

Leavitt v A.O. Smith Water Prods., Co.

2019 NY Slip Op 31715(U)

June 14, 2019

Supreme Court, New York County

Docket Number: 190240/2017

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

RUSSELL LEAVITT and JOYCE LEAVITT Plaintiff(s), INDEX NO. 190240/2017 - against - MOTION DATE 5/29/2019 A.O. SMITH WATER PRODUCTS, CO., et al., MOTION SEQ. NO. 004 Defendants. MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on Goodyear Tire & Rubber Co.'s motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, Replying Affidavits, and Cross-Motion.

FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Plastics Engineering Company's (hereinafter, "Plenco") motion, pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, and for summary judgment pursuant to CPLR § 3212 dismissing all claims and cross-claims against it for plaintiffs' failure to establish exposure to asbestos from its products, is denied.

Plaintiff, Russell Leavitt, claims he developed mesothelioma from exposure to asbestos in defendant's product. At his deposition on April 17 and 19, 2018 (see generally Aff. in Opp., Exh. 1) he stated that during the early 1970s, he visited a Square-D plant in Cedar Rapids, Iowa (id. at 69).

Mr. Leavitt also explained that he breathed in the dust during each of his two- or three-hour tours of the facility because the fans there blew the dust around so that he was constantly inhaling it (id. at 354). Mr. Leavitt testified that he visited the Square-D facility in North Carolina "a few" times between 1969 and 1985 (id. at 88-89).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Michelle Redfield, the corporate representative of the Square-D Company, in a deposition in an unrelated case (*Kovar v Schneider Electric USA, et al.*, No. 1322-CC01123 [Missouri Cir. Ct., Cty. of St. Louis]), testified that Square-D purchased defendant's phenolic molding compound for use at the Cedar Rapids facility during the period when Mr. Leavitt visited (see Aff. in Opp., Exh. 2). Ms. Redfield reviewed interrogatory responses from Plenco, which indicated that from 1958 through 1978, the company delivered "just under 30 million pounds of asbestos molding compounds to the Square-D facility in Cedar Rapids" (*id.* at 60-62). Ms. Redfield stated that this number appeared accurate to her (*id.* at 63) and she acknowledged that the Cedar Rapids plant did not go "asbestos free" until 1980 (*id.* at 79).

Mr. Leavitt visited the Allen-Bradley site in Milwaukee several times for "two to three hours" each time (Aff. in Opp., Exh. 1 at 117). At this location, too, he visited the "Bakelite line," where he saw pellets being "put into a hopper and poured and molded and sanded" (*id.* at 170) and stated that he believed this process exposed him to asbestos (*id.* at 170-71). He stated that there was dust in the air which he breathed in as fans were blowing it around" (*id.* at 172-73). While he was touring the facility, he did not see any other activity that could have caused the dust in the air other than the Bakelite line (*id.* at 173). Charles Germain, the corporate representative of the Rockwell Automation Company (corporate successor to Allen-Bradley), in a deposition in an unrelated case [*In re: New York City Asbestos Litigation* (Podhayski, Cohen, Errico) (Supreme Ct., N.Y. Cty.) (Aff. in Opp., Exh. 3)], further testified that Allen-Bradley purchased phenolic molding compound from Plenco (*id.* at 47-48).

Mr. Leavitt visited the General Electric facility in Schenectady, New York at least two or three times between 1969 and the early 1980s (Aff. in Opp., Exh. 1 at 97, 368). During these visits, Mr. Leavitt toured the facility and visited the "Bakelite line" (*id.* at 97-98). In so doing, he stated that he witnessed black pellets being poured into a hopper (*id.* at 370). He visited the Schenectady facility for a few hours each time, and repeatedly observed the Bakelite process each time he was there (*id.* at 98, 370). This process would last from twenty to thirty minutes (*id.* at 98-99) and allegedly exposed him to asbestos (*id.* at 99).

On February 14, 1973, Rich Cree of Johns-Manville authored an internal memorandum regarding his visit to the Plastics Engineering Company facility in Sheboygan, WI (see Aff. in Opp., Exh. 4). Mr. Cree stated that Plenco "provided GE with asbestos-filled phenolics and probably will produce all the asbestos-filled compounds for GE in the future" (*id.*). Mr. Arthur Freeman, testifying on behalf of General Electric in an unrelated case [*Hess v Alray Construction Corp.*, Index No. 12010-11479 (Aff. in Opp., Exh. 5)], explained that between 1959 to 1976, GE Brockport, NY, also used Plenco asbestos-containing phenolic molding compound (*id.* at 43-44).

Defendant, Plenco, moves to dismiss this action for lack of personal jurisdiction, arguing that this Court does not have general or specific personal jurisdiction over it. As for general personal jurisdiction, defendant contends that such jurisdiction cannot be exercised because Plenco is incorporated in Wisconsin and its principal place of business is in Sheboygan, Wisconsin. Plenco

further claims that New York has never been its principal place of business nor the location of its corporate headquarters.

As for specific personal jurisdiction, defendant argues that plaintiffs have produced no evidence connecting their specific claims with the State of New York. Therefore, this Court does not have specific personal jurisdiction over Plenco.

Plaintiffs oppose the motion to dismiss for lack of personal jurisdiction, arguing that there has been enough evidence presented to challenge the defendant as to the existence of specific jurisdiction under CPLR § 302(a)(1) and (2). Alternatively, plaintiffs cross-move for additional jurisdictional discovery to determine the extent of defendant's sale of asbestos containing phenolic molding materials to General Electric's Schenectady, New York facility, and the materials used by General Electric in the relevant manufacturing operations at the time of Mr. Leavitt's visits.

"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]).

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 Plenco because at the time this action was commenced, Plenco was neither incorporated nor had 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 Plenco’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.

CPLR § 302(a)(1) requires that (1) defendant has purposefully availed itself of the privilege of conducting activities within the state by either transacting business in New York or contracting anywhere to supply goods or services in New York, and (2) the claim arises from that business transaction or from the contract to provide goods or services” (Mckinney’s CPLR § 302[a][1]). “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. However, it is not enough that the non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, 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 NY3d 292, 78 NE3d 1172, 56 NYS 3d 488 [2017] quoting *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 984 NE2d 893, 960 NYS2d 695 [2012]).

Properly giving plaintiffs the benefit of every possible inference in construing the evidence presented, they have shown through the internal memorandum of Rich Cree (see Aff. in Opp., Exh. 4) and the testimony of Arthur Freeman (Aff. in Opp., Exh. 5) that Plenco provided General Electric with asbestos-filled phenolics utilized at General Electric's facility in Schenectady, New York. Pursuant to CPLR § 302(a)(1) and (2) there is an articulable nexus or substantial relationship between defendant's in state conduct and the claims asserted. Mr. Leavitt's injury arose from exposure to defendant's product which was purchased by General Electric and shipped into New York by the moving defendant. Mr. Leavitt was also a New York resident at the time of his alleged exposure within the State of New York to defendant's asbestos-laden products at the General Electric facility in Schenectady New York.

Plaintiffs have established that long-arm jurisdiction should be exercised over the defendants under CPLR § 302(a)(1) and (2). Accordingly, the motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is denied

Alternatively, defendant seeks to convert the relief to summary judgment pursuant to CPLR § 3211(c).

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a

defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.-Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept 2014]).

Defendant moves for summary judgment, claiming plaintiffs have failed to establish that any asbestos containing product manufactured by Plenco was a source of Russell Leavitt's asbestos-exposure. To this effect, defendant argues that Mr. Leavitt never identified the "Bakelite" product at issue as being a Plenco product. Rather, he merely used the term "Bakelite" generically. Defendant also argues that it cannot be established that Plenco manufactured the asbestos containing products to which Mr. Leavitt alleges exposure because it was not the only supplier of such products to the facilities in which he alleges the exposure.

Plaintiffs oppose the summary judgment motion, arguing that the defendant has not met its prima facie burden of establishing that its products could not have contributed to Mr. Leavitt's illness. Plaintiffs further contend that defendant's assertion that other manufacturers supplied the Square-D and Allen-Bradley facilities with phenolic molding compound is not supported by evidence. For instance, there are no supporting exhibits detailing from which other manufacturers such facilities purchased such compound. Moreover, plaintiffs maintain that defendant's motion fails to address Mr. Leavitt's alleged exposure to Plenco phenolic molding compound at the General Electric facility in Schenectady, New York.

Important questions of fact remain as to whether defendant's product could have contributed to Mr. Leavitt's injury. For example, the credibility of Mr. Leavitt's testimony that he was exposed to defendant's asbestos containing products at the General Electric facility in Schenectady, New York (*supra*) must be weighed against that of Todd R. Meyer's affidavit (NYSCEF Doc. No. 252), who states that Plenco sold no such products to the facility.

It is not, however, the function of the court deciding a summary judgment motion to determine credibility issues or make findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 3d 439, 29 NYS 3d 178 [1st Dept 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

For the purposes of defeating defendant's motion for summary judgment, Mr. Leavitt also need not have identified the "Bakelite" product under circumstances where Plenco would have been the only supplier of such products. This is because the plaintiff needs "only [to] show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.-Pacific Corp.*,

212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). In other words, it simply must be established that "facts and conditions" were present such that Mr. Leavitt could have been exposed to asbestos from Plenco products under the circumstances alleged (see *id.*).

Defendant has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its products could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig., supra*). Therefore, summary judgment is denied.

Plaintiffs have established that long-arm jurisdiction should be exercised over the defendant under CPLR § 302(a)(1) and (2). Accordingly, the motion to dismiss for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), and for summary judgment under CPLR § 3211(c), is denied.


There is no need to address the merits of the relief sought in the cross-motion. The defendant's motion is denied, rendering the cross-motion moot.

Accordingly, it is ORDERED that defendant, Plastics Engineering Company's motion, pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, and for summary judgment, pursuant to CPLR § 3212, is denied, and it is further,

ORDERED that plaintiffs' cross-motion pursuant to CPLR § 302 compelling Plastics Engineering Company to respond to jurisdictional discovery, is denied.

MANUEL J. MENDEZ
J.S.C.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: June 14, 2019

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