

Babcock v A.O. Smith Corp.
2019 NY Slip Op 31714(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 190134/2018
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

ARNOLD BABCOCK and ROSE MARY BABCOCK,

INDEX NO. 190134/2018

Plaintiffs,

MOTION DATE 06/12/2019

- against -

MOTION SEQ. NO. 009

A.O. SMITH CORPORATION, *et al.*,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 9 were read on this motion by Watts Water Technologies, Inc., pursuant to CPLR §3211(8) and CPLR §§ 301 and 302, to dismiss this action and plaintiffs' cross-motion to amend the pleadings:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5, 6 - 7</u>
Replying Affidavits _____	<u>8 - 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Watts Water Technologies, Inc.'s motion pursuant to CPLR §3211(a)(8) and CPLR §301 and §302 to dismiss plaintiff's complaint for lack of personal jurisdiction, is denied. Plaintiffs' cross-motion is granted to the extent of amending the Summons and Complaint to add Watts Regulator, Co. as a defendant, the remainder of the relief sought on the cross-motion is denied.

Plaintiff, Arnold Babcock, was diagnosed with malignant epithelioid mesothelioma on or about March 19, 2018 (Mot. Exh. C, Answer 7). His exposure - as relevant to this motion - is allegedly from his work in New York as a union pipefitter from 1962 through 1993. He was a member of the Plumbing and Steamfitting Local Union 269 (now Local 373) (Mot. Exh. C, Answer 21(a), and Opp. Exh. B, at pages 1289-1290, 1299, 1307, 1332-1333, 1345-1347).

Mr. Babcock was deposed over the course of nine (9) days, May 30, 31, June 1, 4, 5, 6, 18 and 20, 2018. Mr. Babcock identified his work with "Watts" asbestos containing products, and testified that he remembered repairing traps and removing old gaskets. He testified that washer or gaskets next to the valves and steam traps bore the word "Watts." He remembered that the name "Watts" was either embossed or on the nameplate of the products. Mr. Babcock testified that he worked with "Watts" valves, including those associated with washing machines, feed valves and pressure relief valves on boilers. He also recalled work on "Watts" steam traps (Opp. Exh. B, pgs. 52, 62, 214-215, 285-286, 392-393, 452-453, 1289-1291, 1294, 1297, 1299, 1307, 1310-1312 and 1328-1333, and Mot. Exh. C, Amended Chart A).

The motion papers do not state when Watts Water Technologies, Inc. was created. On December 27, 1985 Watts Industries Inc. was incorporated in the State of Delaware to take the company public and to raise investment capital for major acquisitions (Mot. Exh. E and Opp. Exh. E, pg. 5). On March 30, 2003, Watts Industries, Inc. merged with Watts Water Technologies, Inc., also a Delaware Corporation, and changed its name to Watts Water Technologies, Inc. (Mot. Exh. F, para. "Fourth," and Mot. Exh. G, MacPhee Aff., para. 4). Watts Water Technologies, Inc.'s principal place of business is North Andover, Massachusetts (Mot. Exh. G, MacPhee Aff. paras. 4 and 5).

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

Watts Regulator Company was started in 1874 and manufactured valves, steam and water pressure regulators through at least 1994. In 1936, Watts Regulator Company became incorporated in Massachusetts. The incorporation of Watts Industries Inc. in 1985 created a "parent company" of the business, with Watts Regulator Company becoming a subsidiary. After the 2003 merger, Watts Water Technologies, Inc. became the "parent company" of Watts Regulator Company (See Reply, pg. 5, para. 19 and footnote 2, and Opp. Exhs. E and F).

Plaintiffs commenced this action on April 23, 2018 to recover for personal injuries resulting from Mr. Babcock's exposure to asbestos from the defendants' products and named Watts Water Technologies, Inc. as a defendant (Mot. Exh. A, NYSCEF Docket #1). The summons and complaint were subsequently amended seven times to add defendants. The Seventh Amended Summons and Complaint is dated December 3, 2018 (Mot. Exh. A). Watts Water Technologies, Inc. served and uploaded its Answer to the Summons and Complaint on May 25, 2018 (Mot. Exh. B).

Watts Water Technologies, Inc. participated in discovery which included depositions - with sixty (60) pages of transcript comprising the cross-examination of plaintiff, Arnold Babcock, by Watts Water Technologies, Inc.'s attorney - responses to plaintiffs' interrogatories, and Watts Water Technologies, Inc.'s expert witness disclosures (Opp. Exh. B, pgs. 1287-1347, Reply Exh. A, and Opp. Exh. C). On December 6, 2018 plaintiffs filed the Note of Issue (Opp. to Cross-Mot. Exh. A). Pursuant to the April 3, 2019 Transfer Order this case was added to the October 2018 - In Extremis Cluster (NYSCEF Doc. #317). On April 10, 2019 the parties appeared before this Court for a pre-trial conference and were assigned a June 18, 2019 trial date.

Watts Water Technologies, Inc. seeks to dismiss this action pursuant to CPLR §3211, CPLR §301 and CPLR § 302 for lack of personal jurisdiction.

Watts Water Technologies, Inc. argues that this court lacks general and specific jurisdiction over it and the plaintiffs' claims should be dismissed. Watts Water Technologies, Inc. claims that it is not incorporated in New York, and does not maintain a principal place of business here, therefore there is no general jurisdiction. Watts Water Technologies, Inc. also argues that plaintiffs' claims do not arise from any of Watts Water Technologies, Inc.'s New York transactions, and that the claims asserted against it for the period prior to 1985 were before it even came into existence. It also claims that it could 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, because it did not manufacture, sell or distribute any products before 1993, therefore there is no specific jurisdiction (see CPLR § 302(a)(1), (2) and (3)).

Plaintiffs oppose the motion on the ground that Watts Water Technologies, Inc. did not plead with specificity, or state at any point during discovery and before making this motion, the lack of a corporate existence prior to 1985. Plaintiffs also argue that Watts Water Technologies, Inc. waived the defense of lack of personal jurisdiction by participating in litigation and not making this motion until after the Note of Issue was filed and this case was assigned a trial date.

CPLR §3018 applies to the pleading of affirmative defenses, it requires that a party assert an affirmative defense that is sufficiently detailed to preserve the jurisdictional defense (See *Gibson v. Air & Liquid Systems Corporation*, 2019 N.Y. Slip Op. 04777 [1st Dept., 2019] citing to *Green Bus Lines v. Consolidated Mut. Ins. Co.*, 74 A.D. 2d 136, 426 N.Y.S. 2d 981 [2nd Dept. 1980]). A defendant that clearly asserts the affirmative defense in its answer does not waive personal jurisdiction (*Shabrawy v. Ocean Ships, Inc.*, 266 A.D. 2d 277, 641 N.Y.S. 2d 36 [1st Dept. 1996] and *Goldenberg v. Westchester County Health Care Corp.*, 16 N.Y. 3d 323, 946 N.E. 2d 717, 921 N.Y.S. 2d 619 [2011]).

Watts Water Technologies, Inc. asserted a third affirmative defense in its Answer that states: "This Court lacks personal jurisdiction over Defendant" (Mot. Exh. B). Plaintiffs are confusing a general denial with no stated objection to personal jurisdiction

with Watts Water Technologies, Inc.'s actual pleadings. Watts Water Technologies, Inc.'s Third Affirmative defense clearly states there is an objection to personal jurisdiction sufficient to avoid waiver and proceed on this motion to dismiss.

“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 Watts Water Technologies, Inc. is a successor corporation and subject to specific jurisdiction. They alternatively argue that they will be severely prejudiced if Watts Water Technologies, Inc. is not kept in this case as a successor corporation. Finally they argue that Watts Regulator Company is an admitted principal subsidiary as shown in the 1994 Annual Report made to the Securities and Exchange Commission (SEC) (Opp. Exh. F). Plaintiffs did not name Watts Regulator Company as a defendant in this action or as a successor to Watts Water Technologies, Inc..

Plaintiffs claim there is personal jurisdiction over Watts Water Technologies, Inc. under New York State’s long-arm statute. Plaintiffs argue that this court has jurisdiction over Watts Water Technologies, Inc. because its predecessor transacted business in the state by supplying goods in the form of valves and steam traps, and their actions gave rise to Mr. Babcock’s injuries from exposure to asbestos during the period he was employed here. Plaintiffs claim that Watts Water Technologies, Inc. maintains distributors and sales offices which have a robust business that derives substantial revenue in New York State, warranting denial of the motion to dismiss for lack of personal jurisdiction.

General Jurisdiction:

Defendant Watts Water Technologies, Inc. provides proof that it is a Delaware Corporation with its principal place of business in Massachusetts, it is not a New York resident, its predecessor, Watts Industries, Inc. was also a Delaware corporation (Mot. Exh. F and Exh. G, MacPhee Aff. para. 4).

In Daimler v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed. 2d 624 [2014], 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]).

Plaintiff has not provided proof or otherwise shown that this Court can exercise general personal jurisdiction over Watts Water Technologies, Inc., which is not incorporated nor does it have a principal place of business in the State of 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 (See Bristol Myers Squibb Co., Supra; Walden v. Fiore, 134 S. Ct. 1115 [2014]).” “To justify specific personal jurisdiction over a non-resident defendant, a plaintiff must show that the claim arises from or relates to the defendant’s contacts in the forum state” (In re MTBE Products Liability Litigation, 399 F.Supp2d 325 [S.D.N.Y. 2005]).

“A non-domiciliary defendant transacts business in New York when on their own initiative the non-domiciliary projects itself into this state to engage in a sustained and substantial transaction of business. The plaintiff’s cause of action must have an “articulable nexus” or “substantial relationship with the defendant’s transaction of business here. At the very least there must be a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim. This inquiry is relatively permissive and an articulable nexus or substantial relationship exists where at least one element arises from the New York contacts”(see D& R. Global Selections, S.L., v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 78 N.E.3d 1172, 56 N.Y.S.3d 488 [2017] quoting Licci v. Lebanese Can. Bank, SAL, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 [2012]).

On December 27, 1985 Watts Industries Inc. was incorporated in the State of Delaware (Mot. Exh. E). The motion papers do not state when the pre-merger entity Watts Water Technologies, Inc. was created. On March 30, 2003, Watts Industries, Inc. merged into and assumed the name of “Watts Water Technologies, Inc.”(Mot. Exh. F, para. “Fourth”). Watts Water Technologies, Inc. relies on the affidavit of its corporate representative, Timothy MacPhee, who states that from 1985 through the end of 1993 (after Mr. Babcock’s alleged period of exposure to asbestos in the State of New York), it did not manufacture, sell or distribute any steam traps or valves (Mot. Exh. E, Exh. F, and Exh. G, MacPhee Aff. paras. 4 and 5). Watts Water Technologies, Inc. argues that there is no specific jurisdiction because it did not exist prior to 1985, and did not manufacture, sell or distribute any steam traps or valves that could have been used by Mr. Babcock in New York during the period relevant to his exposure after 1985.

In New York a corporation that acquires the assets of another is generally 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* at 245). Any of the four exceptions can be a basis to retain successor liability. Watts Water Technologies, Inc. concedes that there was a merger, the claim that only one corporation survived the merger lends itself to the possibility that more than one exception to successor liability applies in this case (See Drexler v. Highlift, Inc. 277 A.D. 2d 196, 715 N.Y.S. 2d 722 [2nd Dept. 2000] and

In re New York City Asbestos Litigation (Herlihy v. A.F. Supply Corp.), 112 A.D. 3d 529, 976 N.Y.S. 2d 876 [1st Dept. 2013]).

Mr. Babcock alleges that he was exposed to asbestos containing products bearing the name "Watts" starting in 1962 through 1985. Plaintiffs argue that Watts Water Technologies, Inc. existed prior to 1985 and is still potentially liable to them for Mr. Babcock's exposure to the company's alleged asbestos containing steam traps and valves during his work in New York.

Watts Water Technologies, Inc. concedes that there was a merger of two companies but provides no documentation or otherwise accounts for the potential liability to the plaintiffs for the entity called "Watts Water Technologies, Inc.," prior to 1985, or up to the 2003 merger with Watts Industries, Inc.. The only corporate documentation provided is the "Certificate of Ownership and Merger." Watts Water Technologies, Inc. claims that it is the only entity that survived the merger. The lack of pre-merger documentation, including that which establishes the assets and liabilities of the companies, and the manner in which they were assumed under the merger, establishes that the plaintiffs have made a sufficient showing that their claims of specific jurisdiction under successor liability are not frivolous, warranting denial of the §3211(a) relief sought in this motion.

Plaintiffs alternatively cross-move to amend the caption and the pleadings to add Watts Regulator, Co. as a defendant.

Plaintiff's alleged cross-motion is defective pursuant to CPLR §2215, it does not contain a "Notice of Cross-Motion" (See *Myung Chun v. North American Mortgage Co.*, 285 A.D. 2d 42, 729 N.Y.S. 2d 716 [1st Dept. 2001]). The absence of a "Notice of Cross-Motion" is not necessarily fatal to the relief sought by the plaintiffs. The Court in its discretion may entertain the relief sought in the defective cross-motion papers. Factors to be considered include: the need to encourage careful and forthright practice; the interrelatedness of the relief requested by the cross-movant to that of the underlying motion; the prominence of the arguments of the affirmative relief sought; the underlying movant's opportunity to address the relief sought in the alleged cross-motion; and the interests of judicial economy (see *Fried v. Jacob Holding, Inc.*, 110 AD3d 56, 970 N.Y.S. 2d 260 [2nd Dept. 2013], cited in *Wimbledon Financing Master Fund, Ltd. v. Laslop*, 169 A.D. 3d 550, 95 N.Y.S. 3d 152 [1st Dept. 2019] and *Marx v. Marx*, 258 A.D. 2d 366, 685 N.Y.S. 2d 224 [1st Dept. 1999]).

This Court in its discretion will address the relief sought in plaintiffs' cross-motion in the interests of judicial economy. Furthermore, Watts Water Technologies Inc.'s opposition to plaintiffs' alleged cross-motion establishes that it was fully apprised of the plaintiffs' position and responded to plaintiffs' papers so that there is no prejudice.

