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

PRESENT: SHERRY KLEIN HEITLER Justice PART 30

Index Number : 190149/2011
HERLIHY, ARTHUR D.
VS.
A F SUPPLY CORP. (STOCKHAM)
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 190149/11
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION dated 1.10.12

FILED
JAN 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1-10-12

SHERRY KLEIN HEITLER J.S.C.

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

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

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ARTHUR HERLIHY and GAIL HERLIHY,

Plaintiffs,

-against-

A.F. SUPPLY CORP.., et al.,

Defendants.

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Index No. 190149/11
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Defendant SVI Corporation ("SVI") moves pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against it on the ground that plaintiffs have failed to state a cause of action insofar as its claims are barred by Alabama law.

This action was commenced on April 12, 2011 by plaintiffs Arthur Herilhy and his wife Gail Herlihy to recover for personal injuries allegedly caused by Mr. Herlihy's exposure to asbestos-containing products while working for the Brooklyn Boiler Repair Company of Brooklyn, New York from 1962 to 1991. On June 15, 2011, SVI filed the instant application to dismiss on the ground that under Alabama law plaintiffs' complaint was untimely filed after the expiration of the two-year survival period that followed SVI's corporate dissolution as an Alabama Corporation. *See* Ala. Code §§ 10A-2-14.01 - 10A-2-14.05. In this regard, SVI contends that since the company dissolved and published notice of its dissolution in 2007 in accordance with Alabama law, plaintiffs had until 2009 to assert any claims against it, which they failed to do. Plaintiffs submit that this dispute is not governed by Alabama law[1], but by New York law, which permits a lawsuit to proceed against a dissolved

[1] In their opposition brief, plaintiffs argued that SVI was a Delaware corporation when it dissolved, but abandoned such position at oral argument.

corporation where the exposure and subsequent latent injuries occurred in New York. *See e.g. Ford v Pulmosan Safety Equipment*, 52 AD3d 710 (2d Dept 2008); *see also* Business Corporation Law §§ 1006-08. Plaintiffs also contend that the relevant Alabama statute violates New York public policy and should therefore be disregarded by this court.

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 in New York. *See Republique Francaise v Cellosilk Mfg. Co.*, 309 NY 269, 278 (1955) (Illinois law applied to dissolved Illinois corporation); *Mock v Spivey Co.*, 167 AD2d 230, 230 (1st Dept 1990) (action against defendant properly dismissed based upon the provisions of Pennsylvania law which permits suit against a dissolved corporation only within two years of dissolution); *Bayer v Sarot*, 51 AD2d 366 (1st Dept 1976) (complaint dismissed against Pennsylvania Corporation where Pennsylvania law provides that a dissolved corporation is amenable to suit for up to two years after dissolution).

Since SVI was incorporated in Alabama when it dissolved, it is Alabama law that controls on the issue of whether it is amenable to suit. *See Mock, supra*, 167 AD2d at 230; *Bayer, supra*, 51 AD2d at 366. Accordingly, the extent to which New York law conflicts with Alabama law is not relevant in this instance and this court need not undertake a choice-of-law analysis.

Alabama Code §§ 10A-2-14.01 - 10A-2-14.05[2] prescribe the procedures by which its domestic corporations may be dissolved, how they may resolve known and unknown claims, and the time limits associated with resolution of unknown claims. This process typically begins when a corporation's board of directors proposes dissolution and requests approval from its shareholders. Ala. Code §

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[2] Formerly, Ala. Code §§ 10-2B-14.01 to 10-2B-14.05.

10A-2-14.02. At any time after the dissolution is approved by a majority of the shareholders, the corporation may formally dissolve by filing articles of dissolution with the local probate judge. Ala. Code § 10A-2-14.03. Generally, where notice of such dissolution is published, the claims of unknown claimants are subject to a two-year time limit within which to file claims as set forth in Ala. Code § 10A-1-9.22[3] .

Accordingly, a dissolved Alabama corporation is not competent to be sued two years after publication of its dissolution notice. *See Kachler v Taylor*, 849 F. Supp. 1503, 1514 (M.D. Ala. Apr. 11, 1994). In this case, it is undisputed that SVI published notice of its dissolution in the Birmingham

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[3] § 10A-1-9.22, entitled "Unknown claims against dissolved domestic entity", provides:

(a) A dissolved domestic entity, except as otherwise provided in subsection (f), may also publish notice of its dissolution and request that persons with claims against the entity present them in accordance with the notice.
(b) The notice must:
(1) Be published one time in a newspaper of general circulation in the county where the dissolved domestic entity's principal office, or, if none in this state, 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 domestic entity will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice.
(c) If the dissolved domestic entity 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 against the dissolved domestic entity within two years after the publication date of the newspaper notice:
(1) A claimant who did not receive written notice under Section 10A-1-9.21;
(2) A claimant whose claim was timely sent to the dissolved domestic entity 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 domestic entity, to the extent of its undistributed assets; or
(2) If the assets have been distributed in liquidation, against an owner of the dissolved domestic entity to the extent of his or her pro rata share of the claim or the entity assets distributed to him or her in liquidation, whichever is less, but an owner's total liability for all claims under this section may not exceed the total amount of assets distributed to him or her in liquidation.
(e) Nothing in this section shall be deemed to extend any otherwise applicable statute of limitations.
(f) The procedures of this section do not apply to the disposition of claims against a general or limited partnership.

News on January 25, 2007 and that the two-year survival period expired on January 25, 2009. Accordingly, it would appear that SVI is entitled to dismissal of this action as against it, which was filed well beyond the time limit provided for in the statute.

Plaintiffs nevertheless argue that this court should decline to enforce the Alabama statute as violative of New York public policy because there are significant contacts between the parties and New York State. In this regard, the "public policy doctrine" is a recognized exception to the implementation of an otherwise applicable foreign law by which a New York court may decline to enforce such law because it is repugnant to New York public policy. *See Schultz v Boy Scouts of Am.*, 65 NY2d 189, 202 (1985). However, the party seeking to invoke such exception has the "heavy burden" of proving that the foreign law is "contrary to New York public policy . . . for public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise." *Id.* For example, in *Kilberg v Northeast Airlines,* 9 NY2d 34 (1961), the Court of Appeals declined to apply a Massachusetts law which would have limited a pecuniary damages award in the wrongful death action of a New York resident who had purchased a plane ticket in New York and flew from New York to Massachusetts, where the plane then crashed. The Court concluded there were sufficient contacts to invoke New York's position on such issues, and that to apply the Massachusetts limitation on damages with respect to its own citizen would violate New York public policy. *Id.*

Here, plaintiffs have plainly failed to meet their burden in this respect. The only evidence of SVI's alleged "presence" in New York is a printout from an online encyclopedia in which the author describes SVI as having warehouses in New York during World War II. Such remote contacts are insufficient to implicate the public policy exception. *See Reale v Herco*, Inc., 183 AD2d 163, 172 (2d Dept 1992) (contacts insufficient to constitute the "significant contacts" necessary to implicate New York's public policy doctrine). In addition, it is simply not enough to invoke the doctrine because the

Alabama statute bars plaintiffs from recovery against SVI in New York. As Justice Cardozo observed in *Loucks v Standard Oil Co.*, 224 NY 99, 110-111 (1918), "[o]ur own scheme of legislation may be different . . . . That is not enough to show that public policy forbids us to enforce the foreign right . . . .We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." *See also Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 79 (1993) ("resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious.") Indeed, and as set forth above, the courts of this state have consistently applied foreign statutes similar to the one adopted by Alabama even though they may place strict time limits on suits against dissolved foreign corporations. *See Bayer, supra; Mock, supra.* There is no valid reason presented in this case why the Alabama statute should not be given full force and effect.

Accordingly, it is hereby

ORDERED that SVI Corporation's motion to dismiss is granted and that this action against SVI, 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.

DATED: January 10, 2012

SHERRY KLEIN HEITLER
J.S.C.