

Miller v A.O. Smith Water Prods. Co.
2018 NY Slip Op 32387(U)
September 21, 2018
Supreme Court, New York County
Docket Number: 190257/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

DEBORAH HAMPTON MILLER, Individually
and as Administratrix of the Estate of
MYRON WILLIAM MILLER, deceased,

Index No. 190257/2016

Plaintiff

- against -

DECISION AND ORDER

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

Defendants

APPEARANCES:

For Plaintiff

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For Defendant Jenkins Bros.

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for the deceased Myron Miller's injury and death suffered after Miller was exposed to equipment and materials containing asbestos while purchasing, refurbishing, and reselling equipment and materials he obtained from factories, plants, mills, and foundries. Plaintiff alleges that Miller was exposed to asbestos from 1980 to 1987 when he removed and replaced gaskets and packing material in valves that defendant Jenkins Bros. manufactured.

Plaintiff and Jenkins Bros. do not dispute that Miller moved

to Georgia in the 1970s, where he started his business purchasing, refurbishing, and reselling equipment. Plaintiff, Miller's widow, testified at her deposition that during 1980 to 1987 Miller travelled to facility closings and liquidation sales in other states, including New York, to purchase the equipment, including valves, for his business. He then returned to Georgia, where he was exposed to asbestos when he refurbished these valves, including Jenkins Bros. valves containing asbestos, by scraping out the gaskets with a metal tool, removing the packing material around the valves' turning wheels, and using a blower to blow out dust from inside the valves.

Jenkins Bros. moves to dismiss the complaint against Jenkins Bros. due to lack of personal jurisdiction over this defendant, C.P.L.R. § 3211(a)(8), since plaintiff alleges that Miller was exposed to asbestos only while working in Georgia. At oral argument September 6, 2018, plaintiff clarified that she bases jurisdiction on C.P.L.R. § 302(a)(1) and not C.P.L.R. § 302(a)(2) and withdrew any contention that 100 Park Avenue, New York, New York, was Jenkins Bros.' principal place of business for purposes of establishing jurisdiction based on C.P.L.R. § 301. She also withdrew her contentions that Jenkins Bros.' insurance policies establish jurisdiction over Jenkins Bros. and that it is collaterally estopped from challenging jurisdiction.

II. JURISDICTION BASED ON C.P.L.R. § 302(1)

To contest jurisdiction based on C.P.L.R. § 302(a)(1), Jenkins Bros. points to the testimony by plaintiff that, although

she observed her husband working on Jenkins Bros. valves after he returned to Georgia from his trips to facility closings and liquidation sales, she did not know where her husband obtained the Jenkins Bros. valves that he worked on. Plaintiff contends that Miller travelled to New York at every opportunity to purchase equipment from large liquidations, and therefore he must have purchased Jenkins Bros. valves from New York, where Jenkins Bros. was headquartered. The deposition testimony by David Boisvert, a Jenkins Bros. officer from 1974 to 1986, suggests that Jenkins Bros. conducted sales to its customers from its office at 100 Park Avenue, New York, New York, during the 1970s, immediately before Miller was making his purchases of valves from their prior purchasers. Contrary to Jenkins Bros.' insistence, reasonable inferences from the evidence may confer jurisdiction under C.P.L.R. § 302(a)(1). Wimbeldon Fin. Master Fund, Ltd. v. Weston Capital Mgt. LLC, 160 A.D.3d 596, 597 (1st Dep't 2018); Lawati v. Montague Morgan Slade Ltd., 102 A.D.3d 427, 430 (1st Dep't 2013).

A. Miller's Purchases in New York

The inferences that plaintiff asks the court to draw to conclude that Miller purchased Jenkins Bros. valves in New York, however, are unreasonable. While plaintiff testified that Miller travelled to New York, she did not accompany him on his trips during 1980-87 and did not recall that he ever returned from a trip to New York with Jenkins Bros. valves or any other facts suggesting that he purchased Jenkins Bros. valves in New York.

Nor did she recall specifically where Miller traveled for facility closings or liquidation sales during 1980-87 or before that period and thus from what sellers, prior purchasers of the equipment being sold, in what state, he purchased Jenkins Bros. valves.

Plaintiff presents no other evidence that Miller purchased Jenkins Bros. valves in New York or that he made any purchases from sellers in New York that previously may have purchased Jenkins Bros. valves. Without that evidence, Miller's visits to liquidations in New York, among other states, even when combined with Boisvert's testimony about sales from Jenkins Bros.' office in New York, fail to establish the required connection between its sales transactions in New York and the Jenkins Bros. valves containing asbestos that Miller acquired and to which he was exposed in Georgia. Bristol-Myers Squibb Co. v. Superior Court, ___ U.S. ___, 137 S. Ct. 1773, 1781 (2017); Paterno v. Laser Spine Inst., 24 N.Y.3d 370, 379 (2014); McGowan v. Smith, 52 N.Y.2d 268, 273 (1981); Stern v. Four Points by Sheraton Ann Arbor Hotel, 133 A.D.3d 514, 514 (1st Dep't 2015). See D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 299 (2017); Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 330 (2016).

