

<b>Godfrey v A.O. Smith Water Prods.</b>
2018 NY Slip Op 30620(U)
March 30, 2018
Supreme Court, New York County
Docket Number: 190280/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

SHIRLEY JO GODFREY, Individually  
and as Executrix of the Estate of  
ROBERT C. GODFREY, Deceased,

Index No. 190280/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants

LUCY BILLINGS, J.S.C.:

Plaintiff sues defendant Bird Incorporated to recover damages for the decedent Robert Godfrey's exposure to asbestos between 1973 and 1978 in Massachusetts from cement siding shingles that Bird Incorporated purchased from nonparty Ruberoid Company and resold and that Godfrey's employer used. Bird Incorporated moves to dismiss the claims against it based on lack of personal jurisdiction over it. C.P.L.R. § 3211(a)(8). For the reasons explained below, the court denies Bird Incorporated's motion.

I. JURISDICTION UNDER C.P.L.R. § 301

Bird Incorporated relies on the affidavit dated October 27, 2017, of Michael Starczewski, associate general counsel to CertainTeed Corporation, of which Bird Incorporated was a wholly owned subsidiary, to contest personal jurisdiction and support dismissal. By not disclosing the duration of his employment, Starczewski fails to demonstrate his personal knowledge that Bird

Incorporated's principal place of business was outside New York in 2015, DeCanio v. Principal Bldg. Servs. Inc., 115 A.D.3d 579, 580 (1st Dep't 2013); Rodriguez v. Board of Educ. of the City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 253-54 (1st Dep't 2011); Casey v. New York El. & Elec. Corp., 82 A.D.3d 639, 640 (1st Dep't 2011), when Robert Godfrey commenced this action, to contest general jurisdiction under C.P.L.R. § 301. See Uzan v. Telsim Mobil Telekomunikasyon Hizmetleri A.C., 51 A.D.3d 476, 477 (1st Dep't 2008); Lancaster v. Colonial Motor Frgt. Line, 177 A.D.2d 152, 156-57 (1st Dep't 1992). Bird Incorporated's attempt to rectify this omission through Starczewski's reply affidavit, attesting to his employment with CertainTeed Corporation since 2003, is impermissible, as the duration of Starczewski's employment dating back before 2015 does not reply to anything in plaintiff's opposition regarding Bird Incorporated's principal place of business. See Enjoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Scafe v. Schindler El. Corp., 111 A.D.3d 556, 556 (1st Dep't 2013); Keneally v. 400 Fifth Realty LLC, 110 A.D.3d 624, 624 (1st Dep't 2013). See Young v. New York City Health & Hosps. Corp., 147 A.D.3d 509, 510 (1st Dep't 2017); 71 Clinton St. Apts. LLC v. 71 Clinton Inc., 114 A.D.3d 583, 584 (1st Dep't 2014). To demonstrate that Bird Incorporated was incorporated outside New York, Starczewski presents Bird Incorporated's uncertified

Restated Articles of Organization filed April 16, 1999, see C.P.L.R. §§ 4520, 4540(a) and (c); Raposo v. Robinson, 106 A.D.3d 593, 593 (1st Dep't 2013); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 283 A.D.2d 322, 323 (1st Dep't 2001), aff'd, 98 N.Y.2d 208 (2002); People v. Siorski, 280 A.D.2d 414, 414 (1st Dep't 2001), yet fails to lay a foundation for the document's admissibility as Bird Incorporated's business record, C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); 135 E. 57th St., LLC v. 57th St. Day Spa, LLC, 126 A.D.3d 471, 472 (1st Dep't 2015); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012), or as an official state document from a governmental website. LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011); Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dep't 2009).

## II. JURISDICTION UNDER C.P.L.R. § 302(a)

### A. Bird Incorporated's Contentions

To contest specific jurisdiction under C.P.L.R. § 302(a), Bird Incorporated relies on the absence of employees retained or property owned, leased, or operated by Bird Incorporated in New York during the period of Robert Godfrey's exposure to asbestos, 1973-78. Starczewski, counsel to CertainTeed Corporation, shows no operational connection with Bird Incorporated or between the two corporations to evince his personal knowledge that Bird Incorporated, distinct from its parent corporation, did not

retain employees or own, lease, or operate property in New York, let alone during or leading up to 1973-78. Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 253-54. Insofar as Starczewski attests that Bird Incorporated does not currently retain employees or own, lease, or operate property in New York, he does not attest and is incompetent to attest that Bird Incorporated did not retain employees for the transaction of business in New York during or leading up to 1973-78. Starczewski's reply affidavit does not remedy his lack of personal knowledge regarding Bird Incorporated's operations. Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 253-54.

Insofar as Starczewski's affidavits may be interpreted as referring to the period of Godfrey's exposure to asbestos, he relies on Bird Incorporated's documents relating to that period. Even though those documents may be admissible as ancient documents, Estate of Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2d Dep't 2008); Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868 (3d Dep't 1999), Starczewski neither presents them nor identifies them as Bird Incorporated's documents relating to the relevant period. His recitation of their contents is hearsay and "not an acceptable substitute" for the documents themselves. People v. Joseph, 86 N.Y.2d 565, 570 (1995). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51

A.D.3d 513, 515 (1st Dep't 2008).

While Godfrey's testimony establishes his exposure to Bird Incorporated's asbestos siding only in Massachusetts, Bird Incorporated never addresses where it was, whether it was in New York, when it admittedly purchased its asbestos siding from Ruberoid Company, which it admits was the sole source of cement siding shingles that it sold during their contractual relationship. Nor does it address where it was when it admittedly resold the siding used by Godfrey's employer. Absent evidence where Bird Incorporated's buyers and sellers were when they purchased, marketed, or resold its asbestos siding that then was purchased and used by Godfrey's employer, Bird Incorporated fails to negate such a transaction of business in New York that would confer jurisdiction. See C.P.L.R. § 302(a)(1); D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 298-99 (2017); Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 328 (2016); Matter of Stettiner, 148 A.D.3d 184, 192 (1st Dep't 2017); C. Mahendra (NY), LLC v. National Gold & Diamond Ctr., Inc., 125 A.D.3d 454, 457-58 (1st Dep't 2015). Similarly, Starczewski does not demonstrate his personal knowledge of the business relationship between Bird Incorporated and Ruberoid Company from 1957 to 1967, nor present any document concerning such a relationship or negating it.

B. Plaintiff's Evidence

The 1957 document that instituted the contractual relationship between Bird Incorporated and Ruberoid Company,

presented by plaintiff, emanated from Bird Incorporated, which projected itself into New York commerce by proposing to Ruberoid Company in New York an agreement for Bird Incorporated to purchase its supply of asbestos siding from Ruberoid Company.

D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d at 298; Rushaid v. Pictet & Cie, 28 N.Y.3d at 326; First Manhattan Energy Corp. v. Meyer, 150 A.D.3d 521, 522 (1st Dep't 2017). Bird Incorporated requested that Ruberoid Company in New York execute the contract and return it to Bird Incorporated in Massachusetts. According to the contract, which Bird Incorporated does not dispute, Ruberoid Company approved the proposal and executed the contract in New York. The proposal also refers to prior "various discussions and correspondence," at unidentified locations, but inferably at one of the two entities' locations, including Ruberoid's in New York. Aff. of Seth A. Dymond Ex. A, at 1; Supp. Aff. of Michael T. Starczewski (Reply Aff. of Lisa Pascarella Ex. C) Ex. 1, at 1. See FIA Leveraged Fund Ltd. v. Grant Thornton LLP, 150 A.D.3d 492, 494 (1st Dep't 2017); Wilson v. Dantas, 128 A.D.3d 176, 182-83 (1st Dep't 2015), aff'd on other grounds, 29 N.Y.3d 1051 (2017); C. Mahendra (NY), LLC v. National Gold & Diamond Ctr., Inc., 125 A.D.3d at 456; New Media Holding Co. LLC v. Kagalovsky, 97 A.D.3d 463, 464 (1st Dep't 2012).

At minimum, plaintiff has shown that activities associated with the contract occurred in New York, even if not precisely which activities or whether its performance occurred in New York,

and Bird Incorporated has not shown that no such activities occurred here. Because Bird Incorporated was purchasing its supply of cement siding shingles through this contract, its relationship with Ruberoid Company in New York was ongoing, to adjust for changing prices, freight charges, and procedures for payments, which Bird Incorporated made to New York. Moreover, since all the asbestos siding to which Robert Godfrey was exposed derived from this transaction of business, there is a sufficient connection between the contract and his claims to support jurisdiction under C.P.L.R. § 302(a)(1). Even though plaintiff admits that Godfrey was injured by the asbestos siding only in Massachusetts, his claim need not have arisen in New York to confer jurisdiction under § 302(a)(1); injury in New York would confer jurisdiction under § 302(a)(2), Invar Intl., Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi, 86 A.D.3d 404, 405 (1st Dep't 2011); CIBC Mellon Trust Co. v. HSBC Guyerzellar Bank AG, 56 A.D.3d 307, 308-309 (1st Dep't 2008); his claim need only arise from a transaction of business in New York. C.P.L.R. § 302(a)(1); D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d at 299; Rushaid v. Pictet & Cie, 28 N.Y.3d at 330.

Regarding the location of Bird Incorporated's buyers and sellers when they purchased from Ruberoid Company, marketed, or resold the asbestos siding, the 1957 contract does not limit Ruberoid Company's shipments to destinations outside New York:

Ruberoid will ship such Asbestos products with full freight allowed to any regularly established Bird Asphalt Roofing

plant, and to Bird warehouses where their Asphalt Roofing products are stocked, at Jersey City, New Jersey, or any other point where Bird maintains a warehouse for their Asphalt Roofing products . . . in the 37 states east of the Rockies.

Dymond Aff. Ex. A, at 1; Starczewski Supp. Aff. (Pascarella Reply Aff. Ex. C) Ex. 1, at 1 (emphases added).

C. Termination of the Contract

Again, only in reply does Bird Incorporated present a 1967 document to demonstrate the termination of Bird Incorporated's contract with Ruberoid Company, suggesting that the asbestos siding Robert Godfrey encountered beginning in 1973 could not have derived from transactions six or more years earlier. Although Bird Incorporated attempts to justify its belated production of this document as a reply to plaintiff's production of the 1957 contract, Starczewski's original affidavit referred to the 1967 termination of the contract, but unjustifiably failed to present the actual evidence.

Moreover, while this document also might be admissible as an ancient document without further foundation, Estate of Essig v. 5670 58 St. Holding Corp., 50 A.D.3d at 949; Szalkowski v. Asbestospray Corp., 259 A.D.2d at 868, nothing in it identifies it as Bird Incorporated's document, rather than a document from another entity altogether. Starczewski attests that he is "aware of the corporate records, record keeping practices and record retention of Bird," Supp. Starczewski Aff. (Pascarella Reply Aff. Ex. C) ¶ 5, and that the document is part of "the original business records of Bird which were made at or near the time of godfrey.193

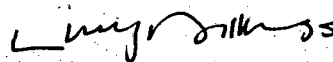
the events recorded therein and kept in the regular course of Bird's business." Id. ¶ 7. Yet he never demonstrates the familiarity with Bird Incorporated's record keeping practices in 1957 necessary to establish his competence to lay a foundation for its business records 46 years before his employment with the corporation. B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d at 403 n.2; Cintron v. Calogero, 99 A.D.3d 456, 458 (1st Dep't 2012); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d at 253-54; Castro v. New York Univ., 5 A.D.3d 135, 136 (1st Dep't 2004). See People v. Nashal, 130 A.D.3d 480, 481 (1st Dep't 2015); People v. King, 102 A.D.3d 434, 434-35 (1st Dep't 2013). Nor does Starczewski remedy the bare fact that, even if this 1967 document is a business record, it simply does not reflect that Bird Incorporated, rather than another entity, was terminating Bird Incorporated's relationship with Ruberoid Company,

In any event, Starczewski's reply affidavit also attests that Bird Incorporated maintained the asbestos siding purchased from Ruberoid Company in Bird Incorporated's Massachusetts warehouse inventory. This inventory does not confer jurisdiction in New York, but demonstrates that Godfrey's exposure in Massachusetts during 1973-78 well may have derived from the residual distribution or wholesale or retail markets of Bird Incorporated's purchases from New York. Taylor v. A.C. & S., Inc., 306 A.D.2d 202, 202-203 (1st Dep't 2003).

III. CONCLUSION

In sum, while plaintiff claims neither the manufacture in New York of the asbestos siding to which Richard Godfrey was exposed, nor his exposure there, plaintiff does show activities in New York associated with the purchase of that asbestos siding from its manufacturer and the resale of that asbestos siding purchased in New York for use by Godfrey's employer. Significant among these activities was Bird Incorporated affirmatively reaching out to initiate the contract for ongoing purchases in New York and consummating the contract there. Nothing in either of Starczewski's affidavits or the 1967 correspondence demonstrates that Bird Incorporated's only facilities that dealt with these purchases and sales were colocated with its warehouses in New Jersey, Massachusetts, or elsewhere outside New York. Therefore the court denies Bird Incorporated's motion to dismiss the claims against Bird Incorporated based on lack of personal jurisdiction over this defendant. C.P.L.R. § 3211(a)(8).

DATED: March 30, 2018



LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.