

**English v Avon Prods., Inc.**

2019 NY Slip Op 32026(U)

July 12, 2019

Supreme Court, New York County

Docket Number: 190346/2018

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  
LINDA ENGLISH and PATRICIA RASO,

INDEX NO. 190346/2018

Plaintiff(s),  
- against -  
AVON PRODUCTS, INC., *et al.*,  
Defendants.

MOTION DATE 7/10/2019  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s motion to dismiss:

	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>

Cross-Motion:            Yes    X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. (hereinafter, "JJCI") motion to dismiss the plaintiffs' Amended Complaint and all cross-claims against it for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) or, pursuant to CPLR § 327, for forum non conveniens, is granted.

Plaintiffs commenced this action on August 24, 2018 by filing a Summons and Complaint. Plaintiff, Linda English, alleges that she contracted mesothelioma from being exposed to asbestos contained in various talcum powder products that she used over the course of her life (See generally NYSCEF Doc. No. 146). J&J is a New Jersey holding corporation with its principal place of business in New Jersey (See generally NYSCEF Doc. No. 150 at ¶¶ 4-14). JJCI also is a New Jersey corporation with its principal place of business in New Jersey (See NYSCEF Doc. No. 149 at ¶ 4). JJCI is not a resident of New York and does not own any property in New York (See *id.* at ¶¶ 6-7).

Ms. English is currently a citizen of the State of Texas where she resides with her spouse, Patti Raso (NYSCEF Doc. No. 147 at 6; NYSCEF Doc. No. 148 at 9:4-21) and she has also previously resided in Texas and Maine (NYSCEF Doc. 147 at 7). She testified that she was a flight attendant for Delta Air Lines from 1966 to 1999 (NYSCEF Doc. No. 148 at 22:17-20). From 1966 to 1984, she worked on domestic flights and would sometimes have layovers in New York, during which time she occasionally used talcum powder products (*Id.* at 118:21-119:15; 253:20-258:23). After 1984, Ms. English worked on international flights, and only had a single layover in New York during these years (*Id.* at 142:10-18; 259:17-24).

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

After retirement, she visited New York another three or four times but did not allege talcum powder use on these trips (Id. at 259:9–16). Ms. English testified that she never purchased any talcum powder product in New York State (Id. at 118:18–20). Rather, she brought Johnson’s Baby Powder with her from Texas during her years as a flight attendant (Id. at 257:23–258:7; 306:6-25). Lastly, Ms. English’s diagnosis and all treatment for her mesothelioma occurred outside of New York State (NYSCEF Doc. No. 147 at 7-8; NYSCEF Doc. No. 148 at 45:9–46:5).

Defendants contend that this court does not have personal jurisdiction over them because Ms. English’s transient use of Johnson’s Baby Powder, which she did not buy in New York, does not provide for specific jurisdiction over Johnson & Johnson or JJCI (collectively, “J&J”). Defendants further argue that J&J’s unrelated activities within New York cannot give rise to jurisdiction over plaintiff’s personal injury claims. Lastly, J&J claims that it is entitled, in the alternative, to dismissal under New York’s doctrine of forum non conveniens.

Plaintiffs oppose the motion, claiming that defendants’ specific targeting of New York contacts to conceal information from the public regarding the asbestos content of its talcum powder product subjects them to personal jurisdiction in New York under CPLR § 302(a)(2). Plaintiffs further argue that defendants are subject to personal jurisdiction in New York under CPLR § 302(a)(3) because as a result of their tortious conduct, Ms. English suffered the injury giving rise to this action in New York. Furthermore, plaintiffs contend that defendants derive substantial revenue from interstate commerce and could reasonably foresee that their activities would have consequences in the State of New York.

“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, 180 L.Ed. 796 [2011]; *Daimler AG v Bauman*, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; and *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 (*Ralph Cole 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*, 134 S. Ct. 746, *supra*). Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business (*Daimler AG*, 134 S. Ct. 746, *supra*). 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 the J&J entities because they are neither incorporated nor maintain their principal places of business in the State of New York. The J&J entities are incorporated in New Jersey and maintain their principal places of business there, as well.**

#### **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*, 137 S.Ct. 1773, 198 L.Ed. 395 [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, 188 L.Ed. 12 [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 (l) 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]).

This court cannot exercise specific personal jurisdiction under CPLR § 302(a)(1) because there is no articulable nexus or substantial relationship between the J&J Entities' New York conduct and the claims asserted. 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. The record before this Court establishes that the injuries claimed by the plaintiffs did not arise from any of J&J's activity within the State of New York. Rather, the products at issue were purchased outside the State of New York and there are, in fact, no allegations that the products were purchased within the state. Furthermore, Ms. English specifically denied purchasing Johnson's Baby Powder in New York (see Aff. in Supp., Exh. C at 118:18-20).

This court cannot exercise specific personal jurisdiction under CPLR § 302(a)(2) because the J&J entities have not committed a tortious act within New York State. Rather, J&J's alleged negligence in selling asbestos-contaminated talcum powder to Ms. English occurred outside of New York (Aff in Supp., Exh. C at 118:18-20; 257:23-258:7; 306:6-25). Given that Ms. English never purchased Johnson's Baby Powder in New York, J&J's alleged New York sales are irrelevant.

"CPLR § 302(a)(3) which allows for jurisdiction over an out of state defendant who causes personal injury in New York by committing a tortious act elsewhere if it reasonably expects its act to have consequences in this state and derives substantial revenue from interstate or international commerce, was adopted for the purpose of broadening New York's long-arm jurisdiction so as to include non-residents who cause tortious injury in the state by an act or omission outside the state... .The amendment was not intended to burden unfairly non-residents whose connection with the State is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York" (Lebron v. Encarnacion, 253 F. Supp. 3d 513, supra).

More is required than just an injury in New York. The plaintiff must establish that the defendant either "(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, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR § 302[a][3]).

This court cannot exercise jurisdiction under CPLR § 302(a)(3) because there is no connection between New York and the specific claims at issue for a state court to exercise specific jurisdiction over foreign entities such as J&J. In other words, this case does not present the needed connection between the forum and the specific claims at issue because the products from which Ms. English alleges exposure were not purchased in New York and her resultant illness manifested itself outside the state (see *Bristol-Myers Squibb Co. v Superior Court of California, San Francisco*, 136 S. Ct. 1773, *supra*).

Given that this court is unable to exercise general or specific personal jurisdiction over the J&J entities, this case may be properly disposed of without addressing the issue of forum non conveniens.

Accordingly, it is ORDERED, that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion to dismiss Plaintiff's Second Amended Complaint and all Cross-Claims against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted, and it is further,


ORDERED, that Plaintiff's Second Amended Complaint and all Cross-Claims against Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. are severed and dismissed, and it is further,

ORDERED, that the Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER: MANUEL J. MENDEZ  
J.S.C.

Dated: July 12, 2019

  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE