

Loccisano v A.O. Smith Water Prod. Co.

2011 NY Slip Op 33724(U)

November 2, 2011

Sup Ct, New York County

Docket Number: 190357/10

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Horton
Justice

PART 30

GIULIO LOCCISANO

INDEX NO.

190357/10

MOTION DATE

- v -

MOTION SEQ. NO.

3

A.O. SMITH WATER PRODUCTS

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

PAPERS NUMBERED

NOV 09 2011

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*As per the memo decision
of 11-2-11.*

Dated: 11.2.11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
GIULIO LOCCISANO and LINDA FEGGANS,

Index No. 190357/10
Motion Seq. 003

Plaintiffs,

DECISION AND ORDER

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

FILED

NOV 09 2011

----- X
SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Thomas Green & Company Incorporated ("Thomas Green") moves pursuant to CPLR 3211(a)(8) to dismiss the complaint and all other claims asserted against it for lack of personal jurisdiction. For the following reasons, the motion is granted.

BACKGROUND

This action was commenced by plaintiffs Guilio Loccisano, now deceased, and Linda Feggans, to recover for personal injuries caused by Mr. Loccisano's alleged exposure to asbestos-containing products. Relevant to this motion is plaintiffs' claim that Mr. Loccisano was exposed to asbestos while working as an electrician from 1976 to 1983 at the Stella D'Oro factory in the Bronx, New York. In this capacity, Mr. Loccisano testified¹ that he was exposed to asbestos from repairing ovens manufactured by defendant Thomas Green, a foreign corporation that had been incorporated under Indiana law until it voluntarily dissolved in 2001. Mr. Loccisano testified that his work on the ovens required him to disturb the asbestos-containing panels that lined the oven walls and that he breathed the dust associated therewith.

¹ Mr. Loccisano was deposed on October 15, 2010, October 20, 2010, and twice on February 3, 2011. His depositions transcripts are submitted as defendant's exhibits C, D, E, and F.

Defendant brought this motion to dismiss on the ground that plaintiffs' complaint is time-barred pursuant to Indiana Code §§ 23-1-45-6 and 23-1-45-7. In this regard, defendant asserts that since the company dissolved and published notice of its dissolution in 2001, plaintiffs had until 2003 to assert any claims against it, which it failed to do. Plaintiffs submit that this dispute is governed not by Indiana law, but by New York law, which permits a lawsuit against a dissolved corporation where the exposure and subsequent injuries occurred in New York.

DISCUSSION

As a general rule, the issue of whether a dissolved corporation may be subject to suit is governed by the laws of its state of incorporation. This rule has been consistently applied by the New York courts. *See Republique Francaise v Cellosilk Mfg. Co.*, 309 NY 269, 278 (1955) (applying Illinois law to dissolved Illinois corporation); *see also McCagg v Schulte Roth & Zabel LLP*, 74 AD3d 620, 626 (1st Dept 2010) (applying Delaware law to dissolved Delaware corporation); *Mock v Spivey Co.*, 167 AD2d 230, 230 (1st Dept 1990) (trial court properly dismissed action against defendant based upon the provisions of Pennsylvania law which permits suit against a dissolved corporation only within two years of such dissolution.); *Westbank Contr., Inc. v Rondout Val. Cent. School Dist.*, 2007 NY Slip Op 52579U, at * 6 (Sup. Ct. Ulst. Co. Jan. 11, 2007), *aff'd* 46 AD3d 1187 (3d Dept 2007) (claim against dissolved Massachusetts corporation dismissed where Massachusetts law provided that a corporation can be sued for up to three years after dissolution). As Thomas Green was incorporated in Indiana, it is Indiana law that controls on the issue of whether it is amenable to suit. *See Mock, supra*, 167 AD2d at 230. Accordingly, the extent to which New York law conflicts with Indiana Law is not relevant in this instance and the court need not undertake a choice-of-law analysis.

Indiana Code § 23-1-45 sets forth the procedure for voluntary dissolution of an Indiana corporation, which commences when a corporation's board of directors proposes dissolution and

notifies its shareholders. Ind. Code § 23-1-45-2. At any time after the dissolution is authorized, the corporation may dissolve by filing articles of dissolution with the Indiana Secretary of State. Ind. Code § 23-1-45-3. Generally, where notice is given to creditors as set forth by the statute, their claims are subject to a two-year statute of limitations as set forth in Ind. Code § 23-1-45-7.² This survival rule was enacted to “place a definite termination upon corporate existence with respect to dissolution, as well as to protect shareholders, officers, and directors of dissolved corporations from prolonged and uncertain liability.” *Lovold Co. v Galyan’s Brownsburg, Inc.*, 764 N.E.2d 281, 285-286 (Ind. Ct. App. 2002).

It is undisputed that Thomas Green published notice of its dissolution in accordance with the Indiana statute and, accordingly, any claims against it are subject to the two-year limitations period set forth therein. The company was only amenable to suit from November 12, 2001 to November 12, 2003, exactly two years from the date of publication of its voluntary dissolution. Plaintiffs’ argument

² Indiana Code § 23-1-45-7. Publication of notice.

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) Be published one (1) time in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in Indiana, its registered office) is or was last located;

(2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within two (2) years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim within two (2) years after the publication date of the newspaper notice:

(1) A claimant who did not receive written notice under section 6 [IC 23-1-45-6] of this chapter.

(2) A claimant whose claim was timely sent to the dissolved corporation but not acted on.

(3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim may be enforced under this section:

(1) Against the dissolved corporation, to the extent of its undistributed assets; or

(2) If the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to the shareholder.

that claims may be filed beyond the survival period to the extent there are assets that are undistributed or were distributed to shareholders post-dissolution does not comport with the plain language of the statute, which merely provides that a claim may be enforced against such assets so long as it is commenced within the two-year limitations period. Ind. Code § 23-1-45-7(d)

Accordingly, it is hereby

ORDERED that Thomas L. Green & Company Incorporated's motion to dismiss is granted and that this action against Thomas Green, and any cross-claims related to this defendant are severed and dismissed as time-barred; and it is further

ORDERED that this action shall continue as against the remaining defendants herein; and it is further

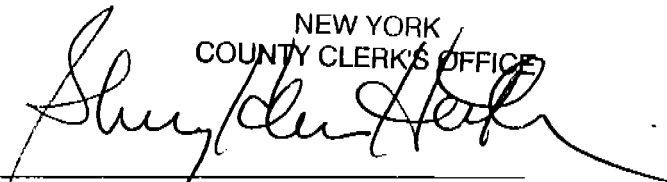
ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

FILED

NOV 09 2011

DATED: November 2, 2011

NEW YORK COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER
J.S.C.