

Taylor v A.O. Smith Water Prods. Co.

2019 NY Slip Op 31110(U)

April 11, 2019

Supreme Court, New York County

Docket Number: 190113/2015

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 CLARICE TAYLOR, as Personal Representative For the Estate of CLIVE K. TAYLOR, and CLARICE TAYLOR, Individually

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Plaintiff(s), - against - A.O. SMITH WATER PRODUCTS COMPANY, et al., including ROPER PUMP COMPANY Defendants.

The following papers, numbered 1 to 7 were read on defendant Roper Pump Company's motion to dismiss for lack of personal jurisdiction:

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 defendant Roper Pump Company's (hereinafter, "Roper"), 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.

Plaintiff commenced this action on April 13, 2015 by filing a summons and complaint. Defendant, Roper filed its answer on July 8, 2015. Roper's answer did not contain an affirmative defense of lack of personal jurisdiction. Instead, it contained the following language:

All defenses which have been or will be asserted by other Defendants in this action are adopted and incorporated by reference as if fully set forth herein. In addition, Roper Technologies, Inc. will rely upon any and all other further defenses which become available or appear during discovery in this action and hereby specifically reserves its right to amend its answer for the purpose of asserting any such additional affirmative defenses.

(Aff. in Opp., Exh. 1 at ¶ 79)

On or about April 27, 2017, plaintiff filed a Supplemental Summons and Third Verified Complaint to substitute the Estate as a party after the demise of the plaintiff, Clive Taylor, and to allege a wrongful death cause of action (see Aff. in Supp., Exh. A). Roper served its Verified Answer to the Third Amended Complaint on October 10, 2018 (see Aff. in Supp., Exh. B). Within its Verified Answer, Roper

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

asserted the affirmative defense that this Court lacks personal jurisdiction over Roper (see Aff. in Supp., Exh. B at ¶ 53). Plaintiff served Responses to Interrogatories on or about May 4, 2015 (see Aff. in Supp., Exh. C). Decedent was deposited for two days on May 19 - 20, 2015 (see Aff. in Supp., Transcript Volumes 1 and 2, Exh. D).

Plaintiff-decedent, Clive Taylor, alleged that he suffered asbestos-related injuries due to exposure to asbestos while serving in the United States Navy from February 1962 – May 1966. Mr. Taylor testified that he served aboard two ships during his naval service: (1) the USS Somers (DD 947), a Forrest Sherman class destroyer; and (2) the USS MacKenzie (DD 836), a Gearing class destroyer. Plaintiffs brought this action to recover for Mr. Taylor's personal injuries due to asbestos exposure.

Defendant, Roper, now moves to dismiss this action for lack of personal jurisdiction. Roper, essentially, argues that the uncontested evidence establishes that Roper is not a New York corporation and that any of plaintiff-decedent's alleged injuries caused from Roper pumps occurred only while serving aboard the USS Somers. Therefore, Roper lacks the necessary contacts to the State of New York in this matter and personal jurisdiction cannot be established.

More specifically, Roper argues in this case that it is not subject to specific or general personal jurisdiction in the State of New York. As for general personal jurisdiction, defendant argues that it has produced uncontested evidence that it is (and was at the period pertinent to this case) an entity incorporated in Delaware with its principal place of business in Georgia. Therefore, New York cannot exercise general personal jurisdiction over it in this case. As for specific personal jurisdiction, defendant argues that there are insufficient contacts between Roper and the forum State of New York to satisfy any of the various means of establishing specific personal jurisdiction.

Plaintiff opposes Roper's motion, arguing that defendant impermissibly moves to dismiss on personal jurisdiction grounds despite its having failed to raise a lack of personal jurisdiction under CPLR §§ 301 or 302 as an affirmative defense in its Answer, filed on July 8, 2015. Thus, plaintiff argues that defendant has waived the right to raise a personal jurisdiction defense. Moreover, defendant's second answer in this matter (which included a personal jurisdiction affirmative defense) was filed about 18 months after plaintiff's third amended complaint. As such, plaintiff claims it was egregiously untimely under CPLR § 3025(d) and should be disregarded by this Court.

Plaintiff argues that even if the defendant had filed a timely answer to the third amended complaint, it still could not have, then, raised a jurisdictional defense. This is because plaintiff argues that the New York State Court of Appeals, and courts throughout the state, have held on numerous occasions that a defendant can only add a jurisdictional defense to an amended answer "if the defendant corrects the omission before the time to amend the answer without leave of court has expired" (*Iacovangelo v Shepherd*, 5 NY3d 184, 185, 833 NE2d 259, 800 NYS2d 116 [2005]). Plaintiff further argues that this rule holds true, even if the defendant is filing an answer to an amended complaint (see *Boulay v*

***Olympic Flame*, 165 AD2d 191, 565 NYS2d 905 [3d Dept 1991]].**

In light of all this, plaintiff claims the defendant filed an amended responsive pleading in a manner impermissible under the CPLR, and has, in effect, attempted to add a jurisdictional defense years after the permissible time to do so. Therefore, plaintiff argues that Roper has incurably waived its right to assert that this Court lacks personal jurisdiction over it in this matter.

“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 [1st 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 AD2d 973, 413 NYS2d 451 [2nd 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.”).

Roper has not asserted a lack of jurisdiction defense in its answer. Nevertheless, defendant now makes this motion to dismiss, years after this action was commenced, on the basis that it is not subject to specific or general personal jurisdiction in the State of New York.

Defendant also attempts to argue that it has, in fact, raised a timely objection to personal jurisdiction by incorporating such an objection into its answer by reference to any other such timely objection that might be raised by the other parties to this action (see Aff. in Opp., Exh. 1 at ¶ 79). This argument is unavailing, however, because a specific objection to the jurisdiction of this Court over Roper was not, in fact, properly raised in its answer. The defense raised in defendant's answer also lacked specificity and did not fairly apprise the plaintiffs of the objection to jurisdiction now being raised (see *Walden v Genevieve, supra*). Thus, this court finds the lack of personal jurisdiction defense to have been waived.

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

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 11, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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