

Matter of Gibson v Air & Liquid Sys. Corp.
2018 NY Slip Op 31324(U)
June 25, 2018
Supreme Court, New York County
Docket Number: 190187/15
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13

Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION:

KRISTIAN NICHOLE GIBSON, as Executrix for the Estate of WAYNE GIBSON, Plaintiffs

INDEX NO. 190187 / 15

MOTION DATE 06-13 -2018

- Against-

AIR & LIQUID SYSTEMS CORPORATION, as successor by merger to BUFFALO PUMPS, INC., et al., Defendants.

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion by defendant MACK TRUCKS, INC., to dismiss for lack of personal jurisdiction.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4,</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that defendant Mack Trucks, Inc.'s motion to dismiss Plaintiff's claims and all cross-claims asserted against it, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8), is denied. The personal jurisdiction defense was not raised in the defendant's answer therefore it has been waived.

Plaintiff's decedent Wayne Gibson was diagnosed with and died from Mesothelioma, which is alleged to have resulted from his exposure to asbestos. It is alleged that Plaintiff's decedent was exposed to asbestos when he came in contact with defendant Mack Trucks, Inc., and Kenworth Trucks, Inc.'s (hereinafter "Mack" and "Kenworth") asbestos containing brake pads, clutches and gaskets, when he worked as a driver for a trucking company called "Russell Transfer" in the State of Virginia from 1968 to 1985 . Plaintiff alleges that the injuries were caused when, on a few occasions, its decedent helped the company's mechanics and in his presence they removed and replaced brake pads, clutches and gaskets on Mack and Kenworth Trucks.

Mr. Gibson at all relevant times resided outside the state of New York and was exposed to asbestos outside the state of New York, except for a brief six month period when he was serving in the United States Navy between 1963 and 1968. Mack Trucks, Inc., is a Pennsylvania Corporation with its principal place of business in Greensboro

North Carolina. Mack's Vehicle assembly plant is located in Macungie Pennsylvania and its engine assembly plant is located in Hagerstown Maryland. The only alleged exposure Mr. Gibson had with a product made or sold by Mack occurred in the course of his duties as a driver with Russell Transfer, a company that operated in the State of Virginia. Mr. Gibson did not know, and could not tell where Russell Transfer's Mack Trucks, or the replacement parts they used were purchased.

Plaintiff commenced this action on June 16, 2015 against various defendants, including defendant Mack Trucks, Inc., to recover for the injuries Wayne Gibson sustained. Mack filed an acknowledgment of Plaintiff's complaint on July 10, 2015. Mack's acknowledgment cited its standard Answer denying all material allegations. Mack's Standard Answer did not contain an affirmative defense of lack of personal jurisdiction. On July 29, 2015 plaintiff served Amended Responses to defendants' Standard Liability interrogatories delineating the basic facts of this case.

Mack Trucks, Inc., does not own any land or lease any offices, own any dealerships, factory branches or service centers, or have any employees in the State of New York. It is a foreign corporation registered to do business in the State of New York and has appointed the New York State Secretary of State as its agent in New York for the service of process.

Defendant Mack Trucks, Inc., makes this motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). It argues that this court does not have personal jurisdiction over it because Wayne Gibson's exposures occurred outside of the State of New York, Mr. Gibson did not reside in the State of New York, Defendant Mack is not incorporated in New York and does not maintain its principal place of business here, therefore there is no general jurisdiction. Furthermore, Plaintiff's decedent's claims do not arise from any of defendant Mack Truck, Inc.'s New York transactions, and Mack Trucks Inc., did not commit a tortious act within the State of New York or without the state of New York that caused an injury to person or property within the State of New York, therefore there is no specific jurisdiction. (see CPLR § 302(a)(1), (2) and (3)).

In support of its motion defendant Mack Trucks, Inc., cites to Daimler v. Bauman, (134 S. Ct. 746, [2014] where the supreme court Reversed the Ninth Circuit Court of Appeals and held that due process did not permit exercise of general personal jurisdiction over a German corporation in California based on the services performed in California by its United States Subsidiary, when neither the parent German corporation or the Subsidiary were incorporated in California or had their principal place of business there. General jurisdiction over a corporation can only be exercised where the corporation is at home. Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business.

