

Miller v A.O. Smith Water Prods.
2019 NY Slip Op 31982(U)
July 11, 2019
Supreme Court, New York County
Docket Number: 190257/2016
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
*Justice*PART 13IN RE: NEW YORK CITY ASBESTOS LITIGATION
DEBORAH HAMPTON MILLER, Individually and
as Administratrix of the Estate of MYRON WILLIAM
MILLER, deceased,INDEX NO. 190257/2016

Plaintiff(s),

MOTION DATE 7/10/2019

- against -

MOTION SEQ. NO. 015

A.O. SMITH WATER PRODUCTS, et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 7 were read on defendant Crown Equipment Corporation'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 ☒ No

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

This action was commenced by filing a Summons and Complaint in the Supreme Court of the State of New York, New York County on August 19, 2016. Plaintiffs allege that Decedent, Myron Miller, was diagnosed with asbestos-induced mesothelioma from working with and around various products and equipment manufactured, sold, or distributed by the defendants or companies for which the defendants hold liability. Plaintiffs first amended their complaint on October 17, 2016 to name Crown and several other entities as defendants (Aff in Supp., Exh. A). Notably, Crown's Fourth Affirmative Defense states that "The Court lacks personal jurisdiction over Crown" (NYSCEF Doc. No. 683 at 7). Crown is an Ohio corporation, duly organized under the laws of the State of Ohio, and it maintains its principal place of business at 44 South Washington Street, New Bremen, Ohio 45869 (Aff. in Supp., Exh. C).

On or about October 25, 2016, after Mr. Miller's death, counsel for Crown was served with Plaintiffs' Answers to Defendants' Interrogatories and Request for Production of Documents. Chart A, annexed to Plaintiffs' Answers to Defendants' Interrogatories, alleges that Mr. Miller incurred occupational exposure to asbestos in Marietta, Georgia and New York, New York. The record, however, does not reflect that Mr. Miller performed work on or around Crown equipment anywhere outside of Georgia (Aff. in Supp., Exh. D).

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Mrs. Miller was deposed over the course of two (2) days in November 2016 and she testified as to Mr. Miller's occupational history as well as his alleged asbestos exposure from the time they started working together in the spring of 1980 until Mr. Miller's retirement in approximately 2003 (Aff. in Supp., Exh. E). During her discovery deposition, Mrs. Miller identified Crown as one of the manufacturers of the forklifts upon which Mr. Miller performed brake and clutch replacements while operating his Georgia-based business, Steelmaster Materials Handling Corporation ("Steelmaster") (see Aff. in Supp., Exh. E at 79:14-25). She further alleged that this work exposed Mr. Miller to asbestos (see *generally*, Aff in Supp., Exh. E). Mrs. Miller testified that when she joined the company in 1980, Steelmaster was located in Kennesaw, Georgia until being relocated to Woodstock, Georgia in 1987, and then Marietta, Georgia in 1993 (see *generally*, Aff in Supp., Exh. E).

Mrs. Miller also testified that she observed Mr. Miller servicing the brake and clutch assemblies on forklifts at the Steelmaster warehouses located in Kennesaw and Woodstock, Georgia. She testified that all brake service done on the forklifts was performed in Georgia and that the Crown electric forklifts were clutchless (*id.* at 115:19-131:11). There are no allegations on record that Mr. Miller performed work on any forklifts outside of these warehouses or outside of the State of Georgia (See *generally*, Aff. in Supp., Exh. E).

Mrs. Miller did not allege that Mr. Miller was exposed to asbestos from working on a forklift in the State of New York (See *generally*, Aff. in Supp., Exh. E). Plaintiffs' Answers to Defendants' Interrogatories and Request for Production of Documents provides that Mrs. Miller is a resident of Summerfield, Florida, as was Mr. Miller, up until the time of his death (See Aff in Supp., Exh. D at 3-4). Furthermore, while Mr. Miller was born in Brooklyn, New York, he moved to Marietta, Georgia in 1973 (See Aff. in Supp., Exh. D at 5-6). At no point during the time period of alleged exposure in this matter does the record show that Mr. Miller was a resident of the State of New York (see *generally*, Aff. in Supp., Exh. D and Exh. E).

Crown now moves to dismiss this action, arguing that this Court lacks personal jurisdiction over this matter. Plaintiffs oppose the motion arguing that Crown committed a fatal procedural error and did not properly preserve its personal jurisdiction defense.

More specifically, Defendant argues that this Court cannot exercise general personal jurisdiction over Crown because Crown is neither incorporated nor maintains its principal place of business in the State of New York. As for specific personal jurisdiction, defendant argues that the circumstances of this case do not provide the proper nexus for establishing specific personal jurisdiction over crown under any of the various means provided by the CPLR.

Plaintiffs oppose the motion, arguing that Crown did not properly raise and preserve its lack of personal jurisdiction defense. Plaintiffs also contend that Crown's not having annexed its Standard Answer to its motion is a fatal procedural defect.

“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]).

Waiver and Preservation of Jurisdictional defense:

CPLR § 3211(e) provides that an objection to jurisdiction is waived if a party moves without raising such objection, or if, having made no objection under subdivision (a), it does not raise such objection in a responsive pleading. CPLR § 3018(b) provides that a party shall plead all matters which if not pleaded would be likely to take an adverse party by surprise. As such, courts have found that defendants have waived objection to jurisdiction when the affirmative defense actually pleaded in defendant’s answer did not fairly apprise a plaintiff of the objection made.

A waiver has also been found where the objection to jurisdiction has not been pleaded with specificity (see *Walden v Genevieve*, 67 AD2d 973, 413 NYS2d 451 [2nd Dept 1979] denying motion to dismiss - finding objection not specific enough and waived where affirmative defense plead in answer was that “the court lacks jurisdiction of the defendant... by reason of failure to serve summons on [defendant] in accordance with the provisions of statute”, and “motion to dismiss alleged that no jurisdiction at all is acquired even in rem unless the order of attachment is served before service of the summons and complaint.”).

In this case, however, Crown properly preserved its lack of personal jurisdiction defense by asserting it as the Fourth Affirmative Defense in its answer which states, “The Court lacks personal jurisdiction over Crown” (NYSCEF Doc. No. 683 at 7). Therefore, this defense fairly apprised the plaintiffs of the objection to jurisdiction now being raised (see *Walden v Genevieve*, *supra*).

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 Crown because at the time this action was commenced, defendant was neither incorporated nor had its principal place of business in New York (Aff. in Supp., Exh. C).

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]).

Plaintiffs have failed to directly contest defendant's claims that there is no basis for this Court to exercise specific personal jurisdiction over Crown. Moreover, there is no alleged exposure to Crown products within New York State nor evidence that the alleged injuries arose from any transaction of business within the State of New York. Therefore, there is no basis for this Court to exercise specific personal jurisdiction under CPLR §§ 302(a)(1)-(2).

Lastly, the record reflects that there is no basis for specific personal jurisdiction under CPLR § 302(a)(3). This is because the injuries at issue are alleged to have occurred in Georgia, not New York State.

Accordingly, it is ORDERED that defendant Crown Equipment Corporation'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 Crown Equipment Corporation are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

Dated: July 11, 2019

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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