

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH COSTELLO, et al. : CIVIL ACTION  
:   
v. :   
:   
NOVARTIS PHARMACEUTICALS :   
CORPORATION : NO. 05-3841

ORDER AND OPINION

JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE

DATE:

I. Introduction

Dr. Joseph Costello has sued Novartis Pharmaceuticals Corporation, (“Novartis”), alleging that Lamisil, a drug manufactured by Novartis for the treatment of nail fungus, left him with permanent injuries. His wife, Mary Costello, has asserted a claim for loss of consortium. Novartis now moves under 28 U.S.C. § 1404(a) to transfer venue of this case to the Middle District of Pennsylvania. For the reasons set forth below, I will grant Novartis’s motion.

II. Factual and Procedural Background

The Costellos live in Pittston, Pennsylvania, located in the Middle District of Pennsylvania. Novartis is a corporation headquartered in East Hanover, New Jersey. The Costellos allege in their complaint that Dr. Costello, a podiatrist, treated himself with Lamisil for three months beginning in January, 2003. Complaint at ¶¶ 2-3. He obtained the Lamisil from Novartis sales representatives. Complaint at ¶ 23. He claims that, as a result of this treatment, he now suffers from a taste disturbance (a metallic or salty taste in his mouth), and chronic headaches.

This case was originally filed in the Court of Common Pleas for Philadelphia County. It was removed to this court at Novartis's request. Notice of Removal, docketed as Doc. 1. As noted, Novartis now seeks its removal to the Middle District of Pennsylvania.

III. Relevant Legal Principles

Section 1404(a) of Title 28 states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

As the Court of Appeals for the Third Circuit has explained, in ruling on § 1404(a) motions, courts have not limited their consideration to the factors enumerated in that section:

[I]ndeed, commentators have called upon the courts to 'consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.' 15 Wright, Miller & Cooper § 3847. While there is no definitive formula or list of the factors to consider, *see* 1A Pt. 2 Moore's ¶ 0.345[5], at 4363, courts have considered many variants of the private and public interests protected by the language of § 1404(a).

Jumara v. State Farm Insurance Co., 55 F.3d 873, 879 (3d Cir. 1995).

The private interest factors interpret the "convenience" language of § 1404(a). Schreiber v. Eli Lilly and Co., Civ. A. No. 05-2616, 2006 WL 782441 at \* 7 (E.D. Pa. Mar. 27, 2006).

They include the preferences of the parties; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one forum; and the location of books and records – similarly limited to the extent that the files could not be produced in the alternative forum. Id., *citing* Jumara, *supra*, at 879.

Analogously, the public interest factors interpret the “interests of justice” language of § 1404(a). Schreiber, at \*9. They have included the enforceability of the judgment; practical considerations that could make the trial easy, expeditious or inexpensive; forum congestion in the two fora at issue; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases. Id., citing Jumara, at 879-880.

#### IV. Discussion

##### A. The Private Factors

The most outstanding of the private factors is that the claim arose entirely in the Middle District of Pennsylvania. This is where the Costellos live. The Costellos have never suggested that Novartis’s sales representatives, who – according to Costello’s own discovery responses – live either in the Middle District or in New Jersey, visited Dr. Costello anywhere but in the Middle District. Joseph Costello Interrogatory Responses, attached to Motion as Exhibit 1. It does not appear that Dr. Costello ingested Lamisil anywhere but the Middle District. Certainly, the fact surrounding Mrs. Costello’s loss of consortium (alleged to be her exposure to her husband’s suffering and consequent behavioral changes) arose in the Middle District. Mary Costello Interrogatory Responses, attached to Motion as Exhibit 2.

The principal factor counterbalancing this is that the Eastern District was the plaintiffs’ choice of a forum. A plaintiff’s choice of a forum should rarely be disturbed. Gulf Oil v. Gilbert, 330 U.S. 501, 508-09 (1947); Jumara, supra, at 879. Nevertheless, it has been repeatedly recognized that a plaintiff’s choice of forum receives less weight where the plaintiff does not live in that forum, and none of the operative facts occurred there. Itt Industries v. Pacific Employers,

– F. Supp.2d –, 2006 WL 950751 at \*10 (E.D. Pa. Apr. 13, 2006); Khaaliq v. Pennsylvania State University, Civ. A. No. 02-480, 2002 WL 1042349 at \*2 (E.D. Pa. May 23, 2002); National Paintball Supply v. Cossio, 996 F. Supp. 459, 462 (E.D. Pa. 1998); Lifescan, Inc. v. Polymer Technology International Corp., Civ. A. No. 93-6983, 1994 WL 161375 at \*2 (E.D. Pa. Apr. 28, 1994).

No other factor listed in Jumara as a “private factor” is particularly relevant here. It is apparent, therefore, that the “private factors” favor a transfer of venue to the Middle District.

B. The Public Factors

The public factor which is most influential in this case is that the practical considerations favor trial in the Middle District. By far the most likely scenario is that this case would be tried in Scranton. Novartis has painstakingly prepared a chart showing that, out of the 24 witnesses identified by the Costellos, twenty of them live within 25 miles of Scranton, and therefore over 100 miles from the Philadelphia courthouse where this case would be tried in the Eastern District.

The witnesses would still be available for trial if this case was tried in Philadelphia. Local Rule 234.2(b). For that reason, the convenience of the witnesses was not an appropriate private factor to consider. Schreiber, supra. Nevertheless, the process of trying this case will be easier and more expeditious the closer the bulk of the witnesses live to the courthouse. There will be fewer difficulties scheduling the witnesses, and less pressure to finish with a particular witness by a certain time.

As Novartis has pointed out, it is also true that the docket of the Eastern District is more crowded than that of the Middle District. Judicial Caseload Profile, attached to Motion as

Exhibit 5. Further, there are no strong local interests to consider here, such as if this was a land-use matter, and the Eastern District appears to have no particular interest in this case, since it would not be adjudicating the rights or liabilities of a resident, or monitoring actions that took place here. Thus the public factors, too, favor a transfer of venue.

V. Conclusion

For the reasons discussed above, I will enter the following:

ORDER

AND NOW, this                      day of May, 2006, upon consideration of Novartis Pharmaceutical Corporation's Motion for Section 1404(a) Transfer, docketed in this case as Document 54, Plaintiffs' response thereto, and Novartis's reply memorandum, it is hereby

ORDERED that the motion is GRANTED; this matter is ordered TRANSFERRED to the United States District Court for the Middle District of Pennsylvania, and is further ordered MARKED AS CLOSED in this court.

BY THE COURT:

---

JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE