

Pomponi v A.O. Smith Water Prods. Co.
2019 NY Slip Op 31414(U)
May 21, 2019
Supreme Court, New York County
Docket Number: 190101/2015
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

**EILEEN POMPONI as Administratrix
For the Estate of IALO A. POMPONI, and
EILEEN POMPONI, Individually**

INDEX NO. 190101/2015

Plaintiff(s),

MOTION DATE 5/15/2019

- against -

MOTION SEQ. NO. 003

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

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 7 were read on defendant Mannington Mills, Inc.'s motion to dismiss for lack of personal jurisdiction:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6-7</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that defendant Mannington Mills, Inc.'s (hereinafter, "Mannington"), 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.

Plaintiffs commenced this action on May 1, 2015 against many defendants alleging that Italo A. Pomponi was exposed to asbestos from their products (Aff. in Supp., Exh. 1). Specific to this motion, Mr. Pomponi alleged that he was exposed to asbestos from Mannington flooring when he worked at Luders Shipyard (from 1952 to 1957) and at Jansco Electric (from 1971 to 1998) in Stamford, CT (see Aff. in Supp., Exh. 6). Mannington's NYCAL Acknowledgement of Receipt, filed on June 17, 2015 adopted its NYCAL Standard Answer concerning this Matter (see Index No. 190101/2015, NYSCEF Doc. No. 63). Notably, Mannington's initial standard answer dated December 25, 2005 does not specifically assert a personal jurisdiction defense; rather it contains the following language: "Where applicable, Mannington preserves its right to object to personal jurisdiction of Plaintiff over Mannington" (Aff. in Opp., Exh. A at 6).

Defendant first moved to dismiss this action on the basis of personal jurisdiction on December 3, 2018, by order to show cause (see Index No. 190101/2015, NYSCEF Doc. No. 216). After plaintiffs filed opposition papers on February 1, 2019, (see Index No. 190101/2015, NYSCEF Doc. No. 223), defendant withdrew its motion on February 5, 2019 (see Index No. 190101/2015, NYSCEF Doc. No. 225). Thereafter, defendant re-filed the same motion to dismiss by order to show cause on March 12, 2019 (see Index No. 190101/2015, NYSCEF Doc. No. 227). Again, defendant withdrew that motion on April 1, 2019 (see Index No. 190101/2015, NYSCEF Doc. No. 236).

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Defendant now moves to dismiss this action, arguing that this court has no personal jurisdiction over it. Plaintiffs oppose the motion, essentially, arguing that defendant has waived its right to raise a personal jurisdiction defense by this point in time.

More specifically, Mannington argues 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 is not subject to general personal jurisdiction in the State of New York under CPLR § 301 because Mannington is incorporated and maintains its principal place of business in New Jersey (see CPLR § 301). As for specific personal jurisdiction, defendant argues that there are, essentially, insufficient contacts between Mannington and the forum State of New York to satisfy any of the various means of establishing specific personal jurisdiction.

Plaintiffs argue that defendant is now impermissibly moving to dismiss on personal jurisdiction grounds. This is because plaintiffs contend that defendant failed to properly raise such an objection under CPLR §§ 301 or 302 as an affirmative defense in its original Answer, filed on December 28, 2005 (Aff. in Opp. Exh. A). Thus, plaintiffs argue that defendant has waited too long to raise a proper lack of personal jurisdiction defense and that it has, consequently, waived the right to do so now.

Plaintiffs also argue that Mannington's attempt to file an amended acknowledgment of receipt referencing an amended answer was invalid. Specifically, plaintiffs maintain that defendant's new Acknowledgment of Receipt, referring to a newly-amended NYCAL Standard Answer with a personal jurisdiction affirmative defense does not save it from having waived the right to raise such a defense. This is because the new NYCAL Standard Answer was filed well after the period for amendment without leave of court had expired. Thus, Mannington cannot rely on the new affirmative defenses from the amended answer which it references.

Lastly, plaintiff argues that even if the defendant had properly filed an amended acknowledgement of receipt referencing an amended answer, it cannot belatedly add a jurisdictional affirmative defense. This is because the Court of Appeals, and courts throughout the state, including this Court recently, in *Taylor v. A.O. Smith Water Prods. Co., et al.* (Index No. 190113/2013, 2019 N.Y. Slip Op. 31110[U], 2019 WL 1765883) (Sup. Ct., NY Cty. Apr. 22, 2019) (Mendez, J.), 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]).

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 Mannington 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 also 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.”).

In the instant case, Mannington has not properly asserted a lack of jurisdiction defense in its answer. Nevertheless, it 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.

Mannington also argues that it has, in fact, raised a timely objection to personal jurisdiction by referencing such an objection in its initial answer filed on December 25, 2005 which states that “Where applicable, Mannington preserves its right to object to personal jurisdiction of Plaintiff over Mannington” (Aff. in Opp., Exh. A at 6). This argument is unavailing, however, because a specific and outright objection to the jurisdiction of this Court over Mannington was not, in fact, properly raised in defendant’s answer. The defense raised in the answer 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 Mannington Mills, Inc.'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: May 21, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE