee Lauder is located in Hauppauge, New York. She testified that Estee Lauder contracted with Kolmar Laboratories in Port Jervis, New York to manufacture Clinique face powder using the Kolmar talc (Opp. Exh. A, pgs. 96, 98, 108, 112, 147,147,150-153, 157 and 173-174).

Defendants move to dismiss plaintiffs' Second Amended Summons and Complaint against them pursuant to CPLR §327(a) on the grounds of *forum non conveniens*. Defendants contend that Estee Lauder is incorporated in Delaware but even though they have principal places of business in New York, some of the products that were allegedly used by Mrs. Flecther may have been manufactured in facilities located outside of New York (Mot. Exhs. 11 and 12 and Reply Exh. 13). They argue that this action should be dismissed on the grounds of *forum non conveniens* because: (i) the Plaintiffs do not allege exposure to talcum powder or any asbestos-containing product in New York, (ii) transactions and purchases of their products occured primarily in the United Kingdom, mostly in England, (iii) the witnesses and evidence are located outside of New York, including those that concern potential work related asbestos exposure and her application for and receipt of Industrial Injury Benefits in the United Kingdom (Mot. Exhs. 9 and 10), (iv) litigating here would be a burden to New York courts, (v) England is a readily available alternative forum, and (vi) even if this action were to stay in New York, the laws of England would have to be applied creating a burden on New York Courts, therefore, no nexus exists with the State of New York.

Defendants Avon Products, Inc. and Macy's, Inc. submitted affirmations in support of this motion and in reply but did not file a formal notice of cross-motion seeking to dismiss on forum non conveniens grounds. The Court in its discretion will not address the relief sought by Avon Products, Inc. and Macy's Inc. and will

only address their arguments in support of the moving defendants on this motion (See Blam v. Netcher, 17 AD 3d 495, 793 NYS 2d 464 [2nd Dept. 2005] citing to Siegal NY Practice §249 at 403 [3rd Edition] and Komanicky v. Contractor, 146 AD 2d 1042, 43 NYS 3d 761 [3rd Dept. 2017]).

Plaintiffs oppose the motion on multiple grounds. Plaintiffs allege that the action should stay in New York because: (a) their choice of forum is entitled to substantial deference; (b) New York is the Defendants' principal place of business, most likely the location from where the asbestos Mrs. Fletcher was exposed to was manufactured and distributed to England; (c) defendants have corporate headquarters in New York; (d) Defendants' expert witnesses are most likely located in New York; and (e) the design and/or development of the product in New York City creates a nexus with the State of New York. Furthermore, Plaintiffs contend that the relevant situs is New York, not England, that Mrs. Fletcher was not exposed to asbestos through her work in England and that her application for benefits was only for disability. Her claims are related to exposure from talc in defendant's products purchased in New York that caused her mesothelioma. They claim that Defendants have not specifically identified the witnesses and documents that are unavailable in New York. It is alleged that the relevant witnesses including Mrs. Fletcher's family members, her medical providers and doctors, in all likelihood do not need to be subpoenaed, can be deposed or testify by videotape, and there is no burden on the Defendants or this Court.

Plaintiffs also argue that England is not available as an alternative forum 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. Further, Mrs. Fletcher who is on a fixed income, would suffer hardship and be unable to proceed if the case is required to be litigated in England.

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" (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]).

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]). 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*).

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] *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***).

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 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*. This action has a substantial New York nexus in addition to the defendant maintaining a principal place of business in this state. Defendants are correct in asserting that Mrs. Fletcher resided in England, their products that allegedly exposed Mrs. Fletcher to abestos were used in England, and she received medical treatment in England. However, plaintiffs have established that New York has a substantial nexus with this action by producing evidence that Mrs. Fletcher and her mother purchased the products in New York, Mrs. Fletcher used the products in New York, Defendants' products were developed, manufactured, distributed and/or supplied from New York to England, and that the defendants have ample resources to avoid hardship.

Plaintiffs through the expert witness, Henry David Glyn Steinberg, Q.C. (Opp. Exh. NN) have also shown that the transfer of this action to England - where cases are not taken on contingency fee basis; where there are no jury trials or loss of consortium claims; where necessary discovery is limited, costly and to be paid out of pocket; when discovery from third-party witnesses to refute the Defendants' claims is located in New York; and although there is product's 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 - will create a hardship on them as they have limited

resources, and would be unable to proceed if the case is required to be litigated in England.

Plaintiffs have demonstrated that there is a lack of alternative forum, which warrants keeping the case in New York. Defendants' argument that they would be unable to obtain discovery on Mrs. Fletcher's asbestos exposure is unpersuasive. They have the resources to obtain the discovery.

The affidavit of Malcolm Sheehan, Q.C. (defendants' expert) annexed to the Reply papers (Reply Exh. 19), that states some of the factors creating a hardship to 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. Exh. NN). Plaintiffs have established a lack of alternative forum which warrants keeping the case in New York. Applying the laws of England would not be a burden on this Court, such that dismissal is unwarranted. 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*).

Accordingly, it is ORDERED, that Defendants Clinique Laboratories, LLC, Estee Lauder Inc., Estee Lauder International, Inc., and The Estee Lauder Companies, Inc.'s motion pursuant to CPLR §327(a) and CPLR §3211, to dismiss the second amended complaint on the grounds of *forum non conveniens*, is denied.

ENTER:

Dated: March 25, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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