

Haley v ABB, Inc.

2019 NY Slip Op 33631(U)

December 13, 2019

Supreme Court, New York County

Docket Number: 190150/18

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**

X

**IN RE: NEW YORK CITY ASBESTOS LITIGATION:
HELEN HALEY, Individually and as Executrix of the Estate
Of EDWARD HALEY, deceased,**

Plaintiff(s),

Index: 190150/18

- Against -

Motion Date: 12-04-19

Motion SEQ. NO.: 006

ABB, INC., et al.,

Motion CAL NO.:

X

The following papers, numbered 1 to 5 were read on defendant Munaco Sealing Solutions, Inc.'s motion to dismiss for lack of personal jurisdiction:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause C Affidavits C Exhibits ...	<u>1-2</u>
Answering Affidavits C Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes X No

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

Plaintiff-decedent, Mr. Edward Haley was diagnosed with mesothelioma on or about April 18, 2018. He and his wife Helen Haley, commenced this personal injury action against various defendants, including Munaco, on May 11, 2018. The Complaint alleged that defendants exposed Mr. Haley to asbestos-containing gaskets and packing throughout his career as a mechanic for Con Edison and that this exposure was the proximate cause of his mesothelioma. Mr. Haley also described his alleged exposure to asbestos from products manufactured by Munaco.

Mr. Haley was deposed over the course of five days (June 26, 29 and July 5, 6 and 13, 2018). At his deposition Mr. Haley claimed that from 1964 to 1999 he disassembled and maintained pumps and valves located in various Con Edison power-generating stations through New York City and the surrounding area. While performing this work he was exposed to asbestos-containing gaskets and packing supplied by "Munaco." On August 26, 2018 Mr. Haley passed away from mesothelioma.

Munaco now moves for summary judgment, claiming that the recently discovered contract between Dennis Cullen – previous president and owner of Munaco Packing & Rubber Co., a/k/a Munaco-NY- and Denton Taylor, shows that this court cannot exercise either general or specific personal jurisdiction over it.

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

Munaco argues that this Court cannot exercise general personal jurisdiction over it because it is not a New York Corporation nor is it headquartered in New York. Munaco also contends that there is no specific jurisdiction over it because it has done nothing that would bring it within the reach of this Court's long-arm jurisdiction.

Plaintiffs oppose the motion, claiming that personal jurisdiction has already been found to exist over Munaco in the *Herlihy* case (see opposition Exhibit F). Plaintiffs further argue that defendant's allegedly newly discovered contract (which allegedly clarifies that Munaco Sealing Solutions, Inc. is not the successor-in-interest to Munaco Packing & Rubber Co., Inc.) does not change the personal jurisdiction analysis. Plaintiffs contend that Munaco simply cites to conclusory affidavits rather than the actual contract to support its claim that Denton Taylor Industries, Inc. (hereinafter "DTI") is the true successor to Munaco Packing & Rubber Co., Inc. Moreover, the contract itself does not contain language indicating an actual sale of Munaco Packing & Rubber Co., Inc. to DTI. Lastly, plaintiffs maintain that this case should not be dismissed because defendant should be collaterally estopped from arguing the issue of whether Munaco-SC is the successor-in-interest to Munaco-NY. Plaintiff argues that this issue has been decided by Justice Heitler in the *Herlihy* case (which was affirmed by the Appellate Division First Department) and by this court in the *Barbara DeRoziere* case, therefore Munaco should be collaterally estopped from re-litigating this issue.

Defendant Munaco first filed a Motion to Dismiss for Lack of Personal Jurisdiction in the Arthur Herlihy case. In that case, decedent, Arthur Herlihy, filed suit in Supreme Court, New York County, on November 3, 1993, alleging that he was suffering from asbestosis caused by exposure to asbestos. Thereafter, on April 21, 2011 Mr. Herlihy filed suit for a second asbestos-related injury, lung cancer, in a case captioned *Herlihy v. A.F. Supply Corp., et al.*, Index No. 190149/2011. In Mr. Herlihy's answers to standard interrogatories and at his depositions, he described his exposure to asbestos from products manufactured by Munaco. Mr. Herlihy passed away from asbestos-related lung cancer on July 11, 2011.

In connection with claims against Munaco, the following past and present employees of Munaco were deposed in *Herlihy* (Index No. 190149/2011): (1) Denton Taylor ("Taylor"), a former employee of Munaco who was responsible for computerizing sales inside and outside the company while at Munaco from 1988 until 1995; (2) Dianne Walsh ("Walsh"), who began working for Munaco as a gasket cutter in 1983 and currently serves as Munaco's Secretary/Treasurer; and (3) Brenda DeWachter ("DeWachter"), who began working for Munaco in 1982 as a file clerk and is the current owner and President of Munaco.

According to these fact witnesses, Bill Munn founded Munaco Packing & Rubber Company, Inc. in the early-to-mid 1900s. After the death of Bill Munn, Dennis Cullen became the owner and President of Munaco while it was incorporated in New York and continued as the owner and President when the company moved to South Carolina in 1995. Munaco's only New York facility was located at 325 West 16th Street, New York, New York.

During World War II, Munaco "manufactured and supplied gaskets and packing for the Brooklyn Navy Yard." In addition, Munaco manufactured gaskets, gasketing material, and related items and sold them to Brooklyn Boiler Repair Co., and to their customers, General Electric Company and Con Edison. Taylor testified that he left Munaco in 1995 because the owner, Cullen, decided to "move the company to South Carolina."

On February 2, 1995, Dennis Cullen moved Munaco to South Carolina and incorporated the company in South Carolina under the same name: "Munaco Packing & Rubber Co. Inc"(see opposition Exhibit E). Although Taylor and another employee named Herbie decided not to move to South Carolina for personal reasons, the other six employees of Munaco in New York, including Cullen, Walsh, and DeWachter, decided to relocate and continue the company's operations in South Carolina.

As of 1995, all six Munaco employees in South Carolina were transplants from Munaco's New York location. According to the fact witnesses, most items: equipment, accounts, and funds from Munaco in New York were transferred and/or moved to Munaco's new location in South Carolina. Additionally, Walsh testified that she had handled Munaco's accounts receivables and accounts payable beginning in the mid-1980s, and when Munaco moved to South Carolina, all accounts receivable and payable were transferred to that location.

In its South Carolina location, Munaco continued in the same business it had in New York and continued to cut gaskets and distribute similar goods, such as packing, metal gaskets, and stripping. It also continued to use the same logo that Munaco had used in New York. Although Munaco moved to South Carolina in 1995, the company did not actually dissolve its New York incorporation until January 31, 1997, when Dennis Cullen, who had moved with the company to South Carolina, signed the dissolution paperwork.

After the Herlihy decision, affirmed by the Appellate Division First Department, Munaco moved in this court to dismiss for lack of personal jurisdiction in the Barbara DeRozieres case, claiming, as it does here, that the contract between Dennis Cullen and Denton Taylor shows that Munaco Sealing Solutions, Inc., is not a continuation of Munaco-N.Y. this court found that the contract was no new evidence, and that this evidence had previously been considered. Munaco once again moves for dismissal for lack of jurisdiction, referencing the same contract.

In *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 298 NYS2d 955 (1969), the Court of Appeals set forth two requirements for invoking the doctrine of collateral estoppel: (1) there must be an issue which has necessarily been decided in the prior action and is decisive of the present action; and (2) there must have been a full and fair opportunity to litigate the issue.

The issue has been decided on two occasions and Munaco has had a full and fair opportunity to litigate the issue.

The “issue”, whether Munaco in South Carolina is the successor-in-interest to Munaco in New York, has already been decided by Justice Heitler in the *Herlihy* matter, as well as affirmed by the Appellate Division, with leave to appeal to the Court of Appeals denied, and by this court in the *Barbara DeRozieres* case (see opposition Exhibit I). The first prong of the test for collateral estoppel is, thus, satisfied because the identity of the issue here is the same as in the *Herlihy* and *DeRozieres* cases, which has been fully litigated and is decisive of the present action. The second prong is also satisfied because Munaco has already had a full and fair opportunity to litigate the issue of personal jurisdiction in the *Herlihy* matter, in the Appellate Division First Department and in this court in the *DeRozieres* case.

In this case no new evidence relevant to a personal jurisdiction analysis has been presented other than affidavits with the contract, which was previously produced in the *DeRozieres* case. The contract (motion Exhibit E, opposition Exhibit J), and the affidavits of Brenda DeWachter and Denton Taylor (motion Exhibits C and F), do not demonstrate that DTI is the true successor-in-interest to Munaco Packing & Rubber Co., Inc.; rather, the contract simply reflects an agreement to sell DTI the right to use the Munaco name and logo, and lease certain specified assets. The contract does not state anywhere that DTI assumes Munaco’s previous tort liabilities.

