

Godfrey v A.O. Smith Water Prods. Co.
2019 NY Slip Op 31497(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 190280/2015
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 SHIRLEY JO GODFREY, Individually and as Executrix of the Estate of ROBERT C. GODFREY, deceased

INDEX NO. 190280/2015 MOTION DATE 5/22/2019 MOTION SEQ. NO. 008 MOTION CAL. NO.

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

The following papers, numbered 1 to 7 were read on defendant Kaiser Gypsum Company, Inc.'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 Kaiser Gypsum Company, Inc.'s (hereinafter, "Kaiser Gypsum"), motion to dismiss plaintiffs' claims and all cross claims asserted against it, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is granted.

Plaintiffs commenced this action on September 1, 2015, alleging personal injury due to asbestos-exposure. Specifically, plaintiffs alleged that plaintiff-decedent Robert Godfrey developed mesothelioma due to being exposed to asbestos from, among other things, working with joint compound as a grounds crew laborer at Bradford College between 1973 and 1978.

Defendant now moves to dismiss this action, arguing that this court has no personal jurisdiction over it. Plaintiffs oppose the motion, essentially, arguing that there are grounds for personal jurisdiction and that defendant's objection to personal jurisdiction is untimely.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

More specifically, Kaiser Gypsum 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 such jurisdiction in the State of New York (under CPLR § 301) because it is not incorporated in New York and New York is not its principal place of business. Kaiser Gypsum further presents that it, in fact, has its headquarters and principal place of business in California (see Aff. in Supp., Exh. G).

As for specific personal jurisdiction, defendant argues that there is, essentially, an insufficient nexus between Kaiser Gypsum and the forum State of New York to satisfy any of the various means of establishing specific personal jurisdiction. Defendant also contends that aside from any analysis under the CPLR, Fourteenth Amendment Due Process prohibits the exercise of specific personal jurisdiction over it because Kaiser Gypsum lacks sufficient minimum contacts with the State of New York.

Lastly, defendant claims it has properly preserved its personal jurisdiction defense by asserting it in its answer as required (see Aff. in Supp., Exh. B at 33).

Plaintiffs oppose the motion, arguing that this motion to dismiss for lack of personal jurisdiction is untimely. Specifically, they contend that defendant had more than a year between the time this action was commenced and the beginning of Kaiser Gypsum's bankruptcy proceedings to move to dismiss on personal jurisdiction grounds. In other words, plaintiffs claim that defendant is just seeking eleventh-hour relief because trial for this matter is already scheduled for May 28, 2019. Plaintiffs also maintain that Mr. Godfrey's injuries arose from defendant's transaction of business in New York and that they have sufficiently established a prima facie case of specific jurisdiction over Kaiser Gypsum under CPLR § 302(a)(1). This is because they claim the record establishes that defendant transacted with a supplier in New York to purchase the asbestos fibers used in its pre-mixed joint compound (i.e., the asbestos product to which plaintiffs allege Mr. Godfrey was exposed).

"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 and Preservation 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 this case, however, Kaiser Gypsum properly preserved a lack of personal jurisdiction defense by asserting it as the "Fifth Separate Affirmative Defense" in its answer: "This court lacks personal jurisdiction over each and every count contained in Plaintiff's Verified Complaint" (Aff. in Supp., Exh. B at 33). Therefore, this defense fairly apprised the plaintiffs of the objection to jurisdiction now being raised (see *Walden v Genevieve, supra*).

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 Kaiser Gypsum because at the time this action was commenced defendant was neither incorporated nor had its principal place of business in the state of New York (see Aff. in Supp., Exh. G ¶¶ 9-14).

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.

Plaintiffs have not established that Kaiser Gypsum is “at home” in the State of New York or that any of Mr. Godfrey’s exposure to the actual Kaiser Gypsum products at issue occurred in or is connected to New York. Plaintiffs have failed to produce evidence in this case to prove that Kaiser Gypsum and Union Carbide Company executed a contract in New York to supply Calidria to Kaiser Gypsum’s manufacturing plant, which produced the products that ultimately injured the plaintiff. Without any evidence of such a contract and where

it was executed, there is no basis to assert specific jurisdiction over Kaiser Gypsum in New York under the CPLR.

As such, there have been no grounds shown to exist such that this court may exercise specific or general personal jurisdiction over Kaiser Gypsum and this Court finds defendant's personal jurisdiction objection to be proper.

Accordingly, it is ORDERED that defendant Kaiser Gypsum Company, 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 granted, and it is further

ORDERED that all claims in the complaint and all cross-claims asserted against defendant Kaiser Gypsum Company, Inc. are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

MANUEL J. MENDEZ
J.S.C.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: May 24, 2019

Check one: FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE