

Olson v Brenntag N. Am., Inc.
2019 NY Slip Op 30169(U)
January 22, 2019
Supreme Court, New York County
Docket Number: 190328/2017
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

DONNA A. OLSON and ROBERT M. OLSON,

INDEX NO. 190328/2017

Plaintiffs,

MOTION DATE 01/17/2019

- against -

MOTION SEQ. NO. 002

BRENNTAG NORTH AMERICA, INC., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 8 were read on this motion pursuant to CPLR §3211 and CPLR §301 and §302 by Imerys Talc America, Inc. and Cyprus Amax Minerals Company:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] 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 §301and CPLR § 302, is denied.

Plaintiff, Donna A. Olson, was diagnosed with pleural mesothelioma on or about May of 2016. She alleges that she has no known asbestos exposure except from the use of talcum powder products. Her exposure - as relevant to this motion - is allegedly from the use of Johnson's Baby Powder ("JBP") and Shower to Shower. Mrs. Olson alleges that she used those products daily from 1953 to 2015. She was born in 1953 and lived in New York until she moved to Delaware with her husband in 1995 (Opp. Awad Aff., Exh. 1, pgs. 8-9, 15 and 136). Mrs. Olson switched from JBP to Shower to Shower in 1995 and stopped using all talcum powder products in 2015 after learning of a potential link between talcum powder and ovarian cancer(Opp. Awad Aff., Exh. 1, pgs. 205 and 210-211). She also testified that she always kept a "travel size" bottle of JBP in her bag (Opp. Awad Aff., Exh. 1, pg. 202 and Exh. 2, pg. 91).

Plaintiffs commenced this aciton on October 19, 2017 naming defendants Imerys Talc America, Inc. and Cyprus Amax Minerals, Co. as defendants (Mot. L'Homme Aff., Exh. A). Plaintiffs allege that the moving defendants supplied the raw talc to Johnson & Johnson the manufacturers of JBP and Shower to Shower for use in their products.

The moving defendants now move to dismiss the action pursuant to CPLR §3211 (a)(8), CPLR §301and CPLR § 302 for lack of personal jurisdiction.

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

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

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 they 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.

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. Olson's exposure. Plaintiffs allege that the moving defendants' supply of asbestos-contaminated talc to Kolmar Laboratories Inc. (hereinafter "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.

"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. Kiein, 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 sold raw talc to Kolmar for use by Johnson and Johnson in the manufacture of JBP and Shower to Shower. The moving defendant’s product was shipped into New York on a continuous basis, the allegedly asbestos-contaminated talc was used for the manufacture of talcum powder and subsequently shipped from New York throughout the nation. It is alleged that Plaintiff Donna Olson’s injury arose from the use of JBP and Shower to Shower talcum powder in the State of New York, and the products containing the asbestos-contaminated talc were shipped into New York by the moving defendants.

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

Accordingly, it is ORDERED that defendants Imery’s Talc America, Inc., and Cyprus Amax Minerals, Co.’s 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), is denied.

ENTER:

Dated: January 22, 2019


MANUEL J. MENDEZ
MANUEL J. MENDEZ
J.S.C.

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