As this court found in the *DeRozieres* case, the record fails to present anything that would change the analysis of personal jurisdiction and successor liability already contained in *Herlihy v A.F. Supply Corp., et al.*:

“The facts are that Munaco-SC manufactured, distributed, and sold the same goods and products as Munaco-NY to its same primary customer. Munaco-SC employed six of Munaco-NY’s eight employees, and utilized most of Munaco-NY’s equipment, including gasket presses, cutting table, steel tables, and desks. Dennis Cullen, the sole owner of Munaco-NY, was also the sole owner of Munaco-SC until he passed away in or about 2004. It was Dennis Cullen, not Denton Taylor, who signed dissolution papers for Munaco-NY in January of 1997. This is evidence

that Munaco-NY was not, as defendant urges, sold to Mr. Taylor, but rather that Mr. Cullen simply continued his operation in South Carolina. A further fact evidencing this is that Munaco-SC took with it to South Carolina Munaco-NY's accounts receivable, accounts payable, and pension funds.

In light of these facts, and in accordance with the authorities recited above, I find that this court may properly exercise personal jurisdiction over the continuation of such company in the form of Munaco-SC. The relationship between Munaco-NY and Munaco-SC is such that "the jurisdictional contacts of one [may be deemed] the jurisdictional contacts of the other." *Patin, supra*, 294 F3d at 653.

(*Herlihy v. A.F. Supply* [NY Sup. Ct.], NYSCEF Doc. No. 204 at 5)

Defendant argues that this court did not in the DeRozieres case analyze the personal jurisdiction and successor liability issue. In DeRozieres this court stated that "...This Court need not and will not re-analyze personal jurisdiction and successor liability as concerns Munaco Sealing Solutions, Inc. Rather, this Court will adopt the Court's already properly performed analysis of this issue from *Herlihy* into this decision (*Herlihy v. A.F. Supply* [NY Sup. Ct.], NYSCEF Doc. No. 204). This Court has grounds to exercise personal jurisdiction over Munaco and the defendant's motion is denied..."

This court adopts the findings in *Herlihy* and DeRozieres. Munaco Sealing Solutions, Inc., is the successor to Munaco-NY. Although there may be no general jurisdiction over Munaco Sealing Solutions, Inc., because it is no longer a New York Corporation, or headquartered in New York, there is specific jurisdiction over it. Mr. Haley was a resident of New York during the period of exposure to Munaco's asbestos containing gaskets and packing, Munaco conducted business in New York and Mr. Haley's claims arose from and relate to Munaco's conduct in New York.

The facts show, and the contract does not prove the contrary, that Mr. Cullen simply continued to perform in South Carolina the operations Munaco performed in New York. Munaco-SC is a mere continuation of Munaco-NY and inherits its jurisdictional status. The relationship between the corporation in New York and in South Carolina is such that the jurisdictional contacts of one may be deemed the jurisdictional contacts of the other.

The contract between Dennis Cullen and Denton Taylor does not demonstrate that Munaco-SC is not the Successor-in-interest to Munaco-NY. The contract at its core is an agreement to sell Denton Taylor and DTI the right to use

the Munaco name and logo and to lease certain assets. Finally, the contract does not show that Denton Taylor and DTI, either expressly or implicitly, assumed any of Munaco's tort liabilities in New York.

“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)).

Bristol-Myers Squibb Co. v Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017], resulted in a change in the law. As a result of the change in the law, specific personal jurisdiction under CPLR §302(a)(1) requires that plaintiffs establish that there is an articulable nexus or substantial relationship between Munaco's New York conduct and the claims asserted against it. 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.

Munaco, as claimed by plaintiffs, transacted business in the state of New York (it sold asbestos-containing gaskets and packing to Mr. Haley's employer Con Edison) and Mr. Haley's injury arose from exposure to asbestos from his use of those asbestos-containing gaskets and packing sold by Munaco.

Munaco purposefully availed itself of the privilege of conducting business in New York; Mr. Haley's claim arises out of and relate to Munaco's conduct in New York and the exercise of specific jurisdiction over Munaco in New York, under the circumstances, is reasonable. Therefore, this court finds that it can exercise specific personal jurisdiction over Munaco Sealing Solutions, Inc., under CPLR §302 (a)(1) and (2).

This court has reviewed the cases relied on by the defendant and finds that the BRG and U.S. Bank decisions do not merit a different result (BRG Corp., v. Chevron U.S.A., Inc., 163 A.D.3d 1495, 82 N.Y.S.3d 798 [4th Dept. 2018]) and U.S. Bank National Ass'n v. Bank of America, N.A., 916 F.3d 143 [2nd. Cir. 2019]).

Accordingly, it is ORDERED that defendant Munaco Sealing Solutions, Inc.'s motion, pursuant to CPLR § 3211(a)(8), to dismiss the complaint and all crossclaims asserted against it for lack of personal jurisdiction is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 13, 2019


MANUEL J. MENDEZ
J.S.C.

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