

15-0819

301

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

JOY CLARY, as Administratrix of
The Estate of Bobby Clary, et al.,
Plaintiffs,

vs.

Civil Action Nos. 14-C-101 to 139
The Honorable David W. Nibert

AMERICAN ELECTRIC POWER
CO., INC., et al.,
Defendants.

ORDER DENYING DEFENDANTS' MOTION
TO DISMISS UPON FORUM NON CONVENIENS

FILED IN MY OFFICE
2015 AUG - 5 P 2:37
JILL H. HILLMAN, CLERK
MASON CO. WV CIRCUIT COURT

CAME THE PARTIES, by and through their respective counsel, before the Court, on the 27th day of February, 2015, to be heard on Defendants' Motion to Dismiss Plaintiffs' Claims Pursuant to the Doctrine of *Forum Non Conveniens*. Upon argument of counsel, review of the record, the motion, and response thereto, and for good cause shown, the Court does hereby **DENY** Defendant's Motion to Dismiss upon *Forum Non Conveniens*.

PROCEDURAL BACKGROUND

On August 8, 2014, Plaintiffs filed their Complaint in these matters, which brought claims for wrongful death, failure to warn, failure to eliminate, failure to protect, negligence *per se*, negligence, heightened duty, strict liability, battery, fraud, fraudulent concealment, misrepresentation of a toxic substance, negligent infliction of emotional distress, medical monitoring, loss of consortium, and punitive damages against the Defendants, American Electric Power Co., Inc. ("AEP"), American Electric Power Service Corporation ("AEPSC"), Ohio Power Company ("Ohio Power"), and Doug Workman. The Plaintiffs are comprised of West Virginia and Ohio residents who allege exposure to, and injury from, coal

combustion waste either from working at the Gavin Landfill, or living in the same household with a family member who worked at the Gavin Landfill.¹

On September 11, 2014, the Defendants filed a Motion to Dismiss and a Memorandum in Support of their Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*. In their Motion, Defendants sought dismissal of the Plaintiffs' lawsuit pursuant to the doctrine of *forum non conveniens*, arguing that the State of Ohio is a more proper forum for this action.

On January 16, 2015, Defendants filed a Motion to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*. On February 23, 2015, Plaintiffs filed their Response to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*, and their Response to Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) and the Doctrine of *Forum Non Conveniens*.

DISCUSSION

Defendants do not dispute that they are licensed to and do conduct business and derive substantial revenue in West Virginia. However, the Defendants argue that Ohio is a more proper forum for this action. The Plaintiffs oppose the Defendants' Motion, arguing that multiple West Virginia residents have properly brought suit against a Mason County, West Virginia resident, Defendant Doug Workman, and the corporate Defendants that conduct business in Mason County, West Virginia. The Plaintiffs argue that, under Owen v. Appalachian Power Co., 78 W.Va. 596 (1915), an action for personal injury is transitory and follows a Plaintiff wherever he goes and that such an action may be brought wherever jurisdiction over a defendant may be obtained. The Plaintiffs further argue that

¹ The Plaintiffs also include certain family members of the allegedly exposed individuals who have brought claims for loss of consortium or estate representatives who have brought wrongful death claims on behalf of deceased Gavin Landfill workers.

W.Va. Code § 56-1-1(a)(1) provides that any civil action may be brought in the circuit court of any county wherein any of the defendants may reside and, therefore, the Plaintiffs claims cannot be dismissed for want of venue. The Plaintiffs argue that the West Virginia Supreme Court of Appeals decision in Morris v. Crown Equipment Corp., 219 W.Va. 347 (2006) governs and holds that the Privileges and Immunities clause of the United States Constitution prohibits dismissal of the Ohio Plaintiffs whenever a West Virginia Plaintiff can bring such action and that any such dismissal would be discriminatory to the Ohio Plaintiffs, who have chosen to bring this action in West Virginia, alongside the West Virginia Plaintiffs. Finally, the Plaintiffs argue that the Defendants have failed to, and cannot, provide sufficient evidence under the W.Va. Code Section § 56-1-1a(a) to overcome the great deference afforded the Plaintiffs' choice of forum.

The Court finds Plaintiffs' arguments are consistent with the current status of West Virginia's law on *forum non conveniens* and joinder. The Court first recognizes that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief ... [1] arising out of the same transaction [or] occurrence ... and [2] if any question of law or fact common to all these persons will arise in the action." State ex rel. J.C. v. Mazzone, 233 W.Va. 457, 463, (2014); W.Va. R. Civ. P. 20. Next, the Court finds that the Defendants' argument regarding *forum non conveniens* is foreclosed by the Supreme Court of Appeals' decision in Morris v. Crown Equipment Corp., 219 W.Va. 347, 356 (2006), "there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit."

Under that framework, the Plaintiffs' chosen venue is proper because the instant matter involves claims by nine West Virginia-resident Plaintiffs against a West Virginia-resident Defendant, and granting the Defendants' Motion on *forum*

non conveniens grounds would amount to an impermissible, categorical exclusion of the Ohio Plaintiffs' choice to bring their suit in West Virginia, along with the other West Virginia Plaintiffs. The Court also takes note that, for over 100 years, West Virginia has "follow[ed] the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process." Morris, 219 W.Va. at 356, 633 S.E.2d at 301 (2006). The Court finds that the Plaintiffs have properly brought suit in West Virginia against West Virginia-resident Defendant, Doug Workman. Accordingly, the Plaintiffs lawsuit is properly before this Court with respect to all of the named Defendants.

The Court finds the reasoning in *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 205 (1994) to also be persuasive, and that *Abbott* is still controlling law. *Abbott* holds that even in the case of a non-resident plaintiff, "the doctrine of *forum non conveniens* is a drastic remedy which should be used with caution and restraint." Even where the plaintiff is a non-resident, W.Va. Code § 56-1-1a "does not require a court to diminish, or abolish altogether, the deference it normally affords a Plaintiff's choice of forum; rather, it permits courts to do so, when the precedent factors have been met (unlike the instant case, where nine West Virginia residents have filed suit)." State, ex rel. Mylan, Inc. v. Zakaib, 227 W.Va. at 648. Therefore, a defendant seeking dismissal based upon *forum non conveniens* must prove that the case can be tried substantially more inexpensively and expeditiously in the alternate forum. Norfolk and Western Ry. Co. v. Tsapis, 184 W.Va. 231, (1990). The burden remains with the Defendants to establish that the private and public interest factors heavily weigh in favor of dismissal. This proof must be supported by a record and something more than allegations in a pleading. *Abbott*, 191 W.Va. at 203. Here, even if the Plaintiffs' choice of forum could be diminished under W.Va. Code § 56-1-1(a)(1), for want of a West Virginia-resident Plaintiff, the Court finds that the Defendants have failed to make the requisite

showing necessary to overcome the “heavy burden in opposing the Plaintiff’s chosen forum” under W.Va. Code § 56-1-1a. State ex rel. North River Ins. Co. v. Chafin, 233 W.Va. 289, 294 (2014).

In considering the eight (8) factors enumerated under W.Va. Code § 56-1-1a(a)(1) – (8), the Court finds that the weight of those factors preponderates in favor of the Plaintiffs’ choice of West Virginia as their forum. With respect to Factors one, three and eight, regarding an alternative forum, while the Court recognizes that Ohio exists as an alternative forum, practically speaking, alternative forums almost always exist, particularly in cases that involve border States, and the Court is not persuaded that this is substantial enough for the Defendants to overcome their heavy burden in seeking dismissal of the Plaintiffs’ claims. The Court also notes that while, on the one hand, the Defendants allege that Ohio provides an alternative forum for this lawsuit, the Defendants also allege that the Plaintiffs’ claims requires dismissal under the substantive law of that same Ohio forum, thereby calling into question whether Ohio actually provides a true remedy for the Plaintiffs’ claims.

Considering Factor two, the Court finds no substantial injustice to the Defendants by maintaining this lawsuit in the Plaintiffs’ chosen forum. The Defendants neither dispute that Defendant, Doug Workman, is a West Virginia resident, nor that the corporate Defendants are licensed to transact business in West Virginia, nor that the Defendants regularly transact business in West Virginia, through their ownership and/or operation of coal-fired power plants in West Virginia, and derive substantial revenue from their West Virginia business. See W.Va. Code § 56-3-33(a)(1).

The Court finds that factors four and five essentially yield no practical advantage to either side. While it is undisputed that the cause of action arose in Ohio, it is similarly undisputed that this lawsuit involves West Virginia resident-

Plaintiffs and a West Virginia-resident Defendant.

With respect to Factor six, the Court finds that the private factors preponderate in favor of retaining jurisdiction in the Plaintiffs' chosen forum. With respect to choice of law, should Ohio law control on any issues in this litigation, the Court is not especially daunted by its application. As a Court that essentially sits on the border of Ohio and West Virginia, this Court is regularly called upon to, and does, apply Ohio law in cases litigated before this Court.

The Court finds that access to sources of proof does not predominate in the Defendants' favor, and that the Defendants have failed to offer anything more than conclusory allegations on this factor. As the Defendants point out, the majority of witnesses live in close proximity to the Gavin Landfill, which is in close proximity to Mason County and this Court. The Court is convinced that the vast majority of necessary witness testimony and document collection can be as readily and economically accomplished in West Virginia, as it could in Ohio, using the established methods provided by the West Virginia's Rules of Civil Procedure. Certainly counsel for all the parties take out-of-state depositions and obtain out-of-state documents on a routine basis. Each state has well-established and similar subpoena procedures that can be employed, if necessary, to procure and compel out-of-state witness appearances, if necessary, and gather evidence. The Defendants, as parties, cannot complain about access to *their own property, documents or witnesses*, when they are required to permit the Plaintiffs' access to the same under West Virginia's Civil Rules. Similarly, the vast majority of the witnesses the Defendants will seek to discover are the actual Plaintiffs, who are similarly required to make themselves, and their relevant medical records, available to the Defendants. It is also clear from the record that neither party's

experts will suffer any prejudice by testifying in West Virginia versus Ohio.²

With respect to the Defendants' argument regarding legal expenses, the Defendants fail to identify any additional legal expenses that would be incurred by litigating this case in West Virginia. Again, the Defendants offer only a conclusory statement that the "cost of obtaining the attendance of willing witnesses is higher than it would be if the cases were being litigated in Ohio," but they offer no explanation as to how or to what extent the litigation costs would be higher in this forum. Abbott makes clear that a defendant seeking dismissal must provide a detailed showing of the additional expenses incurred by litigating in West Virginia, and the expenses must be substantial. The Defendants have failed to provide such a showing here, and the Court finds their argument on this point to be unpersuasive, particularly given the close geographic proximity between Mason County, West Virginia and the Gavin Landfill, near which the Defendants admit that most of the witnesses reside.

The Court similarly finds that the public factors also weigh in favor of retaining jurisdiction in the Plaintiffs' chosen forum. The Court finds the Defendants' argument that this Court is too congested to preside over this action to be unpersuasive. The statistics produced by the Defendants fail to demonstrate any significant, compelling difference between the number of Court filings in Mason County and Gallia County or raise any particular concern that this Court is incapable of timely or properly adjudicating this lawsuit. The Court is in the best position to determine the manageability of its docket and finds that it is more than capable of handling this matter.

The Court is not persuaded by the Defendants' argument that the citizens of Mason County, West Virginia have an insufficient interest in deciding this

² The Defendants did not raise any arguments regarding the enforceability of any judgment entered by this Court. However, the Court finds no compelling reason to believe that any judgment entered against the Defendants in this forum would not be enforceable as to the Defendants named in the Plaintiffs' lawsuit.

controversy. As the Plaintiffs have pointed out, exposure to coal combustion waste is an issue that touches citizens on both sides of the Ohio River, particularly those in Mason County, West Virginia, who work and/or live in the shadow of four (4) of the Defendants' coal-fired power plants. The Mason County Courthouse sits less than 10 driving miles from the Gavin Landfill, which is closer than the Defendants' Phillip Sporn or Mountaineer coal-fired power plants that are located in Mason County, West Virginia, and AEP groups their plants on both sides of the Ohio River into distinct regions, such that Defendants' Region 1 includes the Gavin plant, as well as the Mountaineer plant and other West Virginia power plants. Finally, the Court is persuaded that Mason County citizens have a sufficient interest in deciding an action brought by their fellow Mason County resident, and other West Virginia residents, against a Mason County Defendant alleged to have materially misled workers regarding the hazardous nature of the coal combustion waste to which they were being exposed.

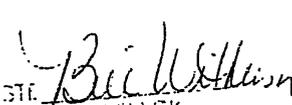
The Court finds the Defendants' argument that they will be substantially prejudiced in West Virginia by the lack of an intermediate appellate Court to be unpersuasive, because transfer to Ohio is arguably substantially prejudicial to the Plaintiffs for that very same reason.

With respect to the Defendants' contention that dismissal would not result in unreasonable duplication or proliferation of litigation, the Court disagrees. As previously set forth, W.Va. Code § 56-1-1 makes clear that dismissal of the West Virginia Plaintiffs' claims is prohibited. As such, dismissal of the Ohio Plaintiffs' claims would necessarily force the filing of the same lawsuit in another forum, setting the stage for massive duplication of effort and costs for the parties and courts alike, as well as the strong possibility of inconsistent rulings and outcomes. The Court finds that this factor also preponderates in favor of retaining jurisdiction over this matter in the Plaintiffs' chosen forum.

In conclusion, the Court is mindful of the fact that no West Virginia plaintiff filing a lawsuit against a West Virginia defendant has ever been dismissed from a West Virginia forum under W.Va. Code § 56-1-1a with the approval of the West Virginia Supreme Court of Appeals. The Court finds that multiple West Virginia residents have properly brought suit against a Mason County, West Virginia resident Defendant, under W.Va. Code § 56-1-1, and have properly brought suit against the named, corporate Defendants that are licensed to conduct, do conduct and derive substantial revenue from, business in West Virginia, under W.Va. Code § 56-3-33(a)(1). The West Virginia Supreme Court of Appeals' holding in Morris v. Crown Equipment makes clear that dismissal under the doctrine of *forum non conveniens* is improper under the instant circumstances of this matter, and even if the Plaintiffs' choice of forum were subject to diminishment, the Defendants have failed to overcome their heavy burden to prove that the case can be tried substantially more inexpensively and expeditiously in an alternate forum. Accordingly, the Defendants' Motion to Dismiss Pursuant to the Doctrine of *Forum Non Conveniens* is DENIED.

The Clerk shall transmit a copy of this order to all counsel of record.

Dated this 5th day of August, 2015.


DAVID W. NIBERT, JUDGE
DIA W. LITTON, CLERK
MASON CO. WV CIRCUIT COURT
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IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

JOY CLARY, as Administratrix of
The Estate of Bobby Clary, et al.,
Plaintiffs,

vs.

Civil Action Nos. 14-C-101 to 139
The Honorable David W. Nibert

AMERICAN ELECTRIC POWER
CO., INC., et al.,
Defendants.

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MASON CO. WV CIRCUIT COURT

**ORDER DENYING DEFENDANTS' MOTION
TO DISMISS PURSUANT TO RULE 12(b)(6)**

CAME THE PARTIES, before the Court, on the 27th day of February, 2015, to be heard on Defendants' Motion to Dismiss Plaintiffs' Claims Against American Electric Power Co., Inc. ("AEP"), American Electric Power Service Corporation ("AEPSC"), and Ohio Power Company ("Ohio Power") pursuant to Rule 12(b)(6). Upon argument of counsel, review of the record, the motion, and response thereto, and for good cause shown, the Court does hereby **DENY** Defendant's Motion to Dismiss.

Legal Authority

West Virginia Rule of Civil Procedure Rule 12(b)(6) provides, in relevant part, that a complaint should be dismissed if it fails to state a claim upon which relief can be granted. Generally, a motion to dismiss should be granted only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Murphy v. Smallridge, 196 W.Va. 35, 36 (1996) (internal citations omitted). In appraising the sufficiency of a complaint, a trial court "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 3, Chapman v. Kane Transfer Company, 160 W.Va. 530 (1977).

For purposes of a motion to dismiss, a complaint is construed in the light most favorable to its drafter and its allegations are to be taken as true. See Lodge v. Texaco, Inc., 161 W.Va. 603, 605 (1978). The West Virginia Supreme Court of Appeals further stated in Lodge that “[t]he policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.” 161 W.Va. at 605.

When considering a Motion to Dismiss under Rule 12(b)(6), a court may not consider matters outside of the pleadings. Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 536 (1977). “In general, material extrinsic to the complaint may not be considered on a Rule 12(b)(6) motion to dismiss without converting it to a Rule 56 motion for Summary Judgment.” Forshey v. Jackson, 222 W.Va. 743, 748 (2008).

CONCLUSIONS OF LAW

Defendants argue that the three corporate Defendants, AEP, AEPSC, and Ohio Power, should be dismissed. In support of this argument, Defendants assert that “the instant action is a premises liability action,” and that the corporate Defendants neither own nor control the Gavin Landfill, and as such, could neither have owed nor breached any duty to the Plaintiffs. Defendants attached to their Memorandum in Support of Their Motion an affidavit from Thomas G. Berkemeyer, the Assistant Secretary of AEPSC, arguing that the assertions made by Mr. Berkemeyer conclusively establish that dismissal of the corporate Defendants is proper. Defendants also argue that Plaintiffs’ claims for negligence *per se* and heightened duty should be dismissed against all Defendants.

In their response in opposition to Defendants’ Motion, Plaintiffs argue that the inclusion of the affidavit from Mr. Berkemeyer was improper in the context of a motion to dismiss, and that, even if the contents of the affidavit were permitted to be

taken into consideration in the court's analysis of the Defendants' Motion, many of the representations made by Mr. Berkemeyer, under oath, are demonstrably and materially inaccurate. Plaintiffs assert that the inferences drawn by the Defendants from this affidavit are similarly inaccurate, and the arguments in support of dismissal should not be given credence based upon a self-serving affidavit provided by Defendants. Plaintiffs went on to provide evidence which supported their argument that Defendants' statements, assertions, and actions, including those made under oath, contradict the assertions in their Motion to Dismiss and Memorandum in Support that the corporate Defendants should be dismissed from this cause of action because they do not hold an ownership interest or exercise control over the premises at issue.

The Court finds that the Plaintiffs' arguments are consistent with West Virginia law governing the standard by which a court is to examine a Motion to Dismiss Pursuant to Rule 12(b)(6). As Plaintiffs assert, the purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 604-05 (1978). To survive a motion to dismiss, "[a]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings." Id. (internal quotations omitted).

Defendants' arguments, on the other hand, essentially ask the court to construe their proffered facts and allegations in the light most favorable to the Defendants, rather than to the Plaintiffs. Defendants also ask this court to disregard the Plaintiffs' factual assertions, and instead accept Defendants' proffered factual

assertions as true for purpose of the Motion to Dismiss. Doing so would be contrary to the well-established standard governing Motions to Dismiss.

Furthermore, Defendants' arguments seeking dismissal on the grounds that the corporate Defendants have maintained no control over the Gavin Landfill are unpersuasive. In particular, the argument set forth by Defendant Ohio Power, which seeks dismissal from this cause of action on the grounds that Ohio Power "recently divested its interest in the Gavin plant" and is therefore absolved of any tort liability is not a proper basis for a motion to dismiss.

Based on the foregoing, and taking the facts set forth in the Complaint as true, and assessing the allegations in the light most favorable to the Plaintiffs, the Court finds that dismissal of any of the three corporate Defendants would be improper at this time. The Court therefore DENIES the Defendants' Motion to Dismiss.

Defendants have also moved for dismissal of specific claims raised in the Plaintiffs' Complaint. Defendants argue that Plaintiffs' claims for negligence *per se* and for heightened duty should be dismissed. The Court finds that dismissal of these claims would be premature.

It is also noted that, in light of the Court's decision to deny the Defendants' Motion to Dismiss Pursuant to the Doctrine of *Forum Non Conveniens*, Defendants' Motion to Stay Discovery is rendered moot, and discovery should proceed under the West Virginia Rules of Civil Procedure. The Court orders the Defendants to respond to Plaintiffs' outstanding discovery requests within three (3) weeks of the entry of this order.

The Clerk shall transmit a copy of this order to all counsel of record.

Dated this 5th day of August, 2015.



DAVID W. NIBERT, JUDGE


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MASON CO. WV CIRCUIT COURT