

<b>DeRozieres v ABB, Inc.</b>
2019 NY Slip Op 31628(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 190350/2017
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**  
**BARBRA DeROZIERES, Individually and as the**  
**Personal Representative of the Estate of JOHN**  
**DeROZIERES**

INDEX NO. 190350/2017

Plaintiff(s),

- against -

MOTION DATE 5/29/2019

ABB, INC., et al.,

MOTION SEQ. NO. 003

Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on defendant Munaco Sealing Solutions, Inc.'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</u>
<b>Cross-Motion:</b> <b>Yes</b> <b>X No</b>	

Upon a reading of the foregoing cited papers it is Ordered that defendant Munaco Sealing Solutions, Inc.'s (hereinafter, "Munaco"), motion to dismiss plaintiffs' claims and all cross claims asserted against it, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is denied.

Plaintiff-decedent, Mr. DeRozieres was diagnosed with mesothelioma on or about October 25, 2017. He and his wife, Barbara DeRozieres, commenced this personal injury action on November 2, 2017 against various defendants, including Munaco (see Prystowsky Aff., Exh. 9). The Complaint alleged that defendants exposed Mr. DeRozieres to asbestos-containing materials, products, and equipment throughout his career as a mechanic and that this exposure was the proximate cause of his mesothelioma. Mr. DeRozieres also described his alleged exposure to asbestos from products manufactured by Munaco (see Prystowsky Aff., Exh. 10 at 12; Exh. 11 at 197, 225, 398, 471, 485, 529-539, and Exh. 12 at 20-21). At his deposition, Mr. DeRozieres claimed that from about March 1968 to 1979, he removed and installed gaskets supplied by "Munaco" and two other pump and valve suppliers at certain plants in New York while employed as a general utility mechanic, equipment operator, and mechanic for Con Ed. (LaSala Aff., Exh. E at 12:17; 14:4-7; 20:4-8; 20:24-21:4; 21:12-14; 29:9-18; 34:18-21; 36:1-3; 37:1-9; 43:1-16). On September 11, 2018, Mr. DeRozieres passed away due to mesothelioma (see Prystowsky Aff., Exh. 15). On February 26, 2019, defendant filed the instant motion

Defendant now moves for summary judgment, claiming that a new contract has been discovered which renders circumstances such that this court cannot exercise any form of personal jurisdiction over it. More specifically, defendant argues that this Court cannot exercise general personal jurisdiction over it

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

because the company lacks the required presence in New York. Munaco also contends it has done nothing that would bring it within the reach of this Court's long-arm jurisdiction.

Plaintiffs oppose the motion, claiming that personal jurisdiction has already been found to exist over Munaco in the *Herlihy* case (see NYSCEF Doc. No. 204). Plaintiffs further argue that defendant's newly discovered contract (which allegedly clarifies that Munaco Sealing Solutions, Inc. is not the successor-in-interest to Munaco Packing & Rubber Co., Inc.) does not change the personal jurisdiction analysis. This is because plaintiffs contend that defendant simply cites to conclusory affidavits rather than the actual newly discovered contract to support its claim that Denton Taylor Industries, Inc. (hereinafter, "DTI") is the true successor to Munaco Packing & Rubber Co., Inc. Moreover, the newly discovered contract itself, which was submitted after the discovery deadline for this case, does not contain language indicating an actual full sale of Munaco Packing & Rubber Co., Inc. to DTI. Lastly, plaintiffs maintain that this case should not be dismissed because defendant should be collaterally estopped from arguing the issue of whether Munaco-SC is the successor-in-interest to Munaco-NY.

Defendant-Munaco first filed a Motion to Dismiss for Lack of Personal Jurisdiction in the Arthur Herlihy case. In that case, decedent, Arthur Herlihy, filed suit in Supreme Court, New York County, on November 3, 1993, alleging that he was suffering from asbestosis caused by exposure to asbestos (see *Prystowsky Aff.*, Exh. 3 at 91-120). Thereafter, on April 21, 2011, Mr. Herlihy filed suit for a second asbestos-related injury, lung cancer, in a case captioned *Herlihy v. A.F. Supply Corp., et al.*, Index No. 190149/2011 (see *id.* at 41-55). In Mr. Herlihy's answers to standard interrogatories and at his depositions, he described his exposure to asbestos from products manufactured by Munaco (see *id.* at 139 and 179 [T106:3—110:10]; 199-200 [T189:1—190:6]; 331-332 [T518:18—519:19]; 446 [T794:15—795:5]; 455 [T831:9—833:23]). On July 11, 2011, Mr. Herlihy passed away from asbestos-related lung cancer (see *Prystowsky Aff.*, Exh. 4 at 490).

In connection with claims against Munaco, the following past and present employees of Munaco were deposed in *Herlihy* (Index No. 190149/2011): (1) Denton Taylor ("Taylor"), a former employee of Munaco who was responsible for computerizing sales inside and outside the company while at Munaco from 1988 until 1995; (2) Dianne Walsh<sup>2</sup> ("Walsh"), who began working for Munaco as a gasket cutter in 1983 and currently serves as Munaco's Secretary/Treasurer; and (3) Brenda DeWachter<sup>3</sup> ("DeWachter"), who began working for Munaco in 1982 as a file clerk and is the current owner and President of Munaco.

According to these fact witnesses, Bill Munn founded Munaco Packing & Rubber Company, Inc. in the early-to-mid 1900s (see *id.* at 528 [Denton Taylor Deposition at T27:10-20]; 588-589 [Dianne Walsh Deposition at T85:18—86:24]; 651 [Brenda DeWachter Deposition at T50:5-9]; see also 730-743 [Munaco Company Profile Webpage]; see also NY Sec. of State Munaco Business Incorporation attached to *Prystowsky Aff.*, Exh. 5). After the death of Bill Munn, Dennis Cullen became the owner and President of Munaco while it was

incorporated in New York and continued as the owner and President when the company moved to South Carolina in 1995 (see Prystowsky Aff., Exh. 4 at 528-529 [Taylor Deposition at T28:20—30:10]; 579 [Walsh Deposition at T48:14-17], 607 [Walsh Deposition at T160:25—161:2]; 686 [DeWachter Deposition at T190:14-17]; 730-743 [Company Profile Webpage]). Munaco's only New York facility was located at 325 West 16th Street, New York, New York (see Prystowsky Aff., Exh. 4 at 528 [Taylor Deposition at T26:13-24]).

During World War II, Munaco “manufactured and supplied gaskets and packing for the Brooklyn Navy Yard.” (see *id.* at 730-737 [Company Profile Webpage]). In addition, Munaco manufactured gaskets, gasketing material, and related items and sold them to Brooklyn Boiler Repair Co. and to their customers, General Electric Company and Con Edison (see *id.* at 529 [Taylor Deposition at 30:17-22], 530-531 [Taylor Deposition at T37:22—38:4]; at 590 [Walsh deposition T93:23—07:20], 603 [Walsh Deposition at T144:4—149:24]; 744-746 [Con Edison Documents]). Taylor testified that he left Munaco in 1995 because the owner, Cullen, decided to “move the company to South Carolina” (see *id.* at 527 [Taylor Deposition at T24:7-22]).

On February 2, 1995, Dennis Cullen moved Munaco to South Carolina and incorporated the company in South Carolina under the same name: “Munaco Packing & Rubber Co. Inc” (see Prystowsky Aff., Exh. 6). Although Taylor and another employee named Herbie decided not to move to South Carolina for personal reasons, the other six employees of Munaco New York, including Cullen, Walsh, and DeWachter, decided to relocate and continue the company's operations in South Carolina (see Prystowsky Aff., Exh. 4 at 577 [Walsh Deposition at T39:1-3], 608 [Walsh Deposition at T162:1-24]).

As of 1995, all six Munaco employees in South Carolina were transplants from Munaco's New York location (see *id.* at 580-581 [Walsh Deposition at T52:12 55:12]). According to the fact witnesses, the majority of items, equipment, accounts, and funds from Munaco in New York were transferred and/or moved to Munaco's new location in South Carolina. Additionally, Walsh testified that she had handled Munaco New York's accounts receivable and accounts payable beginning in the mid-1980s, and when Munaco moved to South Carolina, all accounts receivable and payable were transferred to that location (See *id.* at 574 [Walsh Deposition at T28:19—29:14]; 599-605 [Walsh Deposition at T128:24—151:9]). DeWachter further testified that Munaco's pension fund was transferred to South Carolina (See *id.* at 690 [DeWachter] at T207:21—209:6).

In its South Carolina location, Munaco persisted in the same business as it had in New York and continued to cut gaskets and distribute similar goods, such as packing, metal gaskets, and stripping, as it continued to use the same logo that Munaco had used in New York (See *id.* 580 [Walsh Deposition at T50:7-16], at 534-535 [Taylor Deposition at T:53:25—54:21]; 585 [Walsh Deposition at T71:10—72:4]; 658 [DeWachter Deposition at T80:16-22]; 752 [Defendant's Logo]). Although Munaco moved to South Carolina in 1995, the company did not actually dissolve its New York incorporation until January 31, 1997, when Dennis Cullen (who had moved with the company to South Carolina) signed the dissolution paperwork (see *id.* at 589 [Walsh Deposition at T88:5-13]; 694-695 [DeWachter

Deposition at T225:25—226:6]; see also Prystowsky Aff., Exh. 3 at 35-37 [Dissolution Papers]; see also Prystowsky Aff., Exh. 5; see also Prystowsky Aff., Exh. 6).

In *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 298 NYS2d 955 (1969), the Court of Appeals set forth two requirements for invoking the doctrine of collateral estoppel: (1) there must be an issue which has necessarily been decided in the prior action and is decisive of the present action; and (2) there must have been a full and fair opportunity to litigate the issue. The “issue” here is whether Munaco-SC is the successor-in-interest to Munaco-NY and the issue has already been decided by this Court as well as affirmed by the Appellate Division, with leave to appeal to the Court of Appeals denied (see Prystowsky, Aff., Exhs. 7, 8, and 8a). The first prong of the test for collateral estoppel is, thus, satisfied because the identity of the issue here is same as in the *Herlihy* case (NYSCEF Doc. No. 204). The second prong is also satisfied because plaintiffs performed substantial discovery in litigating *Herlihy* (*id.*) and the issue was litigated all the way up, only to end in a denial of leave to further appeal the matter to the New York State Court of Appeals (see Prystowsky, Aff., Exh. 8a). Defendant has already had a full and fair opportunity to challenge personal jurisdiction both in this Court as well as in the Appellate Division.

In the instant case, no new evidence potentially relevant to a personal jurisdiction analysis has been presented other than affidavits with the newly discovered contract (discussed, *supra* at 1) attached thereto. The newly discovered contract attached to the affidavits of Brenda DeWachter (Affirmation of Brenda DeWachter at NYSCEF Doc. No. 178) and Denton Taylor (Affirmation of Denton Taylor at NYSCEF Doc. No. 177) was signed into evidence beyond the discovery deadline on October 19, 2018 (see Prystowsky Aff., Exh. 24). Moreover, the contract itself does not demonstrate that DTI is the true successor-in-interest to Munaco Packing & Rubber Co., Inc.; rather, the contract simply reflects an agreement to sell DTI the right to use the Munaco name and lease certain specified assets (see Exhibit 1 attached to the Affirmation of Brenda DeWachter, NYSCEF Doc. No. 178). Therefore, the record for the instant case fails to present anything that would change the analysis of personal jurisdiction and successor liability already contained in *Herlihy v A.F. Supply Corp., et al.*:

The facts are that Munaco SC manufactured, distributed, and sold the same goods and products as Munaco NY to its same primary customer. Munaco SC employed six of Munaco NY's eight employees, and utilized most of Munaco NY's equipment, including gasket presses, a cutting table, steel tables, and desks. Dennis Cullen, the sole owner of Munaco NY, was also the sole owner of Munaco SC until he passed away in or about 2004. It was Dennis Cullen, not Denton Taylor, who signed dissolution papers for Munaco NY in January of 1997. This is evidence that Munaco NY was not, as defendant urges, sold to Mr. Taylor, but rather that Mr. Cullen simply continued his operation in South Carolina. A further fact evidencing this is that Munaco SC took with

it to South Carolina Munaco NY's accounts receivable, accounts payable, and pension funds.

In light of these facts, and in accordance with the authorities recited above, I find that this court may properly exercise personal jurisdiction over the continuation of such company in the form of Munaco SC. The relationship between Munaco NY and Munaco SC is such that "the jurisdictional contacts of one [may be deemed] the jurisdictional contacts of the other." *Patin, supra*, 294 F3d at 653.

(*Herlihy v. A.F. Supply* [NY Sup. Ct.], NYSCEF Doc. No. 204 at 5)

This Court need not and will not re-analyze personal jurisdiction and successor liability as concerns Munaco Sealing Solutions, Inc. Rather, this Court will adopt the Court's already properly performed analysis of this issue from *Herlihy* into this decision (*Herlihy v. A.F. Supply* [NY Sup. Ct.], NYSCEF Doc. No. 204). This Court has grounds to exercise personal jurisdiction over Munaco and the defendant's motion is denied.

Accordingly, it is ORDERED that defendant Munaco Sealing Solutions' 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.

MANUEL J. MENDEZ  
J.S.C.

ENTER:



MANUEL J. MENDEZ  
J.S.C.

Dated: June 7, 2019

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