

Nelson v 3M Co.

2019 NY Slip Op 32707(U)

September 13, 2019

Supreme Court, New York County

Docket Number: 190095/2019

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

DARRELL NELSON and BARBARA NELSON,

INDEX NO. 190095/2019

Plaintiffs,

MOTION DATE 08/28/2019

- against -

MOTION SEQ. NO. 004

3M COMPANY, et al,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on Holley Performance Products Inc.'s motion pursuant CPLR §3211(a)(7) and (8) to dismiss the complaint, alternatively pursuant to CPLR §3024 requiring plaintiffs to amend the complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Holley Performance Products Inc.'s (hereinafter "Holley") motion pursuant to CPLR §3211(a)(7) and (8) to dismiss the Complaint and all cross-claims asserted against it with prejudice, for failure to state a cause of action and lack of personal jurisdiction, alternatively pursuant to CPLR §3024(a) requiring plaintiffs to amend the Complaint to provide a more particular and definite statement, is granted.

Plaintiffs are married residents of Minnesota. Plaintiff Darrell Nelson, was diagnosed with mesothelioma in February of 2018 (Mot. Exh. 1). Plaintiffs allege that his exposure - as relevant to this motion - was from his working with Holley asbestos containing carburetors during the repair and maintenance of his own personal vehicles and those of family members and friends in Minnesota during the period of the 1950's through 2005. Plaintiffs claim that during the relevant period of exposure Mr. Nelson resided in Minnesota, Illinois, Virginia, Iowa and Connecticut (Opp. Exh. 2, Answer to Interrogatory No. 4).

On April 12, 2018, plaintiffs commenced this action to recover for injuries sustained from Mr. Nelson's asbestos exposure. The complaint asserts claims against Holley (Mot. Exh. 1, para. 35). The complaint has ten causes of action: (1) for negligence; (2) breach of express and implied warranties of good and merchantable quality and fitness (3) fraudulent misrepresentation; (4) strict liability; (5) concert of action; (6) market share liability; (7) alternative/collective liability; (8) duty to maintain a safe workplace (9) spousal loss of consortium and (10) punitive damages (Mot. Exh.1).

On April 24, 2019 Holley was served with the summons and complaint through service via the New York Secretary State (NYSCEF Doc. No.10). In accordance with BCL §307, plaintiffs sent a registered letter to Holley enclosing the summons and complaint and advising of the service made on the New York Secretary of State. The United States Postal Service tracked and confirmed that the registered letter was delivered on May 7, 2019 under Registered Mail Number RE 023 780 741 US (NYSCEF Doc. No. 132). On May 24, 2019 Holley filed a Notice of Appearance (NYSCEF Doc. No. 77).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On June 14, 2019 Holley filed this motion and seeks an Order pursuant to CPLR §3211(a)(7) and (8) dismissing the Complaint for failure to state a cause of action and lack of personal jurisdiction, alternatively pursuant to §3024(a) requiring plaintiffs to amend the Complaint to provide a more particular and definite statement.

At the outset, the CPLR §3024(a) relief sought in Holley's motion is denied as untimely. CPLR §3024(c) requires that this motion pursuant to CPLR §3024(a) seeking a more particular and definite statement "be served within twenty days after service of the challenged pleading" (McKinney's Cons. Laws of New York, CPLR §3024, C3024:5, Cooper v. Van Cortlandt Associates, 54 AD 2d 545, 387 NYS 2d 127 [1st Dept. 1976] and 220-35 86th Street Realty, LLC v. Tower Insurance Company of New York, 106 AD 3d 478, 965 NYS 2d 412 [1st Dept. 2012]). Holley's motion was served and filed on June 14, 2019 (NYSCEF Doc. Nos. 139-142). Holley provides no explanation for waiting over thirty (30) days after service of the Summons and Complaint to seek CPLR §3024(a) relief.

Holley argues that pursuant to CPLR §3211(a)(8) this Court does not have personal jurisdiction over it because: Mr. Nelson's exposures occurred outside of the State of New York; Mr. Nelson did not live in the State of New York; he did not work in the State of New York during the relevant time period; and plaintiffs do not allege that any asbestos contaminated products used by Mr. Nelson were purchased in New York. Holley states that plaintiffs in their complaint fully acknowledge that Holley was and still is a foreign business corporation with its principal place of business outside of the State of New York (Mot. Exh. 1, para. 35), and contends there is no general jurisdiction. Holley argues that even if as plaintiffs allege it had "a long history of New York ownership" that demonstrates the transaction of business in New York, plaintiffs do not allege any injuries arose from that business activity. It is Holley's contention that plaintiffs' claims do not arise from any of the company's New York transactions, and Holley did not commit a tortious act within the State of New York or without the state of New York that caused an injury to person or property within the State of New York, therefore there is no specific jurisdiction (CPLR §302[a][1], [2] and [3]).

Plaintiffs oppose the motion contending that this Court does have personal general jurisdiction and long-arm jurisdiction over Holley. Plaintiffs argue, alternatively, that if personal jurisdiction over Holley has not been established at this time, the motion should be denied to allow for jurisdictional discovery. Plaintiffs provide copies of articles, that allege that in 1968 Holley merged with Colt Industries, a Delaware Corporation with a principal place of business in New York, and showing that in 1998 Holley was sold to a management group backed by a New York merchant banking company (Opp. Exhs. 3, 4 and 5). Plaintiffs also provide articles allegedly showing that more recently Holley was owned by New York based Monomoy Capital Partners, a private equity firm; in 2013 it was sold to Lincolnshire Management also a New York based private equity firm; and they allege that last year Holley was sold again to Sentinel Partners, an investment firm (Opp. Exhs. 5 and 6). Plaintiffs claim that without discovery they could not determine Holley's operations, specifically the level of control over design manufacturing, operations or sales exercised by any of the entities that owned Holley. Plaintiffs argue that Holley's current principal place of business located outside of New York has no bearing on whether there was jurisdiction over Holley during the period relevant to Mr. Nelson's exposure.

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 §301, and long-arm statute §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]). “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*).

“A foreign corporation is not present on the basis of control unless there is in existence at least a parent-subsidary relationship. The control over the subsidiary’s activities must be so complete that the subsidiary is, in fact, merely a department of the parent” (Delagi v Volkswagenwerk AG of Wolfsburg, 29 NY2d 426, 328 NYS2d 653, 278 NE2d 895 [1972]; see also Pub. Adm’r of Cty. of N.Y. v Royal Bank of Canada, 19 NY2d 127, 278 NYS2d 378, 224 NE2d 877 [1967]). The four factors to determine whether a subsidiary is a mere department of the parent are: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree that the parent interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities; and (4) the degree of the parent’s control of the subsidiary’s marketing and operational policies (Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F.2d 117 [2d Cir. 1984]).

In *Gucci America*, the Second Circuit Court of Appeals stated that “in *Daimler* the Supreme Court addressed for the first time the question whether, consistent with due process, a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary.... Aside from an exceptional case, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company’s place of incorporation or its principal place of business” (Gucci America Inc. v Weixing Li, 768 F3d 122 [2nd Circuit 2014]). The court expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business in the forum through a local branch. “The Second Circuit cautioned against adopting an expansive view of general jurisdiction after *Daimler*” (Chatwal Hotels & Resorts LLC., v Dollywood Co., 90 F. Supp3d 97 [SDNY 2015]).

This Court cannot exercise general personal jurisdiction over Holley because there has been no showing that it is incorporated, or that it has its principal place of business in the State of New York. Plaintiffs’ contention that Holley transacted business in New York based on the ownership by companies that either did business in the state or exist in the state, is unavailing. Plaintiffs have not shown that the equity or investment companies would be involved with the control of Holley’s operational policies or that corporate formalities were not observed. Plaintiffs do not state how any of Mr. Nelson’s alleged injuries arose from Holley’s alleged transaction of business in New York.

Alternatively, even if the Plaintiff alleged or presented any evidence that Holley was merely a department of Colt Industries, the banking company or one of the private equity or management firms, *Daimler* has changed the law for exercising general jurisdiction over a defendant. After *Daimler*, general jurisdiction can only be exercised where the defendant corporation is at home, that is its place of incorporation or its principal place of business (Daimler, *supra*).

Furthermore, the plaintiffs' own complaint specifically states that Holley "was and still is a foreign business corporation which transacted business in the State of New York, with its principal place of business outside of the State of New York" (Mot. Exh. 1, para. 35). Plaintiffs complaint concedes that Holley is not located in New York and they are unable to demonstrate "exceptional circumstances" for this Court to exercise general personal jurisdiction.

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" (*Id*; 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, ...; or (3) commits a tortious act without the state causing injury to person or property within the state, ..., 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, uses or possesses any real property situated within the state" (CPLR §302[a]).

This court cannot exercise specific personal jurisdiction under CPLR §302(a)(1) because there is no articulable nexus or substantial relationship between Holley's alleged 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 asserted by the plaintiffs did not arise from any of Holley's alleged activity within the state of New York. Plaintiffs allegedly purchased the Holley products at issue in Minnesota, Illinois, Virginia, Iowa or Connecticut.

"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, *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 personal specific jurisdiction under CPLR §302(a)(3) because Mr. Nelson’s injury did not occur in the State of New York. Mr. Nelson was allegedly exposed to Holley’s asbestos containing carburetor products in Minnesota, Illinois, Virginia, Iowa and Connecticut meaning that those states are the situs of the injury. Since the exposure and the injury- the original event- took place outside of the State of New York, Mr. Nelson is not and has never been a resident of the State of New York, the New York courts cannot exercise jurisdiction (Bristol-Myers Squibb, *supra*; Lebron, *supra*).

Plaintiff has failed to demonstrate “that discovery would uncover facts establishing” jurisdiction (Hardwick v Auriemma, 116 AD3d 465, 983 NYS2d 509 [1st Dept. 2014]). Holley is not “at home” in New York, and Mr. Nelson did not purchase or use any product manufactured by Holley in New York.

Since this Court is unable to exercise personal jurisdiction over Holley, plaintiffs’ Complaint must be dismissed as against Holley.

The determination that the plaintiffs’ complaint against Holley must be dismissed for the lack of personal jurisdiction, renders it no longer necessary to address the remaining arguments raised in this motion pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

Accordingly, it is ORDERED, that Defendant Holley Performance Products Inc.’s motion pursuant to CPLR §3211(a)(7) and (8) to dismiss the Complaint and all cross-claims asserted against it, for failure to state a cause of action and lack of personal jurisdiction, alternatively pursuant to CPLR §3024(a) requiring plaintiffs to amend the Complaint to provide a more particular and definite statement, is granted, and it is further,

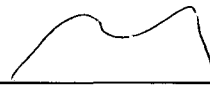
ORDERED, that Plaintiff’s Complaint and all Cross-Claims asserted against Defendant Holley Performance Products Inc. are severed and dismissed without prejudice, and it is further,

ORDERED, that Defendant Holley Performance Products Inc. serve a copy of this Order with Notice of Entry on the remaining parties, the General Clerk’s Office, and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

Dated: September 13, 2019



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

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