

<b>Colella v A.O. Smith Water Prods. Co.</b>
2019 NY Slip Op 30759(U)
March 21, 2019
Supreme Court, New York County
Docket Number: 190302/17
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**

**KAREN J. COLELLA, as Executrix of the Estate of  
DIONISIO GOMEZ, a/k/a DIONISIO N. GOMEZ,  
deceased, and CENZIA GOMEZ, individually,**

**INDEX NUMBER 190302/17  
MOTION DATE 03-06-2019**

**Plaintiffs,**

**MOTION SEQ. NO. 005**

**- against -**

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

**MOTION CAL. NO. \_\_\_\_\_**

**Defendants.**

**The following papers, numbered 1 to 5 were read on Aurora Pump Company's motion pursuant to CPLR §3211(a)(8) to dismiss the Complaint:**

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

**Cross-Motion:  Yes  No**

**Upon a reading of the foregoing cited papers, it is Ordered that defendant Aurora Pump Company's (hereinafter "Aurora") motion to dismiss the plaintiff's Complaint and all cross-claims asserted against it for lack of jurisdiction pursuant to CPLR §3211(a)(8), is denied.**

**Plaintiffs' action arises out of Mr. Gomez's alleged exposure to asbestos from 1968 through 1993 while he served in the United States Coast Guard. Mr. Gomez was stationed on Governors Island in New York, served on vessels that were home-ported at Governors Island, and resided during the relevant period either on Governors Island or on Staten Island, New York. Plaintiffs allege that Mr. Gomez was a steward for the U.S. Coast Guard cutter Rockaway and Tamaroa, both based in Governors Island, New York. He was also an engine man, maintaining engine room equipment on the Morganthau, Gallantin and the Dallas, all Coast Guard cutters stationed on Governors Island, New York. It is alleged that Mr. Gomez was exposed to asbestos from routinely repairing Aurora pumps on these ships, and on other small boats, in a repair shop located on Governors Island, New York. It is alleged that in repairing Aurora Pumps on these ships he obtained replacement parts numbers for gaskets and packing from an Aurora Pump tech publication. Finally it is alleged that the packaging labeled the part as "asbestos-containing".**

**It is alleged that as a result of his exposure to asbestos from Aurora Pumps Mr. Gomez developed and subsequently died from lung cancer. Plaintiffs commenced this action to recover from Aurora and other defendants for Mr. Gomez's injuries and death. Defendant Aurora interposed an answer wherein it raised as a Third Affirmative Defense "this court lacks personal jurisdiction over Defendant." Aurora now moves to dismiss this case alleging that this court lacks general and specific jurisdiction over it.**

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

Aurora was initially founded in Aurora, Illinois in 1919 and reorganized in 1927. In 1952 Aurora was acquired by New York Air Brake Company. In 1967 New York Air Brake Company and Aurora were acquired by General Signal. In 1968, while still a division of New York Air Brake Company- which was headquartered in Watertown New York- Aurora moved its manufacturing facility to North Aurora, Illinois and it is still located there. In August of 1997 Aurora was acquired by Pentair, Inc. and became part of the Pentair Pump Group. Pentair Inc. is incorporated under the laws of the State of Minnesota, with a principal place of business in Minneapolis.

Aurora moves to dismiss the plaintiffs' complaint and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8).

Aurora argues that this court does not have personal jurisdiction over it because Mr. Gomez's exposures occurred outside of the State of New York, Aurora is not incorporated in New York and is part of Pentair Inc., a Minnesota Corporation that does not maintain its principal places of business in New York, so that there is no general jurisdiction. Furthermore, Aurora contends that plaintiffs' claims do not arise from any New York transactions, and that Aurora 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, specific jurisdiction does not exist (See CPLR §302 (a)(1),(2), (3) and (4)).

Aurora argues that the state of New York ceded its jurisdiction over Governor's Island to the United States Federal Government. Governors Island was a federal enclave from 1800 through 1996 and as such any of Mr. Gomez's asbestos exposure on Governor's Island did not occur within the State of New York. Similarly, any sales of pumps or pump parts made by Aurora to the United States Coast Guard into Governors Island were not made within the State of New York.

Plaintiffs oppose the motion contending that this Court does have jurisdiction over Aurora. Plaintiffs argue that Aurora waived the jurisdictional defense when it failed to assert a specific defense of lack of jurisdiction because Governors Island is a Federal Enclave. Plaintiffs argue that the federal enclave defense was not raised properly in the answer and therefore it has been taken by surprise by Aurora's motion. It is argued by plaintiffs that during the period relative to Mr. Gomez's exposure, 1968 through 1993, Aurora was owned by, and was a division of, New York Air Brake Company, a Delaware corporation manufacturer of brakes that maintained offices for business, and its principal place of business, in Water Town, State of New York (Opp. Exh.H, I, and L, ). It is also alleged that Aurora regularly does business through branch offices in the State of New York, and that its international sales offices are located at 140 Cedar Street, New York, N.Y. Plaintiffs claim that it would be reasonable to conclude that during the relevant period, sales to the United States Coast Guard of the pumps plaintiff was exposed to could have been made from offices located in the state of New York. Furthermore, plaintiffs argue that to the extent Governors Island was a federal enclave the State of New York still maintained jurisdiction over causes of action for death or personal injuries occurring to persons in it.

"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 CPLR §301, and long-arm statute CPLR §302(a).

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v Klein, 35 AD2d 248, 315 NYS2d 695 [1<sup>st</sup> 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]).

**Waiver of Jurisdictional defense:**

CPLR 3211(e) provides that an objection to jurisdiction is waived if a party moves without raising such objection, or if, having made no objection under subdivision (a), it does not raise such objection in a responsive pleading. CPLR 3018(b) provides that a party shall plead all matters which if not pleaded would be likely to take an adverse party by surprise. As such courts have found that defendants have waived objection to jurisdiction when the affirmative defense actually pleaded in defendant's answer did not fairly apprise a plaintiff of the objection made.

A waiver has been found where the objection to jurisdiction has not been pleaded with specificity ( see Walden v. Genevieve, 67 A.D.2d 973, 413 N.Y.S.2d 451 [2<sup>nd</sup>. Dept. 1979]denying motion to dismiss- finding objection not specific enough and waived- where affirmative defense plead in answer was that "the court lacks jurisdiction of the defendant... by reason of failure to serve summons on [defendant] in accordance with the provisions of statute", and "motion to dismiss alleged that no jurisdiction at all is acquired even in rem unless the order of attachment is served before service of the summons and complaint.").

Similarly courts have found the affirmative defense actually pleaded did not fairly apprise plaintiff of the objection made, and objection to jurisdiction waived, where the answer raised a defense predicated on improper service but the motion was made to dismiss on the ground the court did not have long-arm jurisdiction ( Wiesener v. Avis Rent-A-Car, 182 A.d.2d 372, 582 N.Y.S.2d 122 [1<sup>st</sup>. Dept. 1992]; Rodriguez v. Hidalgo, 294 A.D.2d 114, 740 N.Y.S.2d 871 [1<sup>st</sup>. Dept. 2002]; or where the defense alleged the defendant was never served but the motion to dismiss alleged that service did not comport with the Hague Convention ( Interlink Metals and Chemicals v. Kazdan, 222 A.D.2d 55, 644 N.Y.S.2d 704 [1<sup>st</sup>. Dept. 1996]).

Defendant asserted a general lack of jurisdiction defense. Defendant now moves to dismiss, years after this action was commenced, on the grounds that Governors Island is a federal enclave, not part of New York State, and therefore any injuries sustained by plaintiff while working and living on Governors Island fall outside the jurisdiction of New York State. This specific objection to the jurisdiction of the court over the defendant was not raised in defendant's answer. The defense raised in the answer lacked specificity and did not fairly apprise the plaintiff of the objection to jurisdiction now being raised. Accordingly this court finds the objection- on the grounds that Governors Island is a federal enclave- has been waived ( see Dunn v. Aerco International, Inc., 2018 WL 5313533 [Sup. Ct. New York County] finding objection to jurisdiction waived for failure to assert it with specificity ).

Although New York State ceded title to Governors Island to the United States, the State of New York ceded such title "on condition that the jurisdiction so ceded should not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein."( McKinney's State Law §22). This means that it did not relinquish all jurisdiction over Governors Island.

The State of New York retains jurisdiction over causes of action arising from death or personal injuries sustained within a federal enclave ( see 28 U.S.C.A. § 5001 (a) death - "In the case of the death of an individual by the neglect or wrongful act of another in a place subject to the exclusive jurisdiction of the United States within a state, a right of action shall exist as though the place were under the jurisdiction of the state in which the place is located; (b) personal injury- In a civil action brought to recover on account of an injury sustained in a place described in subsection (a), the rights of the parties shall be governed by the law of the State in which the place is located.").

The jurisdiction of the State has been recognized over federal enclave residents, and over those transacting business in the federal enclave. Doing business in a federal enclave is tantamount to doing business within the State ( see *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 [1970] residents of federal enclave are residents of State of Maryland and allowed to vote in local elections; *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 [U.S. Ct. Of Appeals, D.C. Circuit 1984] "in the case of death of any person by neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be, and in any action brought to recover on account of injuries sustained in any such place, the rights of the parties shall be governed by the laws of the State within the exterior boundaries whilst it may be; *Mendoza v. Neudorfer*, 145 Washapp 146, 185 P3d 1024 [2008]; *Burgio v. McDonald Douglas*, 747 F.Supp. 865 [E.D.N.Y. 1990] State retains jurisdiction over death occurring in federal enclave).

A corporation that transacts business, renders services or furnishes materials within a federal enclave is not immunized from liability in a State court from liability for breach of any duty arising out of such activity. The acquisition of the personal jurisdiction necessary to give a court the power to deal with such a breach should not be defeated by the fact that the breach occurs within a federal enclave ( *Swanson Painting Company v. Painters Local Union No. 260*, 391 F.2d 523 [1968]). The doing business by a foreign corporation within a military reservation has the same effect, so far as submitting to local jurisdiction for service of process is concerned, as doing business elsewhere within the State ( *Knott v. Furman*, 163 F.2d 199 [4<sup>th</sup> Circ. Ct. Of Appeals, 1947]; *In re Air Crash Disaster at Gander New Foundland*, 660 F. Supp. 1202 [W.D. Kentucky, 1987]).

The State of New York has jurisdiction over residents of a federal enclave( see *Tammy S. V. Albert S.*, 95 Misc.2d 892, 408 N.Y.S.2d 716[ Family Court N.Y. County 1978]; *Reybold v. Reybold*, 45 A.D.2d 263, 357 N.Y.S.2d 231 [4<sup>th</sup> dept. 1974]) and over actions for personal injuries occurring within a federal enclave located within the outer boundaries of the State of New York (see *Matter of Beagle*, 26 A.D.2d 313, 274 N.Y.S.2d 60 [4<sup>th</sup> dept. 1966]; *Henning v. Ebersole*, 8 Misc.2d 768, 166 N.Y.S.2d 167 [Sup. Ct. N.Y. County 1957]).

#### 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 [1<sup>st</sup> Dept. 2014]). The defendant's course of conduct has to be voluntary, continuous and self-benefitting (*Hardware v. Ardowork Corp.*, 117 AD 3d 561, 986 NYS 2d 445 [1<sup>st</sup> 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*). The relevant inquiry regarding a corporate defendant’s place of incorporation and principal place of business, is at the time the action is commenced (Lancaster v Colonial Motor Freight Line, Inc., 177 AD2d 152, 581 NYS2d 283 [1<sup>st</sup> Dept. 1992]).

This court cannot exercise general personal jurisdiction over Aurora because at the time this action was commenced Aurora was incorporated in Delaware with its principal place of business in North Aurora Illinois, and is a division of Pentair, Inc., a Minnesota corporation with its principal place of business in Minneapolis.

#### 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” (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, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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 or possesses any real property situated within the state. (CPLR §302(a)(1),(2),(3) and (4)).

Bristol-Myers Squibb Co. v Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017], resulted in a change in the law. As a result of the change in the law, specific personal jurisdiction under CPLR §302(a)(1) requires that plaintiffs establish that there is an articulable nexus or substantial relationship between Aurora’s alleged New York conduct and the claims asserted against it. 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.

Aurora was transacting business in a federal enclave located within the exterior boundaries of the state of New York. Plaintiff was exposed to asbestos from Aurora’s product and was thereby injured within a federal enclave located within the exterior boundaries of the state of New York. New York retained jurisdiction over service of process and over causes of action arising from death or personal injuries sustained within a federal enclave located within the exterior boundaries of the State of New York. Therefore, this court has specific jurisdiction over Aurora, whose acts in the State of New York are alleged to have resulted in the personal injuries and death of the plaintiff.

Accordingly, it is ORDERED, that defendant Aurora Pump Company's motion to dismiss the plaintiffs' complaint and all cross-claims asserted against it for lack of jurisdiction pursuant to CPLR 3211 (a)(8), is denied.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

Dated: March 21, 2019

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

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