

Godfrey v A.O. Smith Water Prods. Co.
2019 NY Slip Op 31498(U)
May 28, 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

Plaintiff(s),

MOTION DATE

5/22/2019

- against -

MOTION SEQ. NO.

009

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

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 7 were read on defendant DAP, Inc.'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

6-7Cross-Motion: Yes ☒ No

Upon a reading of the foregoing cited papers it is Ordered that defendant DAP, Inc. k/n/a La Mirada Product Co., Inc.'s (hereinafter, "DAP"), 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 by filing a Summons and Complaint in the Supreme Court of the State of New York, New York County on September 1, 2015 against many defendants, including DAP. Plaintiffs later filed a First Amended Verified Complaint alleging a Wrongful Death claim on April 13, 2016, naming Shirley Jo Godfrey as executrix of the estate of Robert C. Godfrey (Aff. in Supp., Exh. A). DAP filed its Answers on October 7, 2015 and April 29, 2016 respectively (Aff. in Supp., Exh. B). The Fifth Affirmative Defense contained in DAP's Answer asserts that "This Court lacks personal jurisdiction over the defendant with respect to each and every count contained in Plaintiff's Complaint" (Aff. in Supp., Exh. B at 30).

On September 30, 2015, counsel for DAP was served with plaintiffs' Responses to Interrogatories and Request for Production of Documents. Chart A, annexed to plaintiffs' Answers to Defendant's Interrogatories shows that Mr. Godfrey was exposed to asbestos from about 1973 to 1978 while he was employed as a carpenter at Bradford College in Haverhill, Massachusetts (Aff. in Supp., Exh. C).

Mr. Godfrey was deposed over the course of three (3) days in October and November of 2015 (Aff. in Supp., Exhs. D and E). Specifically, Mr. Godfrey testified to working for many employers throughout his career, but only alleged exposure to asbestos-containing materials from his work at (1) Bradford College

in Haverhill, Massachusetts (where he was a full-time student and part-time laborer from 1974 to 1978); and (2) Cross and Brown in Long Island City, New York, from 1979 to 1981, due to his being present as a real estate salesperson while others were demolishing asbestos-containing insulation associated with pipes and boilers (see Aff. in Supp., Exh. D at 33-36; 93-95).

Notably, Mr. Godfrey only alleged that he worked with DAP caulk at Bradford College (*id.* at 53-55). In fact, Mr. Godfrey testified that most of his alleged asbestos exposure and all his alleged exposure to the DAP products at issue occurred while he was working at Bradford College (see *id.* at 26:13-17; 54:14-55:9).

Defendant now moves to dismiss this action, arguing that this court has no personal jurisdiction over it and that plaintiffs have failed to properly establish the causation element of their case. Plaintiffs oppose the motion arguing that, among other things, defendant's objection to personal jurisdiction is untimely.

More specifically, DAP argues that it is not subject to general or specific 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. DAP further presents that it, in fact, has been incorporated in Ohio since the late 1950s and has its principal place of business in the state of Maryland (Aff. in Supp., Exh. F). As for specific personal jurisdiction, defendant, essentially, argues that given the nature of Mr. Godfrey's allegations, there is no basis under New York's long-arm statute, CPLR § 302, to support the exercise of such personal jurisdiction. Lastly, defendant mentions that it has preserved its personal jurisdiction defense by asserting it in its answer (see Aff. in Supp., Exh. B at 30).

DAP also maintains that it has demonstrated that plaintiffs have failed to establish the general and specific causation element of their case. To this effect, DAP claims it has met its burden of establishing that plaintiffs failed to produce any causation report and did not utilize any of the means afforded to them by the Court in *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584 (2006); therefore, defendant contends that plaintiffs have failed to establish both general and specific causation.

Plaintiffs argue that this motion to dismiss based on lack of personal jurisdiction is untimely. However, they otherwise state that they do not contest the merits of defendant's lack of personal jurisdiction or lack of causation arguments.

"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]).

Plaintiffs' first argument that this motion is untimely is unavailing. This is because under the applicable NYCAL CMO rules in effect at the time this case was transferred, a party could make a motion to dismiss such as the instant one 30 days prior to trial. This motion was made April 22, 2019 and it is scheduled for trial on May 28, 2019 which means the motion is timely as it was made more than 30 days before the scheduling of this matter for trial.

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, DAP properly preserved its 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 Complaint" (Aff. in Supp., Exh. B at 30). 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 DAP because at the time this action was commenced, defendant was incorporated in Ohio and had its principal place of business in the state of Maryland (Aff. in Supp., Exh. F).

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]).

Plaintiffs have failed to contest defendant’s objection to personal jurisdiction and no grounds have been shown to exist such that this Court may

exercise general or specific personal jurisdiction over DAP. As such, the motion is granted, and this action is dismissed. This Court need not analyze defendant's argument regarding causation.

Accordingly, it is ORDERED that defendant DAP, Inc. k/n/a La Mirada Product Co., 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 DAP, Inc. k/n/a La Mirada Product Co., Inc. are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: May 28, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE