

Matter of Hammock v Avon Prods., Inc.

2018 NY Slip Op 31782(U)

July 27, 2018

Supreme Court, New York County

Docket Number: 190215/2016

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
DAVID HAMMOCK individually and as Administrator
to the Estate of SANDRA HAMMOCK,
Plaintiffs,

INDEX NO. 190215/2016
MOTION DATE 06/20/2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

- against -

AVON PRODUCTS, INC., et al,
Defendants.

The following papers, numbered 1 to 8 were read on Johnson & Johnson, Inc. and Johnson & Johnson Consumer Inc.'s motion to dismiss the Complaint:

Table with 2 columns: PAPERS NUMBERED, 1-3, 4-6, 7-8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits
Cross-Motion: [] Yes [X] No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (incorrectly named as Johnson & Johnson, Inc., "JJCI") motion to dismiss Plaintiff's Second Amended Complaint ("Amended Complaint") and all Cross-Claims against it pursuant to CPLR §3211(a)(8), is granted.

Plaintiff's deceased wife Sandra Hammock, a Virginia resident her entire life, was diagnosed with mesothelioma in 2013 and passed away on August 17, 2016 (Opposition Papers Ex. 3). Plaintiff alleges Mrs. Hammock was exposed to asbestos in a variety of ways. Plaintiff alleges exposure to Johnson & Johnson's asbestos-containing Baby Powder when using the product from 1963 through 1972, and 1975 through 1980 on her three children from birth until they were four years old, and from 1977 through 2009 when she worked as a psychiatric aide and bathed residents (Id at Ex. 2). Plaintiff testified that Mrs. Hammock would apply the powder directly from the bottle on her children's bodies after every shower, and then clean up residual powder after each use (Id). While applying the powder, Mrs. Hammock would inhale powder that rose into the air (Id). The Plaintiff commenced this action on July 28, 2017 to recover for injuries resulting from Mrs. Hammock's exposure to asbestos.

Plaintiff sued Johnson & Johnson, a New Jersey holding company with its principal place of business in New Jersey (Affidavit of Tina French). Johnson & Johnson does not sell or manufacture any products (Id). Plaintiff also named "Johnson & Johnson, Inc." as a Defendant (Moving Papers Ex. A). This entity does not exist. However, JJCI would be the sole entity responsible for manufacturing and distributing Johnson & Johnson's Baby Powder during the subject time period (Affidavit of Laura A. Donnelly). JJCI is a subsidiary of Johnson & Johnson. JJCI is also a New Jersey Corporation with its principal place of business in New Jersey (Id). JJCI does not own any property in New York (Id). Furthermore, JJCI does not manufacture, research, develop, design, or test Johnson & Johnson's Baby Powder in New York (Id). Neither Johnson & Johnson nor JJCI are registered to do business in New York.

Johnson & Johnson and JJCI (hereinafter the "J&J Entities") move to dismiss Plaintiff's Amended Complaint and all Cross-Claims against them pursuant to CPLR §3211(a)(8) and CPLR §327(a). The J&J Entities contend that this

Court does not have personal jurisdiction over them because Mrs. Hammock's exposures occurred outside of the State of New York, Mrs. Hammock did not reside in the State of New York, Johnson & Johnson and JJCI are not incorporated in New York and do not maintain their principal places of business here, and therefore, there is no general jurisdiction. Furthermore, the J&J Entities contend that Plaintiff's claims do not arise from any of the J&J Entities New York transactions, and the J&J Entities 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 (CPLR §302[a][1], [2] and [3]). Finally, the J&J Entities contend that if this Court can exert personal jurisdiction over them, this action should still be dismissed due to *forum non conveniens*.

Plaintiff opposes the motion contending that this Court does have personal general jurisdiction and long-arm jurisdiction over the J&J Entities and that this Court should deny the J&J Entities attempt to dismiss this action on the grounds of *forum non conveniens*. The Plaintiff further contends that if personal jurisdiction over the J&J Entities cannot be established at this time, the motion should be denied to allow for jurisdictional discovery.

"On a motion to dismiss pursuant to CPLR §3211, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 729 NYS2d 425, 754 NE2d 184 [2001]). A motion to dismiss pursuant to CPLR §3211(a)(8) applies to lack of jurisdiction over the defendant. Jurisdiction over a non-domiciliary is governed by New York's general jurisdiction statute §301, and long-arm statute §302(a).

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v Klein, 35 AD2d 248, 315 NYS2d 695 [1st Dept. 1970]). However, in opposing a motion to dismiss, the plaintiff needs only to make a sufficient start by showing that its position is not frivolous (Peterson v Spartan Indus., Inc., 33 NY2d 463, 354 NYS2d 905, 310 NE2d 513 [1974]).

General 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 [EDNY 2017]). To demonstrate jurisdiction pursuant to CPLR §301, the plaintiff must show that the defendant's "affiliations with [New York] are so continuous and systematic as to render them essentially at home in" New York (Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S. Ct. 2846 [2011]; Daimler AG v Bauman, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014], Magdalena v Lins, 123 AD3d 600, 999 NYS2d 44 [1st Dept. 2014]). "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, *supra*). Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business (*Id*).

This Court cannot exercise general personal jurisdiction over Johnson & Johnson because it is not incorporated, nor does it have its principal place of business in the State of New York. Johnson & Johnson is a New Jersey corporation, with its principal place of business in the State of New Jersey. Plaintiff's contention that Johnson & Johnson subjected itself to general jurisdiction because of several isolated events that Johnson & Johnson was involved in (including industry meetings that Johnson & Johnson employees attended in the 1970s, four (4) letters sent from Johnson & Johnson representatives to New York-based scientists, and two statements made to the *New York Times*) [Opposition Memorandum of Law] is unavailing since only "continuous and systematic" contacts can establish general personal jurisdiction (Daimler AG, *supra*). Furthermore, the Plaintiff is unable to demonstrate "exceptional circumstances" for this Court to

exercise general personal jurisdiction over Johnson & Johnson.

Likewise, this Court is also not able to exercise General Personal jurisdiction over JJCI because it is not incorporated, nor does it have its principal place of business in the State of New York. JJCI is also a New Jersey corporation, with its principal place of business in the State of New Jersey. The Plaintiff does not allege or present evidence of any New York contacts on behalf of JJCI to demonstrate “exceptional circumstances” for this Court to exercise General Personal Jurisdiction over JJCI.

Specific Jurisdiction:

“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” (*Id*; Walden v Fiore, 134 S. Ct. 1115 [2014]).

With CPLR §302(a)’s long-arm statute, courts may exercise specific personal jurisdiction over a non-resident when it: “(1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state, ...; or (3) commits a tortious act without the state causing injury to person or property within the state, ..., if he (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, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the state” (CPLR §302[a]).

This court cannot exercise specific personal jurisdiction under CPLR §302(a)(1) because there is no articulable nexus or substantial relationship between the J&J Entities’ New York 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. The record before this Court establishes that the injuries asserted by the Plaintiffs did not arise from any of Johnson & Johnson’s activity within the state of New York. The Plaintiff admitted that the product at issue was purchased in Virginia.

This Court cannot exercise personal specific jurisdiction under CPLR §302(a)(2) because the J&J Entities have not committed a tortious act within the state of New York. All of the alleged exposures to JJCI’s Baby Powder 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, *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"(CPLR § 302[a][3]).

Plaintiff has failed to demonstrate "that discovery would uncover facts establishing" jurisdiction (Hardwick v Auriemma, 116 AD3d 465, 983 NYS2d 509 [1st Dept. 2014]). The J&J Entities are not "at home" in New York, and Mrs. Hammock did not purchase or use any product manufactured by JJCI in New York.

This court cannot exercise personal specific jurisdiction under CPLR §302(a)(3) because the injury did not occur in the State of New York. Mrs. Hammock was exposed to JJCI's Baby Powder in Virginia meaning that Virginia is the situs of the injury. Since the exposure and the injury- the original event- took place outside of the State of New York, Mrs. Hammock is not and has never been a resident of the State of New York, the New York courts cannot exercise jurisdiction (Bristol-Myers Squibb, *supra*; Lebron, *supra*).

Since this Court is unable to exercise personal jurisdiction over the J&J Entities, Plaintiff's Amended Complaint must be dismissed without the necessity to analyze whether the Amended Complaint should have been dismissed on grounds of *forum non conveniens*.

Accordingly, it is ORDERED, that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s (incorrectly named as Johnson & Johnson, Inc.) motion to dismiss Plaintiff's Second Amended Complaint and all Cross-Claims against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted, and it is further,

ORDERED, that Plaintiff's Second Amended Complaint and all Cross-Claims against Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (incorrectly named as Johnson & Johnson, Inc.) are severed and dismissed, and it is further,

ORDERED, that the Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (incorrectly named as Johnson & Johnson, Inc.) serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

Dated: July 27, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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