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| Rothlein v American Intl. Indus. |
| 2019 NY Slip Op 31609(U) |
| June 6, 2019 |
| Supreme Court, New York County |
| Docket Number: 190374/2016 |
| 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

EDWARD ROTHLEIN AND SHARON ROTHLEIN,

Plaintiffs,

- against -

INDEX NO. MOTION DATE MOTION SEQ. NO. MOTION CAL. NO.

190374/2016 05/01/2019 007

AMERICAN INTERNATIONAL INDUSTRIES, for its Clubman and Clubman Brand, et al.,

Defendants.

The following papers, numbered 1 to 10 were read on this motion by Imerys Talc America, Inc., Cyprus Amax Mineral Company, and Cyprus Mineral Co., pursuant to CPLR §3211 and CPLR §§ 301 and 302, to dismiss this action:

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 defendants' Imerys Talc America, Inc. f/k/a Luzenac America Inc., individually and as successor in interest to Windsor Minerals, Inc. (hereinafter "Imerys"); Cyprus Amax Minerals Company, sued individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles, Mathieu, Inc. and Resource Processors, Inc. (hereinafter "CAMC"); and Cyprus Mineral Co., individually and as successor in interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc. and Resource Processor, Inc. (hereinafter "Cypress Mineral") motion pursuant to CPLR §3211 and CPLR §301 and §302 to dismiss for lack of personal jurisdiction over the entities, is granted as stated herein.

Plaintiff, Edward Rothlein (hereinafter decedent), was diagnosed with peritoneal mesothelioma on or about October of 2016. He died in October of 2018 at 72 years of age (Mot. Ex. C). Plaintiffs allege the decedent's exposure - as relevant to this motion - is from the talc supplied by defendants Imerys, CAMC and Cypress Mineral's talc for use in Johnson's Baby Powder ("JBP"), Old Spice, Mennen, Cashmere Bouquet, and Clubman, talcum powder products. Decedent alleged that he was exposed to the asbestos in defendants Imerys, CAMC and Cypress Mineral's talc from about 1946 - when he was born - through 2016.

At his deposition the decedent testified that he was born in Brooklyn New York in 1946 and lived in New York until 2005 when he and his wife, plaintiff Sharon Rothlein, moved to Florida (Opp. Exh. 1, pgs. 13 and 61). Decedent testified that he was exposed to the asbestos contaminated talc in JBP as part of his daily bathing routine from about 1946 to 1964. He stated that he personally used JBP on his children from approximately 1973 through 1979 (Opp. Exh. 1, pgs. 150-152 and Exh. 2, pgs. 205, 207, 335-336, 339-343 and 356). Plaintiffs allege that decedent had second-hand exposure to asbestos contaminated talc in JBP from his children's personal use of the product until they moved out in 2005. They claim that decedent had additional second-hand exposure to asbestos contaminated talc in JBP from Sharon Rothlein's personal use of JBP in the family home from about the 1970's through 2016 (Opp. Exh. 3, pgs. 74-75, Exh. 4, pg. 84, Exh. 5, pgs. 101-102 and 105-107).

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

Decedent testified that from about 1969 to 1972 he used Cashmere Bouquet as part of his daily bathing routine and had second hand exposure to the product from Sharon Rothlein's excessive use of the product from about 1969 through the 1990's (Opp. Exh. 2, pgs. 190-193, 205 and Exh. 6, pgs. 100). Decedent testified that he started using "Old Spice" talcum powder to shave from about 1959 to 1972 (Opp. Exh. 6 pgs. 31 and 100, Exh. 1 pg. 166, Exh. 2 pg. 193 and Exh. 5 pgs. 30-32 and 41). Decedent testified that starting around 1973 he began using Mennen talcum powder as part of his bathing routine and continued to do so until about 1980. He stated that he switched to Clubman talcum powder in about 1982, which he used as part of his daily routine until about 2000 (Opp. Exh. 2, pgs. 192, 208-210 and 224).

Charles Mathieu, Inc. (hereinafter "Charles Mathieu") was owned by Donald Ferry and his sisters starting in 1949 and was operated by Mr. Ferry and his brother-in-law, Peter Bixby, from the later 1940's. Peter Bixby had an ownership interest in Charles Mathieu's subsidiary companies, Metropolitan Talc Company, and part of American Talc Company and Resource Processors, Inc. Charles Mathieu had three main business lines by the 1970s, including importing talc from Italy, mining and exploring U.S. talc, and processing talc at facilities in Alabama and New Jersey. Charles Mathieu and Cyprus Mines Corporation ("Cyprus Mines") were competitors in the 1970s (Reply, Exh. 1, pgs. 15-17).

In 1979 Charles Mathieu sold some assets to Cyprus Industrial Minerals Corporation. Mr. Ferry continued to work for Cyprus Industrial Minerals Corporation until he retired in 1990 (Reply Exh. 1, pg. 16). Cyprus Georesearch, Inc., a wholly owned-subsiary of Cyprus Mines Corporation (hereinafter "Cyprus Mines"), purchased part of Charles Mathieu's assets and none of its liabilities in August 1979. Cyprus Georesearch, Inc. offered an extra \$1 million for all liabilities to remain with Charles Mathieu. Cyprus Mines agreed to pay \$3.5 million in cash and up to \$1.5 million in commissions on sales of Italian talc over the next twenty (20) years. Charles Mathieu retained its talc importation business and was Cyprus Mines exclusive importer and purchasing agent for talc from mines in Val Germanasca, Italy. Cyprus Mines began selling Italian talc imported by Charles Mathieu, who received a 4% commission on all sales. Charles Mathieu eventually changed its name to Charles Mathieu & Co., but remained the same company. The parties agreed to an Amendment in April 21, 1983 to reflect the name change to Charles Mathieu & Co., and continued the commission sales (Reply, Exh. 1, pgs. 20-26, Exhs. 3, 5, 7, 8, 9 10 and 11, and Exh. 19 Ans. to S10, pg. 6).

Cyprus Mines sold its talc business on June 5, 1992. Prior to the sale, it created Cyprus Talc Corporation and transferred its entire talc business to that entity. Rio Tinto purchased all outstanding stock from Cyprus Talc Corporation. Rio Tinto subsequently changed the name of Cyprus Talc Corporation to Luzenac America, Inc.. In 2011, defendant, Imerys purchased all outstanding stock of Luzenac America, Inc. and changed the name of the company to Imerys Talc America, Inc. (Opp. Exh. 14, Reply, Exhs. 15 and 16).

Defendant CMAC was created in 1993 after Rio Tinto acquired the Cyprus Mines Corporation's talc business, and was separated from mining, milling, manufacture, sale or distribution of talc. CAMC was created by the merger of Amax Inc. and Cyprus Minerals Company (Mot. Downey Aff. 10/1/18, Reply Downey Aff. 6/11/18 and Opp. Exh. 12). In 1999 CAMC was acquired by Phelps Dodge Corporation, which was acquired by Freeport-McMoRan in 2007 (Opp. Exh. 12, Patrick J. Downey 08/07/17 Declaration and related exhibits).

Charles Mathieu was the sole company that sold talc for use in JBP from 1954 through 1964. Charles Mathieu also sold talc to Johnson and Johnson for use in JBP from 1964 to 1966. Windsor Minerals sold talc for use in JBP from 1966 through 1972 (Reply, Exh. 20, Answer to No. 3, chart on pg. 10). Imerys states that its predecessors sold talc to Johnson & Johnson from 1979 to 1995 (Opp. Exh. 27, Ans. to S1 and Opp. Exh. 19, Ans. to S10, pg. 6). Luzenac America, Inc. sold talc to Johnson & Johnson for use in JBP From 1995 to 2011. Imerys continued to sell talc

to Johnson & Johnson from August 1, 2011 - the date Imerys purchased Luzenac America, Inc. - to 2017 (Opp. Exh. 26, Answer to S1).

Charles Mathieu was the exclusive supplier of talc used to manufacturer Colgate-Palmolive Company's Cashmere Bouquet from the 1950's through the 1970's (Mot. Exh. D). From 1979 through 1992, Cyprus Mines Corporation d/b/a Cyprus Industrial Minerals sold talc to Colgate-Palmolive Company (hereinafter "Colgate") (Opp. Exh. 11, Preliminary Statement and Resp. No. 2, Opp. Exhs. 10, pg. 37, Exh. 16, pg. 32).

Imerys claims that it only has records of sales of talc to Shulton Inc., the manufacturer of "Old Spice" talcum powder for the period of 1979-1982, 1989, which is outside of the period of decedent's alleged exposure (Mot. Downey Aff. 11/1/18)

Imerys concedes that it sold talc that was shipped to The Mennen Company in New York, but only during the years 1985-1988 and 1990-1991, which is outside decedent's alleged period of exposure (Mot. Downey Aff. 11/1/18).

Imerys was only able to find records of sales of cosmetic talc to Nestle LeMur in 1979-1980 (Mot. Downey Aff. 11/1/18). Whittaker Clark and Daniels - a separate entity, not related to Imerys or any of its predecessors - sold processed talc to Nestle Le Mur Company, a manufacturer of Clubman Talc, for use in talcum powder products from 1975 through 2004 (Reply, Exh. 13, Hubbard deposition, pgs. 69 and 85-86).

Plaintiffs commenced this action on December 8, 2016, the Summons and Complaint were subsequently amended (Mot. Exh. A). Imerys and CMAC separately served their Acknowledgement of Receipt on January 9, 2017 (Mot. Exh. B).

Imerys, CMAC and Cypress Mineral (hereinafter referred to jointly as "the moving defendants") seek to dismiss this action pursuant to CPLR §3211, CPLR §301and CPLR § 302 for lack of personal jurisdiction.

The moving defendants seek dismissal of plaintiffs' claims asserted against Cyprus Mineral. The moving defendants argue that dismissal is warranted because "Cyprus Mineral Co." does not exist as an entity and plaintiffs have not provided any proof of service on the alleged company. Cyprus Mineral Co. did not appear in this action, there was no answer or Acknowledgment of Receipt served on its behalf. Plaintiffs failed to seek a default judgment against Cyprus Mineral Co. and abandoned their claims against that defendant. Furthermore, plaintiffs on this motion failed to make any arguments and have not provided proof of service or otherwise established that "Cyprus Mineral Co." is an actual entity (See Khedouri v. Equinox, 73 A.D. 3d 532, 901 N.Y.S. 2d 221[1st Dept. 2010]). Plaintiffs claims asserted against Cyprus Mineral are dismissed.

Imerys has declared bankruptcy and is no longer seeking relief under this motion. At oral argument, the moving defendants' only sought relief as to defendants CMAC and Cyprus Mineral.

The moving defendants argue that this court lacks general and specific jurisdiction over them and the plaintiffs' claims should be dismissed. CMAC claims that it is not incorporated in New York, and does not maintain a principal place of business here, resulting in no general jurisdiction. They also argue that plaintiffs' claims do not arise from any of CMAC's New York transactions, and that CMAC did not commit a tortious act within the State of New York or without the State of New York that caused an injury to person or property within the State of New York, resulting in no specific jurisdiction (see CPLR § 302(a)(1), (2) and (3)).

