Matter of Kontogouris v A.O. Smith Water Prods. Inc.
2015 NY Slip Op 30876(U)
May 20, 2015
Sup Ct, New York County
Docket Number: 190397/2014
Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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VENETIA KONTOGOURIS, as Administratrix for the Estate of ZORAN DJOKIC, and VENETIA KONTOGOURIS, Individually,

Plaintiffs

-against-

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

Defendants

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Defendant United States Steel Corporation ("US Steel"), plaintiff's former employer, moves to dismiss the complaint against it under CPLR § 3211 for failure to state a cause of action based on New York State's Workers' Compensation Law. Defendant asserts that plaintiff's sole and exclusive remedy against US Steel is workers' compensation benefits and not a common law action, citing Section 53 of the New York State Workers' Compensation Law. US Steel also asserts that discovery was stayed when it filed this motion, and CPLR § 3407 is inapplicable to plaintiff Zoran Djokic (plaintiff) because he died on December 14, 2014.[1] US Steel also seeks to adjourn all depositions if the court grants its motion to dismiss or, if the depositions proceed, defendant argues they should be held inadmissible against it.

Plaintiffs oppose the motion and concede that if New York law is applied, US Steel's motion would be granted, as plaintiff would be barred by New York's Workers' Compensation Law.

[1]CPLR § 3407 provides for expedited discovery for terminally ill patients.

However, plaintiffs assert that under the Court of Appeals' choice of law analysis in *Neumeier v Kuehner* (31 NY2d 121 [1972]), it is Pennsylvania's Workers' Compensation Law that applies.[2] Plaintiffs allege that US Steel both engaged in wrongful conduct in Pennsylvania and is domiciled there. Pursuant to the plain language of Section 301(c)(2) of Pennsylvania's Workers' Compensation Law, an occupational disease which first manifests more than 300 weeks after the last occupational exposure to the hazards of the disease does not fall within the definition of injury set forth in Section 301(c)(2) (see *Tooey v AK Steel Corp*, 81 A3d 851 [Pa 2013]). Therefore, under such circumstances, the exclusivity provision of Section 303(a) does not preclude an employee from seeking recovery for such a disease through a common law action against an employer.[3] In reply, defendant does not contest that a conflict exists between New York's and Pennsylvania's law or that the instant action may proceed if Pennsylvania's law applies. However, defendant asserts that under a *Neumeier*, New York law applies. US Steel argues that the second *Neumeier* prong does not apply because the local law (Pennsylvania) does not favor the domiciliary US Steel. Rather, it is the third *Neumeier* prong which applies. Defendant argues that there will be "great uncertainty for litigants" and "dangerous precedent" if Pennsylvania's law is applied, and therefore, US Steel's motion must be granted. The danger, US Steel argues, results from plaintiffs suing in New York, and serving a

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[2]Plaintiffs also cite *Chrabas v Green Indus.* 273 AD2d 863 [4th Dept 2000]), where the court applied New York law because plaintiffs were exposed to asbestos while residents of New York, even though they were Florida residents when diagnosed, when they died and when the lawsuit was filed, and even though the defendant was a Delaware Corporation with a principal place of business in Ohio.

[3]Both sides agree that the issue of one of "loss-allocation." New York law distinguishes between conduct regulating rules, and loss-allocating rules (*Elson v Defren*, 283 AD2d 109, 115 [1st Dept 2001]).

complaint which refers only to New York law.[4] Thus, "[t]his Court should limit its analysis to the Complaint filed in this Court and the allegations contained therein" (Reply ¶ 7). Defendant however, cites no law which provides that a plaintiff must mention, in a complaint, the state laws which apply. Defendant also cites its concern that plaintiffs are "forum shopping."

At oral argument, plaintiffs retreated from their argument that the second prong applied to this case, conceding that the third prong should be applied. The court also asked for further letter briefs (submitted April 21, 2015) after defendant orally argued (for the first time) that applying New York Workers' Compensation Law would advance New York's "substantive law purposes" (*Neumeier* (31 NY2d at 128) by encouraging employers to voluntarily pay into New York's system in order to obtain the law's protections. At argument, the court also queried which state's substantive law is referenced in the *Neumeier* case. Both sides responded that one looks to the state in which the lawsuit was filed. Upon review, however, plaintiffs assert that "[u]pon further research, it appears that . . . the language just quoted refers to the 'substantive law purposes' not of the forum state alone, but of both the forum and the *lex loci* jurisdiction." [5]

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[4]The amended complaint includes boilerplate which only mentions New York State when referring defendant who "was and is a duly organized domestic corporation doing business within the State of New York and/or should have expected its acts to have consequence within the State of New York."

[5]After not disputing plaintiffs' argument that Pennsylvania's law would not bar an action such as this one if its was applied, defendant impermissibly, for the first time in its letter brief, propounds three reasons why plaintiff would be precluded from filing a worker's compensation claim in Pennsylvania (pages 1-3). Also, for the fist time, US Steel argues that "New York has a less-restrictive statutory scheme under which plaintiffs could file a claim for compensation" (page 6). Further, US Steel maintains that plaintiff can still file a claim in New York - - but against a different employer, non-party Coldwell Banker (page 3). Citing Workers' Compensation § 44-a, defendant maintains that Coldwell Banker is the "employer in whose employment an employee was last exposed to an injurious dust hazard." However, plaintiff has not alleged that Coldwell Banker has caused him any injury. These new arguments are non-

Discussion

The motion is denied as New York's Workers' Compensation Law does not bar this action against US Steel.

The parties do not dispute that plaintiff was a New York resident when diagnosed with mesothelioma in September 2014 and when he filed the amended complaint against US Steel in January, 2015.[6] The parties do not dispute that plaintiff worked for US Steel in Pennsylvania in the summers from 1965 through 1968 (and therefore, alleges exposure there). Plaintiff also asserts that when he worked for defendant, he resided in New Jersey. US Steel is a Delaware corporation. The parties do not dispute that defendant's principal place of business is Pittsburgh Pennsylvania. Nor do they dispute that for choice of law purposes, US Steel is a domiciliary in Pennsylvania (*see Elson* 283 AD2d at 115, *supra).*[7] It is undisputed that US Steel is self-insured in New York for workers' compensation obligations and has paid assessments to New York.

Neumeier (31 NY2d 121 [1972]) (which involved an automobile accident), delineates the following guidelines for choice of law analysis:

> 1. If the parties are domiciled in the same state and the car is registered in the same state, the law of the state controls.

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responsive and are disregarded. Defendant's responsive argument begins on the middle of page 4 starting with the sentence "New York Workers' Compensation Law is recognized as substantive law."

[6]Prior to the diagnosis, plaintiff had lab tests done in a Connecticut walk-in clinic and the test results, which indicated high CRP levels, led plaintiff to see doctors in New York.

[7]Although defendant did not concede that it was a Pennsylvania domiciliary, it assumed "arguendo" that it was. To the extent that defendant believed that it was not a Pennsylvania domiciliary, it was incumbent on US Steel to explain its reasons for disagreement with plaintiffs' argument that it was.

> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not -- in the absence of special circumstances -- be permitted to interpose the law of his state as a defense.
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> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.

(*Neumeier*, 31 NY2d at 128).

Cooney v Osgood Mach. (81 NY2d 66 [1993]) further explores the third prong of *Neumeier* rule which applies in split domicile cases such as this one, and is cited by both sides. *Cooney* applied Missouri's Workers' Compensation Law, instead of New York's Workers' Compensation Law, where the plaintiff received workers' compensation benefits from his employer under Missouri law. Missouri law did not permit a contribution claim against a Missouri employer, but New York's law did. *Cooney* reiterates that usually the governing law will be that of the place where the accident occurred, unless displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants (*id.* at 74). *Cooney* explains that *Neumeier's* third prong "generally uses the place of injury, or locus, as the determining factor" *(id).* Even though the lawsuit was brought in New York, the *Cooney* Court concluded that because the accident occurred in Missouri, Missouri law applied and was not displaced.

As noted by *Neumeier* and *Cooney*, in split domicile cases the law of the state where the

accident occurred generally governs unless it is displaced. Another state's substitute law will displace the law of the lex loci state only when it "will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants" (*Neumeier* (31 NY2d at 128). Although the interests of all the states involved must be examined, *Edwards v Erie Coach Lines Co.* (17 NY3d 306 [2011]) indicates that the relevant substantive law purposes which must be examined are that of the state whose interest would displace the interests of the accident state.[8]

US Steel has not demonstrated that New York has any interest in the application of this State's Workers' Compensation Law to this action. Acceptance of workers' compensation benefits are a factor in considering a state's interest (*see Roach v McGuire & Bennett*, 146 AD2d 89 [3d Dept 1989]). Here, because there is no evidence that plaintiff received workers' compensation benefits in any state for this alleged injury, defendant's argument is based on its assumption that plaintiff would have received New York benefits had he applied for them. However, US Steel has submitted no evidence that it pays into New York's system for those employees who did not work for US Steel

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[8] *Edwards*, 17 NY3d at 321, *supra* stated:

> Since the passenger in Neumeier was domiciled in Ontario, where the guest statute did not allow recovery, and the driver in New York, the third rule--the law of the place of the tort (i.e., Ontario)--would normally control. We saw no reason to apply the third rule's proviso since the wife "failed to show that [New York's] connection with the controversy was sufficient to justify displacing" lex loci delicti, the law of the place of the wrong . . . The wife did not show that ignoring Ontario's guest statute in a case "involv[ing] an Ontario-domiciled guest at the expense of a New Yorker . . . further[ed] the substantive law purposes of New York"; and "failure to apply Ontario's law would impair . . . the smooth working of the multi-state system [and] produce great uncertainty for litigants by sanctioning forum shopping and thereby allowing a party to select a forum [countenancing] a larger recovery than [that party's] own domicile."

in New York State.[9] US Steel's argument, that New York has an interest in encouraging employers to voluntarily contribute to New York's Workers' Compensation system, has no bearing here where plaintiff never worked for US Steel in New York State. Accordingly, "[i]t is undesirable to impose New York's Workers' Compensation Law on an employer who is domiciled in another State with respect to an injury which occurred in a third State . . . applying the locus jurisdiction's rule is most appropriate" (*Gleason v Holman Contract Warehouse*, 250 AD2d 339 [3d Dept 1998]; *see also Roach*, 146 AD2d 89, *supra* [Pennsylvania's law applied where an injured employee, a New York resident, received workers' compensation benefits from his Pennsylvania employer under Pennsylvania's law as a result of a Pennsylvania accident but also sought workers' compensation benefits under New York law; New York's interest was minimal and its interest in assuring that New York residents are compensated was satisfied under Pennsylvania's law]).

Conversely, Pennsylvania has a great interest in the application of its law as the state where the injury occurred (potentially, over a period of three years) and where plaintiff also worked for defendant in Pennsylvania throughout that time. Pennsylvania's Legislature has clearly and unequivocally expressed that State's interest in having its workers' compensation law apply to all industrial accidents that occur within its borders (Pa Stat Annot, tit 77, § 1). Further, because US Steel is domiciled in Pennsylvania, that state has a strong interest, "in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of that State's loss distribution rules" (*Schultz v Boy Scouts of Am.* (65 NY2d 189 [1985] [concluding that New York law, not New Jersey

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[9]The court takes judicial notice of the New York State Insurance Fund website regarding coverage for "Out-of State Employers." The site clarifies that New York requires "That out-of-state employers with employees working in New York State carry a full, statutory New York State workers' compensation insurance policy" for a situation where "an employee of the out- of-state employer is injured while working in New York State."

law applied under the third *Neumeier* prong despite the fact that injury occurred in both states]). The fact that New York is the forum state does not displace the normally applicable rule. That part of US Steel's motion regarding discovery is moot.

It is hereby

ORDERED that defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: May 20, 2015

HON. PETER H. MOULTON J.S.C.