B. Jenkins Bros.' Sales from New York

Plaintiff nonetheless insists that during the 1970s, immediately before Miller was making his purchases, all Jenkins Bros.' sales of its valves emanated from its New York office, at

least before it undisputedly closed in 1980. Assuming those facts, they would confer jurisdiction over plaintiff's claim that Jenkins Bros. sold its valves from New York without warning of the dangers from the valves' asbestos contents, regardless where Miller purchased the valves. Yet plaintiff, repeatedly, premises jurisdiction on Miller's purchases in New York. Even if Jenkins Bros.' sales of valves from New York during the 1970s conferred jurisdiction regardless where Miller purchased the valves, without evidence of where he purchased them jurisdiction would lie in New York only if all Jenkins Bros.' sales of valves occurred here. Otherwise, no evidence connects any plant, factory, mill, or foundry from which Miller purchased Jenkins Bros. valves to any facilities to which Jenkins Bros. sold its valves from its New York office.

The reasonable inferences from plaintiff's evidence do not reach that far. Boisvert testified that, while Jenkins Bros. Vice President Stewart Caddle operated Jenkins Bros.' Sales Department from the New York office during the 1970s, he "had his sales force answering to him," who were "salespeople, maybe twelve or fifteen of them, around the United States." Supp. Aff. of Seth A. Dymond Ex. A, at 541. Boisvert's testimony that the sales force was spread out in states outside New York and merely reported to the Sales Department in New York thus demonstrates that all sales were not transacted in New York.

Plaintiff's best evidence is a Jenkins Bros. catalog from 1975, as well as prior catalogs, which Boisvert identified in his

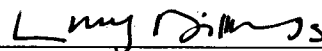
deposition and are admissible as ancient documents because they are more than 30 years old and not claimed to be fraudulent or invalid. Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2d Dep't 2008); Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868 (3d Dep't 1999). Yet these catalogs provide only that: "All agreements, contracts, orders, quotations and terms are subject to approval by the Home Office of Jenkins Bros." Aff. in Opp'n of Seth A. Dymond Ex. O, at 2 (emphasis added). Assuming the Home Office was the New York office, this evidence does not show that all sales, even if not transacted in New York, still were approved here. Without any contrary interpretive evidence, sales being "subject to approval" in New York in this context means only that they might be approved or disapproved here, not that they all necessarily were approved or disapproved here. The provision immediately following demonstrates the phrases's meaning in the context of these "TERMS GOVERNING ACCEPTANCE OF ORDERS": "specifications are subject to change" Id. This use of the phrase surely does not mean that all specifications are changed. Plaintiff's attempts to stitch together a connection between Jenkins Bros.' sales from New York and Miller's exposure to the asbestos contents of Jenkins Bros. valves in Georgia thus fall short of the substantial relationship required between the transaction in New York and plaintiff's claims. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. at 1780; Licci v. Lebanese Can. Bank, SAL, 20 N.Y.3d 327, 339-40 (2012).

III. CONCLUSION

Consequently, for the reasons explained above, the court grants defendant Jenkins Bros.' motion to dismiss the complaint against Jenkins Bros. due lack of personal jurisdiction over this defendant. C.P.L.R. § 3211(a)(8). This dismissal is on the condition that, as long as plaintiff commences a new action for the same claims against Jenkins Bros. in New Jersey within six months after service of this order with notice of entry, see C.P.L.R. § 205(a), Jenkins Bros. will waive any defense based on a statute of limitations as stipulated at oral argument September 6, 2018.

Jenkins Bros. did not move to dismiss co-defendants' cross-claims against it. In light of this order, if any remaining co-defendant seeks to retain its claims against Jenkins Bros., that co-defendant must file and serve a third party complaint within 30 days after service of this order with notice of entry. E.g., Franklin-Hood v. 80th St., LLC, 138 A.D.3d 609, 609 (1st Dep't 2016); Patterson v. New York City Tr. Auth., 5 A.D.3d 454, 454-55 (2d Dep't 2004). See Silver v. Whitney Partners LLC, 130 A.D.3d 512, 514 (1st Dep't 2015); Cole v. Mraz, 77 A.D.3d 526, 527 (1st Dep't 2010); Schorr v. Guardian Life Ins. Co. of Am., 44 A.D.3d 319, 319 (1st Dep't 2007). This decision constitutes the court's order and judgment dismissing the claims against Jenkins Bros., without prejudice to a new action by plaintiff or third party actions by co-defendants on the conditions specified above.

DATED: September 21, 2018



LUCY BILLINGS, J.S.C.