

**Rosen v Genuine Parts Co.**

2019 NY Slip Op 32467(U)

August 20, 2019

Supreme Court, New York County

Docket Number: 190392/2018

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*

<b>IN RE: NEW YORK CITY ASBESTOS LITIGATION</b>		<b>INDEX NO.</b>	<u>190392/2018</u>
<b>MICHAEL ROSEN</b>		<b>MOTION DATE</b>	<u>7/31/2019</u>
Plaintiff(s),		<b>MOTION SEQ. NO.</b>	<u>003</u>
- against -		<b>MOTION CAL. NO.</b>	_____
GENUINE PARTS COMPANY, NATIONAL AUTOMOTIVE PARTS ASSOCIATION, <i>et al.</i> ,			
Defendants.			

The following papers, numbered 1 to 7 were read on defendants Genuine Parts Company's and National Automotive Parts Association's motion to dismiss for lack of personal jurisdiction:

	<u>PAPERS NUMBERED</u>
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        **X** No

Upon a reading of the foregoing cited papers it is Ordered that defendants Genuine Parts Company's (hereinafter, "GPC") and National Automotive Parts Association's (hereinafter, "NAPA"), motion to dismiss plaintiff's claims and all cross claims asserted against it, for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), is granted.

Michael Rosen commenced this asbestos personal injury action on October 15, 2018 by filing a Summons and Complaint in the New York County Clerk's Office (Aff in Supp, Exhibit A). Defendants GPC and NAPA served their Verified Answers on or about November 21, 2018 (Aff in Supp., Exhibit B and Exhibit C, respectively). As to GPC and NAPA, plaintiff's Complaint generally alleges that these defendants do business and/or transact business in the State of New York (See Aff in Supp., Exhibit A, at ¶¶ 12 and 16). GPC's Answer with Cross-Claims asserts as the Fourth Affirmative Defense that this Court lacks personal jurisdiction over it (See Aff in Supp., Exhibit B). NAPA's Answer with Cross-Claims also asserts as the Fourth Affirmative Defense that this Court lacks personal jurisdiction over it (See Aff in Supp., Exhibit C). Neither GPC nor NAPA were identified as sources of Mr. Rosen's asbestos-exposure in plaintiff's Responses to Defendants' First Set of Interrogatories and Request for Production of Documents (see *generally* Aff in Supp., Exhibit D).

Michael Rosen was deposed over the course of three days on December 4, 5, and 6 of 2018 (Aff in Supp., Exhibit E). GPC and NAPA provided Responses to Plaintiff's Interrogatories (Aff in Supp., Exhibits F and G, respectively). The affidavit on record of GPC representative, Mr. Mark Hohe, is uncontroverted in that it establishes that GPC is a Georgia corporation with its principal place of business in Georgia (see Aff in Supp., Exhibit H, at ¶¶ 6-7). The affidavit of NAPA

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

representative, Mr. Gaylord Spencer, is also uncontroverted in that it establishes that NAPA is a Georgia limited liability company with its principal place of business in Georgia (see Aff in Supp., Exhibit I, at ¶¶ 4-5).

By the time plaintiff, Michael Rosen, was deposed in December 2018, he was 68 years old and had already been diagnosed with mesothelioma in May 2018 (see Aff in Supp, Exhibit E). Mr. Rosen alleged that he contracted mesothelioma due to exposure to asbestos and asbestos-containing products attributable to the named defendants, including GPC and NAPA. As it relates to GPC and NAPA, his only alleged exposure was from automotive brake products while he worked at Community Chevrolet in the State of New Jersey (see Aff in Supp, Exhibit E).

The record reflects, and it is undisputed that plaintiff was never a resident of the State of New York (See Aff in Supp, Exhibits D and E). During his deposition, Mr. Rosen testified as to all the ways he claimed exposure to asbestos containing products. Notably, he never alleged that he was exposed to asbestos from a GPC and/or NAPA branded product in New York State (see *generally* Aff. in Supp., Exhibits D and E). His only allegation of working around brake products, which he identified as NAPA brand products, was when he worked intermittently in the parts department of Community Chevrolet located in Ridgefield Park, New Jersey from 1965-1974 (see *generally* Aff in Supp., Exhibits D and E and at 69-83, 414). The record reflects that none of the NAPA branded brakes sold in New Jersey during the relevant time frame were manufactured or remanufactured in New York State (see Aff in Supp., Exhibit H).

Defendants now move to dismiss this action for lack of personal jurisdiction, arguing that the facts of this case show that there is no basis for this Court to exercise personal jurisdiction over them. Plaintiff opposes the motion, contending that there is, indeed, a basis for this Court to exercise personal jurisdiction over the defendants.

More specifically, defendants argue that the facts of this case do not support the exercise of general or specific personal jurisdiction over them. As for general jurisdiction, defendants maintain that GPC and NAPA were not New York corporations at the relevant time such that they may be subject to general personal jurisdiction. As for specific jurisdiction, defendants argue that the facts of this case do not provide the contacts necessary to establish specific personal jurisdiction under any of the methods provided by the CPLR. Lastly, defendants contend that GPC and NAPA are not subject to personal jurisdiction given due process concerns under the fourteenth amendment.

Plaintiff opposes the motion, arguing that it has established a *prima facie* case for personal jurisdiction on the following two bases: (1) specific jurisdiction, under CPLR § 302(a)(1), is proper because Mr. Rosen's exposure to asbestos arose from defendant's transactions with Pneumo Abex (to purchase all of the asbestos-containing friction material for its brakes), which was headquartered in New York during at least a portion of the decedent's exposure period; and (2) CPLR § 302(a)(1) is independently satisfied because the plaintiff's exposure to asbestos arose from defendant's transactions with brake suppliers in Rockland County, New York. Lastly, plaintiff contends that defendants' important

connections to New York which have already been revealed through discovery merit granting additional time for plaintiff to perform jurisdictional discovery.

“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, defendants properly preserved their lack of personal jurisdiction defense by asserting it in their answers. For instance, GPC's Answer with Cross-Claims asserts as the Fourth Affirmative Defense that “the forum chosen by plaintiff lacks personal jurisdiction over all of the answering defendants” (See Aff in Supp., Exhibit B at 3). NAPA's Answer with Cross-Claims also asserts as the Fourth Affirmative Defense that “the forum chosen by the plaintiff lacks personal jurisdiction over all of the answering defendants” (See Aff in Supp., Exhibit C at 3). Therefore, the defendants fairly apprised the plaintiff 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 GPC because at the time this action was commenced, GPC was a Georgia corporation with its principal place of business in Georgia (See Aff in Supp., Exhibit H, at ¶¶ 6-7). This court also cannot exercise general personal jurisdiction over NAPA because at the time this action was commenced NAPA was incorporated in Georgia with its principal place of business located there as well (See Aff in Supp., Exhibit I, at ¶¶ 4-5).

### 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]).

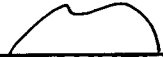
Contrary to plaintiff's argument, this court cannot exercise specific personal jurisdiction over the defendants under CPLR § 302(a)(1). This section of the statute is triggered when a defendant transacts business in New York and the cause of action asserted arises from that activity. The record simply does not reflect that plaintiff, Mr. Rosen, ever obtained a GPC/NAPA product at issue from a supplier in New York (i.e., Rockland County) (see Aff in Supp., Exh. E at 413-415 and generally). Moreover, specific jurisdiction cannot be exercised simply based on assumptions about transactions involving the defendants and Pneumo Abex. Despite this, plaintiff attempts to rely on the assumption that because GPC obtained friction material from Abex, and Abex had an office in New York, that such friction material must have come from New York and/or must have been negotiated for in New York. It is not the role of this Court, however, to decide personal jurisdiction, post-discovery on the mere basis of unsupported assumptions (see *Peterson v Spartan Indus., Inc.*, supra discussing the pre-discovery, as opposed to post-discovery standard for evaluating personal jurisdiction).

Plaintiff has failed to make a "sufficient start" in opposing this motion to dismiss for lack of personal jurisdiction and defendants' motion is granted (see *Peterson v Spartan Indus., Inc.*, supra).

Accordingly, it is ORDERED that defendants Genuine Parts Company's and National Automotive Parts Association'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 defendants Genuine Parts Company and National Automotive Parts Association are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

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

Dated: August 20, 2019

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST <sup>5 of 5</sup>     REFERENCE