

<b>Holleman v Avon Prods., Inc.</b>
2018 NY Slip Op 33614(U)
November 7, 2018
Supreme Court, New York County
Docket Number: 190077/2018
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

KARLENE HOLLEMAN,

Plaintiffs,

INDEX NO. 190077/2018

- against -

MOTION DATE 10/23/2019

AVON PRODUCTS, INC., et al,

MOTION SEQ. NO. 005

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on Cosmetics Specialties, Inc.'s motion to dismiss the Complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 2
Answering Affidavits — Exhibits _____	3-4
Replying Affidavits _____	5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that defendant Cosmetics Specialties, Inc.'s (hereinafter "CSI") motion to dismiss Plaintiff's claims and all crossclaims asserted against it, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is denied.

Plaintiff Karlene Holleman, an Illinois domiciliary, was diagnosed with mesothelioma in August 2017. Plaintiff was deposed over three days on June 5-7, 2018, giving testimony about her use of cosmetic talcum powder products. Plaintiff alleges she was exposed to asbestos from the use of cosmetic talc products that included Avon's talcum powder products. Plaintiff alleges she was exposed to asbestos containing talc from approximately 1940 when she was born, through 1995. She recalls her mother using Avon Talcum powder products at her childhood home in the State of Michigan, when she was in elementary school in the mid-1940s. she moved out of the house in 1967 and started using Avon talcum powder products on herself in 1979 when she became an Avon representative. She recalls using Topaz, Charisma and Occur Avon talcum powder products on herself until 1995. She would apply the powder by shaking the powder into her hands, as well as applying it to her body with powder puffs after bathing. Her husband used Avon Black Suede talcum powder from the time she was an Avon representative in 1979 until he died in 1984.

The Plaintiffs commenced this action in March 2018 against various defendants, including CSI, to recover for injuries resulting from her exposure to asbestos. Plaintiff alleges that defendant CSI distributed talc it obtained from Cyprus Amax Minerals to Avon, for the manufacture of Avon's talcum powder.

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

Plaintiff is not a New York resident and bring this action in New York to recover against CSI for the injuries she sustained. At all relevant times plaintiff has resided in the State of Michigan or the State of Illinois, 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.

CSI now moves to dismiss the action pursuant to CPLR §3211 (a)(8).

Defendant CSI alleges that it is a New Jersey Corporation with its principal place of business in Haddon Heights New Jersey. It is not a New York resident, it has no offices in New York, does not own any property or other facility in New York, has no employees, mailing address or Post Office box in New York, has no bank account in New York, and has not manufactured, sold, or distributed any asbestos-containing product in the State of New York.

CSI makes 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 it because Ms. Holleman's exposures occurred outside of the State of New York, Ms. Holleman did not reside in the State of New York, CSI is not incorporated in New York and does not maintain its principal place of business here, therefore there is no general jurisdiction (see CPLR§301). Furthermore, Plaintiff's claims do not arise from any of CSI's New York transactions, CSI 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, nor did it transact any business within the state or contract anywhere to supply goods or services in the state; therefore there is no specific jurisdiction. (see CPLR § 302(a)(1), (2) and (3)).

In support of its motion CSI 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.

CSI also argues that there is no specific jurisdiction over it. In support of its motion it 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 the moving defendants argue that this court lacks personal general and specific jurisdiction over them because (1) CSI's contacts with New York are insufficient to render it at home in New York; and (2) there is no nexus between New York and Plaintiff's claims against CSI, therefore the claims should be dismissed.

Plaintiffs oppose the motion on the ground that there is personal jurisdiction over CSI under New York State's long-arm statute. Plaintiffs allege

that this court has jurisdiction over CSI because it transacted business in the state to supply goods or services in the state and their actions gave rise to Ms. Holleman's exposure. Plaintiff alleges that CSI distributed and supplied asbestos-contaminated talc to Avon in New York, directly contributing to her alleged injuries.

"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 longarm provisions of CPLR §302.

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v. Kiein, 35 A.D. 2d 248, 315 N.Y.S. 2d 695 [1<sup>st</sup> 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 defendant CSI because it is not incorporated, nor does it have its principal place of business in the State of New York. Defendant CSI is a New Jersey corporation, with its principal place of business in the State of New Jersey.

#### 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 CSI under CPLR § 302(a)(1) because there is an articulable nexus or substantial relationship between its in state conduct, selling and/or distributing asbestos-contaminated talc in New York, 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. Plaintiff alleges, and this is corroborated by documents submitted to the court as exhibits 12, 13 and 16, that CSI from 1985 through 1995 (a period of approximately 10 years) sold to Avon, and shipped into New York on a continuous basis, asbestos-contaminated talc for the manufacture of Avon talcum powder, which was subsequently placed into Avon's talcum powder products and shipped throughout the nation. It is alleged that Plaintiff's injury arose from the use of Avon talcum powder containing the asbestos-contaminated talc sold, distributed and shipped into New York by CSI.

CSI provides the affidavits of Mr. Ronald Grexa dated June 4 and October 9, 2019, wherein Mr. Grexa states that: "Since the time of its incorporation in the State of New Jersey on October 3, 1989, I have been the owner of CSI". That "prior to 1996, CSI served solely as a commission sales agent for Cyprus Industrial Minerals Company ("Cyprus") and Luzenac America, Inc. ("Luzenac") after it acquired Cyprus in 1992." That "at no point prior to 1996, while working solely as a commissioned sales agent, did CSI take title to any goods from either Cyprus or Luzenac, or physically distribute or supply any goods on behalf of

Cyprus or Luzenac.” That “contrary to plaintiff’s claims, CSI has never shipped talc to any Avon facility in New York for any reason or purpose whatsoever.”

However, the Raw Ingredient Specifications for Avon Olympic Talc dated January 16, 1991 lists CSI as the authorized distributor for Cyprus Industrial Minerals Company (see Exhibit 8). A letter from CSI to a Mr. Richard Katstra at Avon dated August 26, 1992 states that CSI is “the authorized distributor for Luzenac America, Inc. formerly Cyprus Industrial Minerals Company...” (see Exhibit 12). The Raw Ingredient Specification for Olympic Talc from Luzenac to Avon, dated September 23, 1992 list CSI as one of the distributors, the other being Luzenac (see Exhibit 13). The Raw Ingredient Specification for Italian Talc from Luzenac to Avon dated February 28, 1999 states that Avon was notified on August 26, 1992 that CSI is the authorized distributor for Luzenac...” (see Exhibit 16). CSI is the authorized distributor for Cyprus and Luzenac, and supplier of talc to Avon during a portion of plaintiff’s relevant period of exposure. This documentary evidence contradicts Mr. Grexa’s affidavit, and creates a nexus between CSI’s transactions in New York and Ms. Holleman’s exposure to asbestos-contaminated talc.

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

Accordingly, it is ORDERED that defendants Cosmetics Specialties, 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.

ENTER:

MANUEL J. MENDEZ  
J.S.C.



MANUEL J. MENDEZ  
J.S.C.

Dated: November 7, 2018

Check one:             FINAL DISPOSITION     NON-FINAL DISPOSITION  
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