Plaintiffs oppose the motion on the ground that there is personal jurisdiction over the moving defendants under New York State's long-arm statute. Plaintiffs allege that this court has jurisdiction over the moving defendants because they or their

predecessors transacted business in the state with Johnson & Johnson and Colgate-Palmolive to supply goods or services in the state and their actions gave rise to the decedent's exposure. Plaintiffs make no arguments to refute the moving defendants claims as to the lack of any transactions in New York during the period relevant to plaintiff's exposure with The Mennen Company, Shulton, Inc., or Nestle Le Mur Company. Plaintiffs allege that the moving defendants' supply of asbestos-contaminated talc to Kolmar Laboratories Inc. in New York - an entity allegedly used by Johnson & Johnson and Colgate-Palmolive - directly contributed to their alleged injuries. Plaintiffs claim that shipments of raw talc were sent to New York Harbor and the Port of New York before being sent to the manufacturers of finished talc products, creating a basis for jurisdiction. Furthermore, plaintiffs state that the moving defendants actively participated in numerous CTFA meetings in New York, engaging in tortious conduct in New York that ultimately gave rise to this action.

"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 alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y. 2d 409, 754 N.E. 2d 425, 729 N.Y.S. 2d 425 [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 CPLR §301, and the long-arm provisions of CPLR §302.

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v. Kiein, 35 A.D. 2d 248, 315 N.Y.S. 2d 695 [1st Dept., 1970]). However, in opposing a motion to dismiss the plaintiff needs only to make a sufficient showing that its position is not frivolous (Peterson v. Spartan Industries, Inc., 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974]).

Plaintiffs argue that this Court has jurisdiction over the moving defendants because they or their predecessors transacted business in New York State to supply goods or services in the state, and their actions gave rise to the decedent's exposure.

In New York a corporation that acquires the assets of another is not liable for the torts of its predecessor (Schumacher v Richards Shear Co., 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]). There are four exceptions to New York's general rule on successor liability, as the successor may be "held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Id*). New York declined to "adopt the product line exception" to the rule that a corporation that purchases another corporation's assets is not liable for the seller's torts since "extending liability to a corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce," which is inconsistent with the justification for strict products liability (Semenetz v Sherling & Walden, Inc., 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 [2006]).

The four exceptions do not apply to hold the moving defendants liable for the torts of their predecessors. Imerys cannot be considered a mere continuation of Charles Mathieu since Charles Matthieu survived the 1979 asset purchase agreement (Schumacher, *supra*). Cyprus Mines did not require Charles Mathieu to dissolve but rather it paid Charles Mathieu cash consideration for the assets it purchased along with hundreds of thousands of dollars in commissions over the course of a decade. The 1979 Agreement did not require Cyprus Mines to acquire Charles Mathieu's liabilities. Furthermore, Charles Mathieu continued its importation business independently throughout the 1980s and retained the right to sell talc to other customers in the event that Cyprus Mines did not make any purchases. Imerys America is not liable for the alleged torts of Charles Mathieu as the 1979 Agreement was not a "de facto merger" or a "mere continuation." CAMC

is the result of a merger between Cyprus Minerals and Amax Inc., and also not a successor to Charles Mathieu.

The moving defendants are granted dismissal of plaintiffs' claims against them for alleged exposure to asbestos from talc prior to 1979. Charles Mathieu retained liability for torts for the talc products produced at least through 1979.

General Jurisdiction:

Defendant CAMC alleges that it is a Delaware Corporation with its principal place of business in Arizona, it is not a New York resident, It has no offices in New York, nor does it own or lease property in New York, it is not registered to do business in New York, has no New York address or bank account, and has not sold, manufactured, supplied, or distributed talc to any person or entity in the United States (Mot. Downey Aff. 10/1/18 and Reply, Downey Aff. 6/11/18). Imerys alleges it is a Delaware corporation with a principle place of business in California (Mot. Downey Aff. 11/1/18).

In support of the motion the moving defendants cite to Daimler v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed. 2d 624 [2014], where the United States Supreme Court reversed the Ninth Circuit Court of Appeals and held that due process did not permit exercise of general personal jurisdiction over a German corporation in California based on the services performed in California by its United States subsidiary, when neither the parent German corporation or the subsidiary were incorporated in California or had their principal place of business there. General jurisdiction over a corporation can only be exercised where the corporation is at home. Absent "exceptional circumstances" a corporation is at home where it is incorporated or it has its principal place of business.

