

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

2019 NY Slip Op 31452(U)

May 22, 2019

Supreme Court, New York County

Docket Number: 190039/2018

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 JOHN H. SHEA and NANCY J. SHEA, Plaintiff(s), - against - A.O. SMITH WATER PRODUCTS COMPANY, et al., Defendants. INDEX NO. 190039/2018 MOTION DATE 5/1/2019 MOTION SEQ. NO. 004 MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on defendant Aurora 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 Aurora Pump Company's (hereinafter, "Aurora"), 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 against various defendants on February 15, 2018, alleging that John Shea (Mr. Shea) was exposed to asbestos from their products (see Aff. in Supp., Exh. A). Plaintiffs allege that plaintiff-decedent, Mr. Shea developed mesothelioma due to asbestos-exposure while training and then serving in the Merchant Marines from 1965 to 2000. Mr. Shea was deposed on March 12, 22, and 23 of 2018 (Aff. in Supp., Exh. F).

After graduating from the Massachusetts Maritime Academy with a degree in Marine Engineering in 1968, Mr. Shea began his career as a Merchant Marine (see Aff. in Opp., Exh. 5 at 27). Throughout his career, he worked and lived on numerous vessels, transporting cargo throughout the world (see generally Aff. in Opp., Exh. 5) Mr. Shea's employment as a marine engineer began in July 1968 when he began working out of a port at the foot of Joralemon Street in Brooklyn, New York (id. at 71-72). Mr. Shea recalled working on Aurora pumps during his time aboard ships at the Maritime Academy which allegedly exposed him to asbestos (id. at 30, 41). He continued to work with Aurora pumps throughout his career and was, thereby, allegedly exposed to asbestos containing packing and gaskets (id. at 129; Vol. 2 at 319; Vol. 3 at 502-523).

Mr. Shea also worked on the SS Mormaccove from June to August of 1970, and boarded and disembarked the vessel out of Brooklyn, New York (id. Vol. 1 at 103, 110-114 and see Aff. in Opp., Exh. 6, CG 0007-8). Mr. Shea testified that he was exposed to asbestos on this ship from, among other things, working on

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

pumps (see Aff. in Opp., Exh. 5 at 112). He further testified that he worked on equipment in the engine room, performing regular preventative maintenance and fixing equipment that broke down during regular wear and tear, including pumps. (*id.* at 83, 90-91, 112). Mr. Shea testified generally that, before and after each voyage out of Brooklyn, he would spend approximately a week in Brooklyn on the ships, performing maintenance and repairing equipment in the engine room (see *id.* at 91-92; Vol. 2 at 319; Vol. 3 at 631-633). He elaborated on the work he performed while in port in Brooklyn, stating that one of his duties was repacking pumps (*id.* at Vol. 3 at 633). Mr. Shea further testified that every time he went to port, he replaced gaskets and packing in every single pump possible on the ships as preventative maintenance. (*id.* at 205-206).

Records obtained from the National Archives and Records Administration indicate that defendant was an equipment supplier to the SS Mormaccove on which Mr. Shea performed pump repair in Brooklyn, N.Y. (see Aff. in Opp., Exh. 7, SS Mormaccove records, at 112.1). Likewise, Mr. Shea was familiar with Aurora pumps and recalled performing maintenance on them throughout his career, starting as far back as his training at the Massachusetts Maritime Academy. He described removing and replacing gaskets and packing on Aurora pumps (see Aff. in Opp., Exh. 5 at 41-44, 61-65, 84-85, Vol. 3 at 502-523). According to him, this type of work created visible dust from asbestos products which he inhaled (*id.* at 204-206, Vol. 3 at 502-523). Aurora states that it sold asbestos containing pumps until 1986 (see Aff. in Opp., Exh. 8, Aurora Pump Company's Responses to Plaintiff's First Standard Set of Liability Interrogatories and Request for Production of Documents Answer to Q9).

Defendant-Aurora was initially founded in Aurora, Illinois in 1919 and reorganized in 1927. In 1952, Aurora was acquired by New York Air Brake Company, a New York corporation. 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 also operated sales offices in New York during the operative years, or the years during which Mr. Shea alleges exposure to asbestos. In its Answers to Interrogatories, Aurora stated that it had the following offices in New York: AURORA Pump Branch Office-90 West Street, New York, NY and AURORA Pump International-140 Cedar Street, New York, NY (Aff. in Opp., Exh. 8). An Aurora Pump Brochure further identifies an Aurora Pump Division New York Air Brake Company factory branch sales office in Long Island City, NY in 1963 (see Aff. in Opp., Exh. 11). Another Aurora Brochure illustrates that while there are many third-party distributors listed in other states, the New York distributor is identified as "Aurora Pump Co." itself (see Aff. in Opp., Exh. 12, SC-AP-0028 at 8).

There is further evidence on record showing that Aurora regularly did business in New York and derived revenue therefrom during the operative time. Specifically, there are New York Naval Shipyard records indicating that Aurora

Pump Division of New York Air Brake Company supplied pumps in New York (see Aff. in Opp., Exh. 13). Likewise, Aurora marketed itself as “the world’s largest producer of turbine-type pumps” and advertised for some time in national publications such as *Marine Engineering and Shipping Magazine*, and *Sweets* (based in New York, NY) (see Aff. in Opp., Exhs. 14, 15, and 16).

Aurora now moves to dismiss this action for lack of personal jurisdiction. Aurora argues that it is not subject to specific or general personal jurisdiction in the State of New York. Plaintiffs oppose the motion, arguing that Aurora is, in fact, subject to personal jurisdiction in the State of New York.

As for general personal jurisdiction, Aurora argues that it is not subject to general jurisdiction in the State of New York, under CPLR § 301 because it is incorporated and maintains its principal place of business in Minnesota (discussed *supra*).

As for specific personal jurisdiction, defendant argues that there are insufficient contacts between Aurora and the State of New York to satisfy any of the various means of establishing specific personal jurisdiction under the CPLR. Lastly, Aurora contends that Fourteenth Amendment Due Process prohibits specific personal jurisdiction over it because Aurora did not purposefully direct its conduct into the forum state (see *Bristol-Myers Squibb Co. v Superior Court of California, San Francisco*, 136 S.Ct. 1773 [2017]).

Plaintiffs oppose the motion, arguing that specific jurisdiction exists under CPLR § 302(a)(1) because they have made a prima facie showing that Aurora engaged in transactions for the design and sale of its pumps used on the SS *Mormaccove* and other ships which Mr. Shea worked on in New York. Plaintiffs also contend that defendant is subject to personal jurisdiction under all three prongs of CPLR § 302(a)(3). This is because they claim: (1) Aurora committed a tortious act outside of New York; (2) the act caused injury to Mr. Shea in New York; and (3) Aurora regularly did business in New York, derived substantial revenue therefrom, and could foresee that its conduct would have consequences in New York.

“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]).

New York Jurisdiction Over Federal Enclaves:

The State of New York retains jurisdiction over causes of action arising from death or personal injuries sustained within a federal enclave (see 28 USCA § 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 US 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 [US 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 [EDNY 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 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 [4th 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 Misc2d 892, 408 NYS2d 716 [Family Court N.Y. County 1978]; *Reybold v Reybold*, 45 AD2d 263, 357 NYS2d 231 [4th 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 AD2d 313, 274 NYS2d 60 [4th dept. 1966]; *Henning v Ebersole*, 8 Misc.2d 768, 166 NYS2d 167 [Sup Ct NY 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 [1st Dept 2014]). The defendant’s course of conduct has to be voluntary, continuous and self-benefitting (*Hardware v Ardowork Corp.*, 117 AD3d 561, 986 NYS 2d 445 [1st 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 [1st 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 (l) 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. Due to 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 (the Brooklyn Navy Yard) located within the exterior boundaries of the state of New York. There is testimony that plaintiff was exposed to asbestos from Aurora’s product (i.e., in the Brooklyn Navy Yard) 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 personal injuries to the plaintiff.

Accordingly, it is ORDERED that defendant Aurora 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.

MANUEL J. MENDEZ
J.S.C.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: May 22, 2019

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