Defendant Mack Trucks, Inc., also argues that there is no specific jurisdiction over it. In support of its motion defendant Mack Trucks, Inc., cites to the decision in Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County, et al, (137 S.Ct. 1773 [June 19, 2017]), where the United States Supreme court dismissed the claims of non-California residents in a products liability action for lack of specific personal jurisdiction, where the non-residents did not suffer a harm in California and all the conduct giving rise to their claims occurred elsewhere.

In sum defendant Mack Trucks, Inc., argues that this court lacks personal general and specific jurisdiction over it and therefore the claims should be dismissed.

Plaintiff opposes the motion on the ground that defendant failed to assert the affirmative defense of lack of personal jurisdiction in its answer, therefore it waived the jurisdictional defense. Plaintiff also argues that there is personal jurisdiction over the defendant under the New York State's long-arm statute. Finally it argues that defendant has consented to jurisdiction when it, being a foreign corporation, registered to do business in the State of New York and appointed the Secretary of State as an agent for the service of Process.

General and Specific Jurisdiction:

“ General Jurisdiction permits a court to adjudicate any cause of action against the defendant, wherever arising, and whoever the plaintiff (Lebron v. Encarnacion, 253 F.Supp3d 513 [E.D.N.Y. 2017]). “ For a corporation the paradigm forum for general jurisdiction, that is the place where the corporation is at home, is the place of incorporation and the principal place of business (Daimler AG v. Bauman, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; Goodyear Dunlop Tires Operations, S.A., v. Brown, 564 U.S. 915, 131 S.Ct. 2846, 180 L.Ed2d 796 [2011]; BNSF Railway Co., v. Tyrrell, 137 S.Ct. 1549 [2017]).”

“For the court to exercise specific jurisdiction over a defendant the suit must arise out of or relate to the defendant's contacts with the forum. Specific Jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction. When no such connection exists specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. What is needed is a connection between the forum and the specific claims at issue (Bristol-Myers Squibb Co., v. Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017]).” “It is the defendant's conduct that must form the necessary connection with the forum state that is the basis for its jurisdiction over it. The mere fact that this conduct affects a plaintiff with connections with a foreign state does not suffice to authorize jurisdiction (See Bristol Myers Squibb Co., Supra; Walden v. Fiore, 134 S. Ct. 1115 [2014]).”

This court could not exercise General Personal jurisdiction over the defendant Mack Trucks, Inc., because it is not incorporated, nor does it have its principal place of business in the State of New York. Defendant Mack Trucks, Inc., is a Pennsylvania corporation, with its principal place of business in the State of North Carolina. This court could not exercise Specific Personal jurisdiction under CPLR § 302(a)(1) because there is no articulable nexus or substantial relationship between its in state conduct and the claims asserted. This section of the Statute is triggered when a defendant transacts business in New York and the cause of action asserted arises from that activity. This court could not exercise personal specific jurisdiction under CPLR § 302(a)(2) because Defendant Mack Trucks, Inc., has not committed a tortious act within the State. All of the alleged exposures to defendant's product occurred in the State of Virginia. Exercise of specific jurisdiction under this section requires a defendant to be physically present in New York.

“CPLR §302(a)(3) which allows for jurisdiction over an out of state defendant who causes personal injury in New York by committing a tortious act elsewhere if it reasonably expects its act to have consequences in this state and derives substantial revenue from interstate or international commerce , was adopted for the purpose of broadening New York’s long-arm jurisdiction so as to include non-residents who cause tortious injury in the state by an act or omission outside the state.... The amendment was not intended to burden unfairly non-residents whose connection with the State is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York (Lebron v. Encarnacion, Supra).

More is required than just an injury in New York. The plaintiff must establish that the defendant either “(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce”(See CPLR § 302(a)(3)).

Defendant Mack Trucks, Inc., argues that CPLR § 302(a)(3) is inapplicable because the injury did not occur in the state of New York. It argues that Plaintiff Wayne Gibson was exposed to their product in Virginia, that Virginia is the situs of the injury. Since the exposure and the injury- the original event- all took place outside of the State of New York, plaintiff is not and has never been a resident of the State of New York, the New York court could not exercise jurisdiction (see Bristol-Myers Squibb v. Superior Court of California, San Francisco, Supra; BNSF Railway Co., v. Tyrrell, Supra; McGowan v. Smith, Supra; Lebron v. Encarnacion, Supra).

In BNSF Railway Co., v. Tyrrell (137 S.Ct. 1549 [May 30, 2017]) the United States Supreme Court dismissed the claim for lack of General personal jurisdiction of non-Montana residents , who were not injured in Montana, where defendant Railroad was not incorporated in Montana, nor maintained its principal place of business there. In McGowan v. Smith (52 N.Y.2d 268, 419 N.E.2d 321, 437 N.Y.S.2d 643 [1981]) the New York Court of Appeals affirmed the dismissal of the claims brought by a New York resident plaintiff , who was injured in Canada by the explosion of a fondue pot plaintiff had purchased in New York State, against a Japanese trading company.

The court in McGowan v. Smith, supra, held that “(1) several visits which representatives of trading company made to New York for purposes of general marketing research and ascertaining what type of products might be salable in New York could not form the predicate for exercise of in personam jurisdiction over trading company, and (2) injury did not occur in New York so as to give New York court jurisdiction on theory that the company had committed a tortious act outside of New York which resulted in injury in New York.”

In Bookstaver v. Sainfort (10 A.D.3d 514, 781 N.Y.S.2d 522 [1st. Dept. 2014]) the First Department reversed Supreme Court and dismissed the action finding the court had no personal jurisdiction over defendant where the underlying accident occurred in New Jersey, and defendant lived in New Jersey at the time of the accident and did not live in New York at any time after the accident. Additionally, defendant did not own property in New York, nor conduct business or derive business revenue in New York. The court Held that “in order to satisfy the constitutional requirement that there be a

jurisdictional basis for a court to have the power, or reach, over a party, so as to enforce judicial decrees, there must be a constitutionally adequate connection between the defendant, the State and the action, and there must be an articulable nexus between the business transacted and the cause of action sued upon.”

Plaintiff Wayne Gibson's exposure to asbestos occurred in the State of Virginia, Mr. Gibson is not now and has never been a New York resident. Defendant Mack Trucks, Inc., is a Pennsylvania Corporation with its principal place of business in North Carolina. It does not own any property, lease any property, have any plants or any employees in New York State. Defendant Mack Trucks, Inc., is not at home in this State, therefore this court could not, consistent with due process, exercise jurisdiction over this defendant.

Foreign Corporation registered to do business in New York:

Plaintiff argues that defendant Mack Trucks, Inc., has consented to the jurisdiction of the courts in the State of New York, when it registered with the Secretary of State as a foreign corporation and appointed the New York State Secretary of State as an agent for the service of process. Plaintiff cites to a number of decisions all of which pre-date Daimler, that hold that “ a foreign corporation authorized to do business in New York consents to personal jurisdiction in New York.” (see Augsbury Corp., v. Petrokey Corp., 97 A.D.2d, 173, 470 N.Y.S.2d 787 [3rd. Dept. 1983]; Doubet LLC, v. Trustees of Columbia University, 99 A.D.3d 433, 952 N.Y.S.2d 16 [1st. Dept. 2012]; Flame S.A., v. Worldlink International Holding, LTD., 107 A.D.3d 436, 967 N.Y.S.2d 328 [1st. Dept. 2013]).

However, Daimler has changed the law for exercising general jurisdiction over a defendant. After Daimler general jurisdiction can only be exercised where the defendant corporation is at home, that is its place of incorporation or its principal place of business (see Daimler v. Bauman, 134 S.Ct. 746, 187 L.Ed2d 624 [2014]). In Gucci America, Inc., v. Weixing Li, (768 F.3d 122 [2nd. Circuit 2014]) the Second Circuit Court of Appeals stated that “in Daimler the Supreme Court addressed for the first time the question whether, consistent with due process, a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary.... Aside from an exceptional case, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company’s place of incorporation or its principal place of business. In so holding, the court expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch in the forum.” “The Second Circuit cautioned against adopting an expansive view of general jurisdiction after Daimler” (see Chatwal Hotels & Resorts LLC., v. Dollywood Co., 90 F. Supp.3d 97 [S.D.N.Y. 2015]).

Federal District Courts in looking at this question post Daimler have come to the conclusion that Daimler rendered this method of acquiring personal jurisdiction outmoded and inapplicable. The mere fact a [corporation] is registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business. The Solicitation of business in New York without more substantial activities within the forum is insufficient to find a corporation’s presence in the forum (see Chatwal Hotels & Resorts, LLC., v. Dollywood Co., 90 F. Supp.3d 97 [S.D.N.Y. 2015]; Wilderness USA, Inc., v. DeAngelo Brothers,

LLC., 265 F.Supp.3d 301 [W.D.N.Y. 2017];Minholz v. Lockheed Martin Corporation, 227 F.Supp.3d 249 [N.D.N.Y. 2016]).

The mere fact defendant Mack Trucks, Inc., registered to do business in New York, after Daimler, is insufficient to confer general jurisdiction in New York over the corporation.

Waiver of Jurisdictional defense:

CPLR § 3211(a)(8) allows a party to move to dismiss one or more causes of action asserted against it on the grounds that the court has no jurisdiction over the person of the defendant. The objection is waived if it is not raised in a responsive pleading or if a party, having raised the objection in a responsive pleading, moves under any of the grounds set forth under subdivision (a) without raising an objection to personal jurisdiction. The CPLR is otherwise silent and does not impose a time limit on a defendant to move to dismiss under CPLR § 3211(a)(8). If a defendant makes no CPLR 3211 motion on any ground, then it can safely include the jurisdictional defense in the answer without fear of waiver (McKinney's Consolidated laws Annotated, Practice Commentaries C3211:5 waiving objections contained in paragraphs 8 or 9 P. 92).

In Insurance Corp., of Ireland Ltd., v. Compagnie des Bauxites de Guinee (456 U.S. 694, 102 S.Ct. 2099, 72 L. Ed2d 492 [1982]), in affirming the District Court's imposition of sanction on the defendant establishing personal jurisdiction, the United States Supreme Court held that "the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest. Because it protects an individual interest, it may be waived, or for various reasons a defendant may be estopped from raising the issue." A personal Jurisdiction defense may be lost by failure to assert it seasonably or by submission through conduct (Neirbo Co., v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 [1939]; Subway International v. Bletas, 512 Fed.Appx 82 [2nd. Cir. 2013];Braman v. Braman 234 A.D. 164, 258 N.Y.S. 181 [1st. Dept. 1932] personal jurisdiction waived by defending case on merits).

A personal jurisdiction defense has been lost where the defendants "participated in lengthy discovery, filed various motions and opposed a number of motions and fully participated in litigation of the merits for over two-and-a half years without actively contesting personal jurisdiction"(Continental Bank N.A., v. Meyer, 10 F.3d 1293 [7th Cir. 1993]), Or where the defendant has participated in extensive pre-trial proceedings but never moved to dismiss for lack of personal jurisdiction despite clear opportunities to do so during the four-year interval after filing its answer. These circumstances establish a forfeiture of the personal jurisdiction defense (see Hamilton v. Atlas Turner, Inc., 197 F.3d 58 [2nd. Cir 1999]).

In Calloway v. National Services Industries, Inc., (93 A.D.2d 734, 461 N.Y.S.2d 280 [1st. Dept. 1983]) the Appellate Division First Department reversed Supreme Court's finding that defendant waived the personal jurisdiction defense by litigating the case on the merits for six years and making seven motions to compel discovery. The court held that participation in the defense of an action does not waive a defense of lack of personal jurisdiction contained in the answer. "The practical effect of asserting the defense by answer is to put off resolution of the objection until the trial(Colbert v. International Security Bureau, Inc., 79 A.D.2d 448, 437 N.Y.S.2d 360)... The remedy

thereafter lay in plaintiff's hands...to bring the issue to prompt adjudication by moving to dismiss the defense." The personal Jurisdiction defense asserted in the answer is not waived by litigating the case on the merits and can be asserted at any time up to the time of trial.

"However, regardless of how meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer motion to dismiss pursuant to CPLR 3211, is waived. By appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendant conferred jurisdiction upon the court and waived the defense (McGowan v. Hoffmeister, 15 A.D.3d 297, 792 N.Y.S.2d 381 [1st. Dept. 2005]).

This court finds that defendant Mack Trucks, Inc., has waived or forfeited its personal jurisdiction defense.

Accordingly, for the foregoing stated reasons it is ORDERED that the motion to dismiss the complaint and all cross-claims asserted against defendant Mack Trucks, Inc., for lack of personal jurisdiction, is denied.

Enter: **MANUEL J. MENDEZ**
J.S.C.

Dated: June 25, 2018



Manuel J. Mendez
J.S.C.

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