"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 [E.D.N.Y. 2017]). "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 v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014] and Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S.Ct. 2846, 180 L.Ed2d 796 [2011]).

This court cannot exercise General Personal jurisdiction over the moving defendants because they are not incorporated, nor do they have their principal place of business in the State of New York.

Specific Jurisdiction:

Defendant CAMC has provided sufficient proof in support of its motion to prove that it was created in 1993 as a result of the merger between Cyprus Minerals Corporation and Amax and has never performed any mining, milling, manufacture, sale or distribution of talc, establishing that plaintiffs' specific jurisdiction claims should be dismissed. Cyprus Mines, a subsidiary of Cyprus Minerals, transferred all of its talc assets to Cyprus Talc Corporation which was then sold to Rio Tinto in 1992, and eventually became Imerys (Mot. Downey Aff. 10/1/18, Reply Downey Aff. 6/11/18 and Reply Exhs. 15 and 16). Plaintiffs have not provided proof or otherwise shown that either Cyprus Mines or Cyprus Minerals Corporation retained any talc related liabilities after the transfer of assets to Cyprus Talc Corporation, or after the 1992 sale to Rio Tinto.

Plaintiffs rely on conclusory statements and have not provided any proof in support of their speculative allegations that CAMC is part of the Cyprus group of entities and has any liability. CAMC is a separate entity and the result of a 1993 merger between Cyprus Minerals Corporation and Amax. Plaintiffs provide no proof or otherwise support their allegations that any successor liabilities prior to the transfer of assets belong to CAMC. Plaintiffs' allegations were refuted by the

moving defendants (Reply, Downey Aff. 6/11/18 and Reply Exhs. 15 and 16). Plaintiffs have not shown that there is a basis to assert jurisdictional claims against CAMC.

Plaintiffs' claims that decedent's mesothelioma arose from the use of Johnson & Johnson's JBP and Colgate Palmolive's Cashmere Bouquet in the State of New York, and that the products containing the asbestos-contaminated talc were shipped into New York are sufficient to establish potential long arm jurisdiction over Imerys pursuant to CPLR 302(a)(1). The motion to dismiss for lack of personal jurisdiction is denied as to Imerys.

Accordingly, it is ORDERED that defendants Imerys Talc America, Inc. f/k/a Luzenac America Inc., individually and as successor in interest to Windsor Minerals, Inc.; Cyprus Amax Minerals Company, sued individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles, Mathieu, Inc. and Resource Processors, Inc.; and Cyprus Mineral Co., individually and as successor in interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc. and Resource Processor, Inc.'s motion pursuant to CPLR §3211(a)(8) and CPLR §301 and §302 to dismiss this action for lack of personal jurisdiction over the entities, is granted, and it is further,

ORDERED that plaintiffs' causes of action and all cross-claims asserted against Cyprus Amax Minerals, Company, sued individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles, Mathieu, Inc. and Resource Processors, Inc. are severed and dismissed, and it is further,

ORDERED that plaintiffs' causes of action and all cross-claims asserted against Cyprus Mineral Co., individually and as successor in interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc. and Resource Processor, Inc., are severed and dismissed, and it is further,

ORDERED that plaintiffs' claims asserted against Imerys Talc America, Inc. f/k/a Luzenac America Inc., individually and as successor in interest to Windsor Minerals, Inc.; Cyprus Amax Minerals Company, sued individually and as successor-in-interest to American Talc Company, Metropolitan Talc Company, Inc., Charles, Mathieu, Inc. and Resource Processors, Inc., are dismissed only as to the plaintiffs' claims for the period prior to 1979, which are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion, as to Imerys Talc America, Inc., is denied, and it is further,

ORDERED, that within fifteen (15) days from the date of entry of this Order, the defendant Cyprus Amax Minerals Company shall serve a copy of this Order with Notice of Entry on all remaining parties, on the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk, pursuant to e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: June 6, 2019

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