

Matter of Black v Brenntag N. Am.
2018 NY Slip Op 31871(U)
August 6, 2018
Supreme Court, New York County
Docket Number: 190016/2017
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

MARY BLACK and DAVID BLACK,
Plaintiffs,
- against -
BRENTAG NORTH AMERICA, et al,
Defendants.

INDEX NO. 190016/2017
MOTION DATE 06/20/2018
MOTION SEQ. NO. 0012
MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on Imerys Talc America, Inc. and Cyprus Amax Meinerals, Co.'s motion to dismiss the Complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers it is Ordered that defendants Imerys Talc America, Inc. (hereinafter individually "Imerys") and Cyprus Amax Minerals, Co.'s (hereinafter individually "CAMC") motion to dismiss Plaintiff's claims and all cross-claims asserted against them, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8), CPLR §301, CPLR § 302, and pursuant to CPLR §327(a) and CPLR § 3211 for forum non conveniens is denied.

Plaintiff Mary Black, a citizen of Florida, was diagnosed with mesothelioma in November of 2016. Plaintiffs allege Mrs. Black was exposed to asbestos in a variety of ways from the use of cosmetic talc products that included Colgate's Cashmere Bouquet, Johnson & Johnson's Baby Powder and Shower to Shower, Avon body powder and Coty face powder. Plaintiffs allege Mary Black was exposed to asbestos containing talc from approximately 1960 through 1973, and from 1973 through approximately 2012 to 2014. Mrs. Black has never had any contact with New York. She has lived and worked in various towns and cities in Kentucky (with no exposure), Iowa, and Florida (Opposition Papers, Exhs. 3, 4 and 5). The Plaintiffs commenced this action on January 12, 2017 to recover for injuries resulting from Mrs. Black's exposure to asbestos. Her husband, David Black asserts a claim for loss of consortium (Opposition Papers, Exh. 1).

Plaintiffs are non-residents and bring this action in New York to recover against the moving defendants for the injuries sustained. At all relevant times plaintiff Mary Black has resided in the State of Florida, which is where she purchased and used the products, where she was exposed, where the injury manifested itself, where she has received medical treatment and where her witnesses are located.

The moving defendants now move to dismiss the action pursuant to CPLR §3211 (a)(8) and § 327(a) for lack of personal jurisdiction and Forum non conveniens.

Defendant Imerys alleges that it is a Delaware Corporation with its principal place of business in California, it is not a New York resident, It has no offices in New York, nor does it own or lease property in New York, it is not registered to do business in New York, has no New York address or bank account, does not mine, manufacture, research,

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

develop, design or test talc or talcum powder in New York and has never sued anyone in New York.

Defendant CAMC alleges that it is a Delaware Corporation with its principal place of business in Arizona, it is not a New York resident, It has no offices in New York, nor does it own or lease property in New York, it is not registered to do business in New York, has no New York address or bank account, does not mine, manufacture, research, develop, design or test talc or talcum powder in New York and has never sued anyone in New York.

The moving defendants make this motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). They argue that this court does not have personal jurisdiction over them because Mary Black's exposures occurred outside of the State of New York, Ms. Black did not reside in the State of New York, the moving defendants are not incorporated in New York and do not maintain their principal place of business here, therefore there is no general jurisdiction. Furthermore, Plaintiffs' claims do not arise from any of the moving defendants New York transactions, and the moving defendants 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 their motion the moving defendants cite 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.

The moving defendants also argue that there is no specific jurisdiction over them. In support of their motion defendants cite 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 the moving defendants argue that this court lacks personal general and specific jurisdiction over them and therefore the claims should be dismissed.

If the court were to find that there is jurisdiction and denies the motion, the moving defendants argue that the action should be dismissed on the grounds of forum non conveniens as all the events alleged as the source of liability and all the witnesses are in Florida, therefore, New York is not a convenient forum.

Plaintiffs oppose the motion on the ground that there is personal jurisdiction over the moving defendants under New York State's long-arm statute. Plaintiffs allege that this court has jurisdiction over the moving defendants because they or their predecessors transacted business in the state to supply goods or services in the state and their actions gave rise to Mrs. Black's exposure. Plaintiffs allege that the moving defendants' supply of asbestos-contaminated talc to Avon and Kolmar in New York, directly contributed to their alleged injuries. Furthermore, plaintiffs allege that the moving defendants actively participated in numerous CTFA meetings in New York, engaging in Tortious conduct in New York that ultimately gave rise to this action. Plaintiffs also oppose dismissal on Forum non conveniens grounds arguing that their choice of forum should not be disturbed, the moving defendants have not shown they are inconvenienced by litigating in New York as key witnesses are located in New York which is the principal place of business of the other defendants and the facts that gave

rise to this litigation occurred in New York. Finally plaintiffs argue that dismissing the claim on Forum non conveniens will result in the splintering of this action.

“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 alleged fit within any cognizable legal theory” (Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y. 2d 409, 754 N.E. 2d 425, 729 N.Y.S. 2d 425 [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 CPLR §301, and the long-arm provisions of CPLR §302.

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v. Klein, 35 A.D. 2d 248, 315 N.Y.S. 2d 695 [1st Dept., 1970]). However, in opposing a motion to dismiss the plaintiff needs only to make a sufficient showing that its position is not frivolous (Peterson v. Spartan Industries, Inc., 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [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 [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]).” 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.

This court could not exercise General Personal jurisdiction over the defendants Imerys or CAMC because they are not incorporated, nor do they have their principal place of business in the State of New York. Defendant Imerys is a Delaware corporation, with its principal place of business in the State of California. Defendant CAMC is a Delaware Corporation, with its principal place of business in the State of Arizona.

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 (See Bristol Myers Squibb Co., Supra; Walden v. Fiore, 134 S. Ct. 1115 [2014]).” “To justify specific personal jurisdiction over a non-resident defendant, a plaintiff must show that the claim arises from or relates to the defendant’s contacts in the forum state” (In re MTBE Products Liability Litigation, 399 F.Supp2d 325 [S.D.N.Y. 2005]).

“Application of New York’s long-arm statute requires that (1) defendant has purposefully availed itself of the privilege of conducting activities within the state by either transacting business in New York or contracting anywhere to supply goods or

services in New York, and (2) the claim arises from that business transaction or from the contract to provide goods or services". (McKinney's CPLR 302(a)(1)).

"Jurisdiction is proper under the transacting of business provision of New York's long-arm statute even though the defendant never enters New York, so long as the defendant's activities in the state were purposeful and there is a substantial relationship between the transaction and the claim asserted (McKinney's CPLR 302(a)(1), *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 68 N.E.3d 1, 45 N.Y.S.3d 276 [2016]).

"A non-domiciliary defendant transacts business in New York when on their own initiative the non-domiciliary projects itself into this state to engage in a sustained and substantial transaction of business. However, it is not enough that the non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an "articulable nexus" or "substantial relationship with the defendant's transaction of business here. At the very least there must be a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim. This inquiry is relatively permissive and an articulable nexus or substantial relationship exists where at least one element arises from the New York contacts"(see *D& R. Global Selections, S.L., v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 78 N.E.3d 1172, 56 N.Y.S.3d 488 [2017] quoting *Licci v. Lebanese Can. Bank, SAL*, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 [2012]).

This court can exercise Specific Personal jurisdiction over the moving defendants under CPLR § 302(a)(1) because there is an articulable nexus or substantial relationship between their 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. The moving defendants from 1965 through 2015 (a period of approximately 50 years) sold to Avon and to Kolmar Laboratories, and shipped into New York on a continuous basis, asbestos-contaminated talc for the manufacture of Avon talc powder, which was subsequently shipped throughout the nation. It is alleged that Plaintiff Mary Black's injury arose from the use of Avon talc powder containing the asbestos-contaminated talc shipped into New York by the moving defendants. Furthermore, it is alleged that the moving defendants, as members of the CTFA, from at least the 1970s, attended many meetings in New York where asbestos-contamination of talc was discussed and attempts were made to refute medical studies of its dangers.

Plaintiffs have established that long-arm jurisdiction should be exercised over the moving defendants under CPLR 302(a)(1). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

Forum non conveniens:

CPLR § 327[a] applies the doctrine of forum non conveniens flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case (*Matter of New York City Asbestos Litig.*, 239 A.D. 2d 303, 658 N.Y.S. 2d 858 [1st Dept., 1997] and *Phat Tan Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 797 N.Y.S.2d 89 [1st. Dept. 2005]). In determining a motion seeking to dismiss on forum non conveniens grounds, "no one factor is controlling" and the Court should take into consideration any or all of the following factors: (1) residency of the parties; (2) the jurisdiction in which the underlying claims occurred; (3) the location of relevant evidence and potential witnesses; (4) availability of bringing the action in an alternative forum; and (5) the interest of the foreign forum in deciding the issues (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y. 2d 474, 467 N.E. 2d 245, 478 N.Y.S. 2d 597 [1984]).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors militating in favor of a finding of forum non conveniens. It is not enough that some factors weigh in the defendants' favor. The motion should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs

