

Dembski v American Biltrite, Inc.
2019 NY Slip Op 31548(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 190158/2018
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
DENNIS DEMBSKI, INDEX NO. 190158/2018

Plaintiff(s),
- against - MOTION DATE 5/30/2019
AMERICAN BILTRITE, INC., et al., MOTION SEQ. NO. 003
Defendants. 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 ...	<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 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 granted.

Plaintiff, Mr. Dembski, commenced this action by filing a Summons and Complaint in the Supreme Court of the State of New York, New York County on or about May 22, 2018 (Aff. in Supp., Exh. A). Plaintiff’s action arises out of his alleged exposure to asbestos from his use of a variety of alleged asbestos-containing products while he served aboard the USS Dealey (May 1971 – May 1973) and USS Charles P. Cecil (June 1973 – 1974). He alleged this exposure caused his mesothelioma. Aurora timely filed its Verified Answer (“Answer”) on June 14, 2018 (Aff. in Supp., Exh. B). Aurora’s Answer asserts in the Third Separate Affirmative Defense that, “This Court lacks personal jurisdiction over Defendant” (Aff. in Supp., Exh. B at 2). Plaintiff provided Answers to Interrogatories in this matter on or about June 12, 2018 (Aff. in Supp., Exh. C). Plaintiff was deposed over two days, on July 16-17, 2018 (Aff. in Supp., Exh. D).

Mr. Dembski testified that he was exposed to asbestos from an Aurora product when he served in the fire rooms aboard the USS Dealey between May 1971 and May 1973 (Aff in Supp., Exh. D at 61, 65). Plaintiff alleged that Aurora was a manufacturer of some of the valves that he encountered aboard the USS Dealey (Aff. in Supp., Exh. D at 65). He did not, however, allege that the USS Dealey made any contact with New York. Rather, he testified that he boarded the ship in Newport, Rhode Island (Aff. in Supp., Exh. D at 58). The ship then sailed to Cuba, Venezuela, Puerto Rico, Mexico, Jamaica, and Boston (Aff. in Supp., Exh. D at 60-61, 99).

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Plaintiff also testified that he was exposed to asbestos when he served as a fireman apprentice in the fire rooms aboard the USS Charles P. Cecil (Aff. in Supp., Exh. D at 102, 105). Plaintiff, however, did not allege that he encountered any Aurora product while aboard the USS Charles P. Cecil (see Aff. in Supp., Exh. D). Plaintiff testified that he boarded the USS Charles P. Cecil in New London, Connecticut (Aff. in Supp., Exh. D at 102). He later alleged that the ship entered the "New York naval shipyard" or the Brooklyn Navy Yard (Aff. in Supp., Exh. D at 112-113).

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 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. As for general personal jurisdiction, Aurora argues that it is not a corporation and that the Aurora brand name is owned by Pentair, Inc., a Minnesota corporation that maintains its principal place of business in Minneapolis, Minnesota (see Aff. in Supp., Exh. I). Aurora also claims that it is not subject to consent jurisdiction in New York because it is not currently registered as a business in New York; therefore, Aurora's conduct in New York does not give rise to general jurisdiction by consent and New York cannot establish general personal jurisdiction over it in this case.

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 served aboard two Navy vessels, one of which did not make any contact with the State of New York and the other only contacted New York through the Brooklyn Navy Yard, a federal enclave under exclusive federal jurisdiction. As such, pursuant to New York law, defendant argues that plaintiff has failed to establish a nexus between the State of New York and plaintiff's alleged exposure from an Aurora product; therefore, this case must be dismissed for lack of personal jurisdiction.

Plaintiff opposes the motion, arguing that the defendant failed to raise a timely "federal enclave" lack of personal jurisdiction defense with proper specificity. Plaintiff also argues that there is personal jurisdiction over Aurora most especially due to how this case involves a personal injury claim to which it argues state law applies. Lastly, plaintiff argues that it has established a prima facie case of specific personal jurisdiction over Aurora under CPLR § 302(a)(3) because Mr. Dembski was exposed to asbestos from asbestos containing products - and thus injured - at the Brooklyn Navy Yard, New York. Plaintiff claims that it is established 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]).

In this case, plaintiff only alleged exposure to asbestos aboard the USS Dealey and the USS Charles P. Cecil. The USS Dealey, however, was never alleged to have contacted New York and the USS Charles P. Cecil was alleged to have entered the Brooklyn Navy Yard but was never alleged to have been the site of plaintiff’s exposure to asbestos-containing Aurora products. The USS Dealey is the only ship relevant to the personal jurisdiction analysis because it is the only ship aboard which there was ever an allegation of potential exposure to Aurora products.

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 neither incorporated in New York nor maintained its principal place of business in New York.

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.

Although Mr. Dembski may have alleged exposure to asbestos-containing Aurora products aboard the USS Dealey, that ship never contacted New York. Plaintiff did not allege any exposure to Aurora products aboard the USS Charles P. Cecil, the ship which did have contact with New York. Plaintiff also fails to present evidence that his injuries somehow arose from a business transaction in New York. Therefore, the record does not reflect any basis to exercise specific personal jurisdiction over Aurora.

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 granted, and it is further

ORDERED that all claims in the complaint and all cross-claims asserted against defendant Aurora Pump Company 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 31, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE