

Barber v A.O. Smith Water Prods. Co.

2019 NY Slip Op 32318(U)

August 1, 2019

Supreme Court, New York County

Docket Number: 190241/2015

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 KAREN E. BARBER as Executrix for the Estate of JAMES MONTELL,

INDEX NO. 190241/2015 MOTION DATE 7/31/2019 MOTION SEQ. NO. 003 MOTION CAL. NO.

Plaintiff(s),

- against -

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

Defendants.

The following papers, numbered 1 to 7 were read on defendant Kohler Co.'s motion to dismiss for lack of personal jurisdiction:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that defendant Kohler Co.'s (hereinafter, "Kohler"), 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, James Montell originally commenced this action by filing a Summons and Complaint on August 7, 2015 (Aff. in Supp., Exh. A). He subsequently passed away and, on July 12, 2016, Karen E. Barber Individually and as Executrix of the Estate of James R. Montell filed a Third Amended Complaint (see Aff. in Supp., Exh. B). In Mr. Montell's Answers to Interrogatories, he alleged that he lived almost exclusively on the west coast, including Provo, Utah; Butte, Colorado; Denver, Colorado; Oakland, California; San Lorenzo, California; Honolulu, Hawaii; Newark, California; Dam Neck, Washington; Oswego, Oregon; Victor, Washington; and Port Orchard, Washington (see Aff. in Supp., Exh. C at 4-7).

From 1966 to 1968, as specifically concerns this motion, Mr. Montell stated that he lived in San Lorenzo and Newark, California. While enlisted in the Navy from 1959 to 1966, and from 1969 to 1979, Mr. Montell alleged exposure to asbestos through work with and around pumps, valves, boilers, gaskets, packing, insulation, HVAC, pipe and pipe covering, refractory cement, and electrical equipment. Relevant to this motion, he also alleged exposure from his work in various residences in California from 1966 to 1969, from joint compound, caulking compound, floor tiles, electrical equipment, boilers, pumps, valves, insulation, gaskets and packing (see Aff in Supp, Exh. C at chart A).

Mr. Montell's discovery deposition took place over 12 days between September 1 and October 23, 2015 (Aff in Supp, Exhs. 1T to 12T). During his

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

deposition, he stated that he enlisted in the Navy in Oakland, California in 1959 (Aff in Supp, Exh 1T at 59:23-60:4). He was then eventually assigned to a three-month submarine school in Groton or New London, Connecticut. During the three months he was in submarine school, decedent dated a woman he met in New York (Aff. in Supp., Exh. 12T at 892:8-894:7). He visited her on weekends and stayed in her apartment wherein he alleged exposure from unidentified insulated piping on her radiator and caulk on her windows (id.).

In 1959, prior to graduating from his submarine classes, Mr. Montell spent four or five hours of one day in the Brooklyn Navy Yard, looking around (Aff in Supp, Exh. 2T at 85:5-86:21). There, he alleged exposure to asbestos from work being performed by others in the Navy Yard involving insulation, refractory products, and firebrick (Aff in Supp, Exh. 12T at 889:25-892:7). After he graduated from submarine school, he returned to the west coast (Aff in Supp, Exh. 2T at 88:13-22).

From 1966 to 1969, Mr. Montell was temporarily discharged from the Navy for health reasons unrelated to asbestos exposure (Aff in Supp, Exh. 2T at 154:8-155:17). During that period, he was living in the Oakland, California area (Aff in Supp, Exh. 3T at 199:22-200:5). There, he eventually began work with his father-in-law, Andrew McVeigh, who had a handyman business (Aff in Supp, Exh. 3T at 202:2-21) and he continued working with him for about two years before returning to the Navy. Mr. Montell stated that he worked off the books (Aff in Supp, Exh. 3T at 204:13-21) with McVeigh all over the Bay Area (id. at 206:9-16). He performed work in single family houses, apartment buildings, and small warehouses. The work he did included replacing boilers, doing some electrical rewiring, installing sheetrock, painting, replacing windows, building decks, some plumbing work, installing floor tiles, and building additions to homes (id. at 206:17-208:14; 209:13-210:9). During this time, Mr. Montell alleged that he was exposed to asbestos from working with joint compound (id. at 211:12-22); unidentified manufacturers of linoleum and floor tiles which he installed (id. at 213:8-18); boilers by various companies, including Kohler (id. at 216:16-22; 218:1-21); and caulk (id. at 221:7-22).

Mr. Montell returned to the Navy in 1969 and from 1970 to 1975, he was assigned to the USS Sperry in Portland, Oregon (Aff in Supp., 2T at 160:11 to 3T at 194:10). He alleged exposure onboard that ship from motors by many manufacturers (Aff in Supp., Exh. 2T at 166:4-8, 3T181:13-17); pumps by many manufacturers (3T183:13-24); panels and breakers by multiple manufacturers (3T188:21 to 190:1); and unidentified sheet gaskets.

During cross examination by counsel for Kohler, Mr. Montell attributed his asbestos-exposure from Kohler products to the work he performed in residences with his father-in-law (Aff in Supp, 5T at 371:7-377:21). Then during cross examination by plaintiffs' counsel, he reiterated that during his Navy service, he was exposed to asbestos associated with pumps (12T893:13 to 900:6); valves (12T900:9 to 903:21; engines (12T903:23 to 904:25); gaskets, (12T904:18 to 906:11); packing (12T906:12 to 907:2); generators (12T907:3 to 908:17); as well as electrical panels and breakers (12T908:18 to 917:19). Notably, Mr. Montell did not

allege asbestos-exposure from any Kohler boilers during his service in the Navy (see *generally* Aff. in Supp., Exhs. 1T-12T).

Plaintiffs' counsel then moved on to questions regarding Mr. Montell's work with his father-in-law. At this point, Mr. Montell repeated his allegation of exposure associated with his work with boilers (12T917:12 to 920:20); joint compound (12T920:23 to 922:5); caulk (12T922:8 to 923:3); and floor tiles (id. at 923:9 to 925:6).

Kohler is and always has been incorporated in the state of Wisconsin, where it also maintains its principal place of business (see Aff in Supp, Exh. C). Relevant to this motion, Kohler raised the following as its Seventeenth Affirmative Defense in its Amended Standard Answer: "Where applicable, Kohler preserves its right to object to personal jurisdiction of Plaintiff over Kohler" (Aff in Reply, Exh. C at 8).

Defendant now moves to dismiss this action for lack of personal jurisdiction, arguing that it has properly preserved its personal jurisdiction defense by raising it in its Answer. Plaintiffs oppose the motion, essentially, claiming that defendant has waived its right to raise a personal jurisdiction defense.

More specifically, Kohler argues in this case that it is not subject to general or specific personal jurisdiction in the State of New York. As for general personal jurisdiction, defendant argues that it is an entity incorporated in the state of Wisconsin with its principal place of business located there, as well. Therefore, New York cannot establish general personal jurisdiction over it in this case. As for specific personal jurisdiction, defendant argues that there are, essentially, insufficient contacts between Kohler and the forum State of New York such as to satisfy any of the various means of establishing specific personal jurisdiction.

Plaintiffs oppose the motion, arguing that defendant impermissibly moves to dismiss on personal jurisdiction grounds despite its having failed to raise a lack of personal jurisdiction as an affirmative defense in its Answer or Amended Standard Answer, filed on June 18, 2012 (see *generally* Aff. in Reply, Exh. C). Thus, plaintiffs contend that defendant has waived the right to raise a personal jurisdiction defense in the present motion. Should the court find otherwise, however, plaintiffs still maintain that defendant has proceeded in this litigation so long that it should be denied the right to raise a personal jurisdiction defense.

"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 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 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.").

Kohler argues that it has properly preserved its right to object to personal jurisdiction. This argument is unavailing, however, because Kohler's Seventeenth Affirmative Defense in its Amended Standard Answer does not, in fact, properly assert a personal jurisdiction defense (see Aff in Reply, Exh. C at 8). Rather it simply attempts to preserve the right to later object to personal jurisdiction without ever formally raising such a defense: "Where applicable, Kohler preserves its right to object to personal jurisdiction of Plaintiff over Kohler" (*id.*). Therefore, this affirmative defense lacked specificity and did not fairly apprise the plaintiffs of the objection to jurisdiction now being raised (see *Walden v Genevieve, supra*). Thus, this court finds that Kohler has waived its right to raise a personal jurisdiction defense at this juncture.

Accordingly, it is ORDERED that defendant Kohler Co.'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 denied.

**MANUEL J. MENDEZ
J.S.C.**

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: August 1, 2019

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