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (*McCaskey, Davies & Associates, Inc. v. New York City*, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party (*Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [1st Dept., 2011] and *Anoun v City of New York*, 85 AD3d 694, 926 NYS2d 98 [1st Dept. 2011]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 734 NYS2d 24 [1st Dept. 2001]). Lateness alone does not prevent amendment, there must also be "significant prejudice" to the other side amounting to laches (*Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y. 2d 957, 459 N.E. 2d 164, 471 N.Y.S. 2d 55 [1983]).

"A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d

134, 135, [1st Dept., 2012] citing to, *Otis El. Co. v. 1166 Ave. of Ams. Condominium*, 166 A.D.2d 307, 307, 564 N.Y.S.2d 119 [1st Dept, 1990]). Defendants will not suffer any prejudice when an amended complaint adds a claim premised upon the very same subject matter alleged by the original complaint (*Brown v Blennerhasset Corp.*, 113 A.D.3d 454, 979 N.Y.S.2d 27 [1st Dept., 2014]).

Watts Water Technologies, Inc. argues that the CMO states a case should be removed from the trial cluster if an amendment to the complaint is sought before 60 days of Oct 1st. (October of 2018 Trial Cluster). The CMO actually states that a case should only be removed from the trial cluster (October of 2018 Trial Cluster) when an amendment is sought adding a defendant "*unrelated*" to an existing defendant after the sixty (60) day period before October 1st, except for extraordinary cause shown by plaintiff (CMO, Section VII B - Amended Complaints). Plaintiff contacted the Special Master by email seeking to amend the Complaint and have shown extraordinary cause for the belated amendment (Opp./Cross-Mot. Exh. A).

Plaintiffs have stated extraordinary circumstances and the greater prejudice to them that would ensue if the case proceeds to trial without Watts Regulator Company as a defendant. Watts Regulator Company is described in the 1994 Annual Report as the manufacturer of the same valves described by Mr. Babcock. The amendment is necessary to avoid any prejudice to the plaintiffs, specifically Mr. Babcock, because of his terminal illness. The prejudice to plaintiffs further results from Watts Water Technologies, Inc.'s failure to identify its subsidiary, Watts Regulator Company during discovery. Watts Water Technologies, Inc. conceded that Watts Regulator Company was in existence at the time of Mr. Babcock's alleged exposure and was manufacturing valves.

Watts Water Technologies, Inc. concedes that Watts Regulator Company is a subsidiary as stated in the 1994 Annual Report filed with the SEC (Opp. Exh. F). Watts Water Technologies, Inc. has not denied it is represented by the same attorneys. Watts Regulator Company would not be prejudiced by proceeding to trial on the discovery obtained and exchanged in this action by the parent company, Watts Water Technologies, Inc., and there has been no showing that the discovery or arguments on causation for Watts Regulator Company would otherwise be different. Watts Water Technologies, Inc.'s reference to its own causation argument in a summary judgment motion which was subsequently withdrawn (NYSCEF Doc. # 372 - 388, Mot. Seq. 010) as applying to Watts Regulator Company, further demonstrates that there would be no prejudice (See Opp. to Cross-Mot./Reply Exh. B, para. 18). Watts Regulator Company is being added as a defendant in the caption. Watts Water Technologies, Inc. has not shown that it would be prejudiced from the addition of Watts Regulator Company to the caption.

Plaintiffs have established that they are entitled to amend the complaint to add Watts Regulator Company as a defendant in this action, and there is no need to adjourn the pending June 18, 2019 trial date.

Pursuant to 22 NYCRR 130-1.1, sanctions are applied to conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party (*Emery v. Parker*, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [1st Dept. 2013]). Plaintiff has not stated a basis for sanctioning Watts Water Technologies, Inc. for the comments on the website which are consistent with its own arguments.

Accordingly, it is ORDERED that defendant Watts Water Technologies, Inc.'s motion pursuant to CPLR §3211(a)(8) and CPLR §301 and §302 to dismiss plaintiff's complaint for lack of personal jurisdiction is denied, and it is further

ORDERED that plaintiffs' cross-motion to amend the pleadings to add Watts Regulator Company as a defendant, is granted to the extent that the Summons and Complaint are amended to add Watts Regulator Company as a defendant, and it is further

ORDERED that plaintiffs' Summons and Complaint are amended and Watts Regulator Company is added as a defendant, and it is further


ORDERED that the remainder of the relief sought in plaintiff's cross-motion, for costs and attorneys fees is denied, and it is further

ORDERED, that the plaintiff 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, who are directed to amend their records accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: June 18, 2019



MANUEL J. MENDEZ
J.S.C.

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