Fay v Aerco Intl.
2019 NY Slip Op 31455(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 190378/2017
Judge: Manuel J. Mendez

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 F. FAY,

Plaintiff(s),

- against -

AERCO INTERNATIONAL, *et al.*,

Defendants.

INDEX NO. 190378/2017

MOTION DATE 5/15/2019

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

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

Cross-Motion: Yes X No

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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.

On December 14, 2017, plaintiff commenced this action against various defendants, alleging that John F. Fay ("Mr. Fay") was exposed to asbestos from their products (*see* Aff. in Supp., Exh. A). On January 24, 2018, Aurora filed a Verified Answer, which asserted in its third affirmative defense: "This Court lacks personal jurisdiction over Defendant." (Aff. in Supp., Exh. B). At his deposition, Mr. Fay testified that he was exposed to asbestos from Aurora pumps at the Brooklyn Navy Yard from 1957 to 1964 (*see generally* Aff. in Supp., Exh F). Plaintiff now brings this action to recover for his personal injuries due to asbestos-exposure.

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 its principal place of business in Minneapolis, Minnesota.

During the operative years or the years during which Mr. Fay alleges exposure to asbestos, there is evidence that Aurora did business in New York and derived revenue therefrom. For instance, in its amended answers to

interrogatories, Aurora states that, between 1935-1980, one of its sales offices/distributors was located at "140 Cedar Street, New York, NY" (Aff. in Opp., Exh. 1 at 3-4). Aurora also states that it had a "branch sales office" at "31-19 37th Avenue, Long Island City, NY" (*id.*).

Aurora now moves to dismiss for lack of personal jurisdiction, arguing that it is not subject to specific or general personal jurisdiction in the State of New York. As for general personal jurisdiction, Aurora argues that it is not subject to such jurisdiction because it is incorporated and maintains its principal place of business in Minnesota.

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. In sum, defendant argues that plaintiff was exposed to asbestos in the Brooklyn Navy Yard which is a federal enclave and therefore beyond the reach of New York's specific personal jurisdiction.

Lastly, defendant argues that aside from any analysis under the CPLR, Fourteenth Amendment Due Process prohibits the exercise of specific personal jurisdiction over it because Aurora did not purposefully avail itself of the privilege of conducting activities within the forum state or 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]).

Plaintiff opposes the motion, arguing that the defendant failed to raise a timely "federal enclave" lack of personal jurisdiction defense with proper specificity. Plaintiff further contends that under dispositive and long-established law, a federal enclave is treated as state land for the purposes of determining personal jurisdiction in personal injury and wrongful death actions. Plaintiff also argues that it has established a prima facie case of specific personal jurisdiction over Aurora under CPLR § 302(a)(3) because Mr. Fay was exposed to asbestos from aurora pumps - and thus injured - at the Brooklyn Navy Yard, New York. Lastly, plaintiff claims that it is indisputable that Aurora otherwise regularly does business in New York, derives substantial revenues from its New York Business, derives substantial business from interstate commerce, and foresaw that its acts would have consequences at the Brooklyn Navy Yard.

"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.").

Aurora has asserted a lack of jurisdiction defense in support of its motion to dismiss. This specific objection to the jurisdiction of the court over Aurora was raised to some extent in Aurora's Answer. However, it was raised in generic terms and lacked specificity about a personal jurisdiction defense involving a "federal enclave" and, therefore, did not fairly apprise the plaintiff of the objection to jurisdiction now being raised.

Aurora's "Third Separate And Complete Defense" states the following affirmative defense: "This court lack personal jurisdiction over Defendant" (Aff. in Supp., Exh. B at 2). Thus, this court finds the objection that it lacks personal jurisdiction over Aurora - on the basis of the Brooklyn Navy Yard being a federal enclave - to have 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).

The State of New York also 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 F2d 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 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 [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 (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. 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 the State of New York and in a federal enclave (the Brooklyn Navy Yard) 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, even absent the waiver of Aurora's personal jurisdiction defense (discussed, *supra*), this court would still have 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.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: May 24, 2019

MANUEL J. MENDEZ
J.S.C.

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