Theodore v Air & Liquid Sys. Corp.
2019 NY Slip Op 34014(U)
January 7, 2019
Supreme Court, Westchester County
Docket Number: 54022/2017
Judge: Mary H. Smith

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

GREGORY THEODORE,

Plaintiff(s),

- against -

DECISION & ORDER
Index No.: 54022/2017
Motion Date: 12/14/18

AIR & LIQUID SYSTEMS CORPORATION,
as successor-by-merger to BUFFALO PUMPS, INC.,
AMCHEM PRODUCTS, INC.,
n/k/a RHONE POULENC AG COMPANY,
n/k/a BAYER CROPSCIENCE INC.,
AMERICAN HONDA MOTOR CO., INC. (AHM),
AMERICAN OIL COMPANY,
Individually and as successor in interest to AMOCO TRINIDAD OIL COMPANY,
AMOCO CHEMICALS CORPORATION,
AMOCO PRODUCTION CO.,
AMOCO TRINIDAD OIL COMPANY,
AURORA PUMP COMPANY,
BMCE INC.,
f/k/a UNITED CENTRIFUGAL PUMP,
BORGWARNER MORSE TEC LLC.,
BP AMERICA INC.
Individually and as successor in interest to AMOCO TRINIDAD OIL COMPANY and THE STANDARD OIL COMPANY and THE STANDARD OIL COMPANY (OHIO),
BP AMOCO CHEMICAL COMPANY
Individually and as successor in interest to AMOCO TRINIDAD OIL COMPANY and THE STANDARD OIL COMPANY and THE STANDARD OIL COMPANY (OHIO),
BP P.L.C.
Individually and as successor in interest to AMOCO TRINIDAD OIL COMPANY and THE STANDAED OIL COMPANY and THE STANDARD OIL COMPANY (OHIO),
BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES,

CARQUEST AUTO PARTS,
CBS CORPORATION, f/k/a VIACOM INC.,
successor by merger to
CBS CORPORATION, f/k/a
WESTINGHOUSE ELECTRIC CORPORATION,
CERTAINTEED CORPORATION,
CHEVRON PHILLIPS CHEMICAL COMPANY, LLC,
CHEVRON TEXACO CORPORATION,
CONOCOPHILLIPS COMPANY, as successor by merger to
PHILLIPS PETROLEUM COMPANY, and
TOSCO CORPORATION,
CRANE CO.,
DANA COMPANIES, LLC,
DRILLING SPECIALTIES COMPANY LLC
Individually and as successor in interest to
CHEVRON-PHILLIPS CHEMICAL COMPANY, LP,
ELLIOTT COMPANY,
EXXON MOBIL CORPORATION,
FLOWSERVE US, INC.
Solely as Successor to Rockwell Manufacturing Company,
Edward Valve, Inc., Nordstrom Valves, Inc., Edward Vogt
Valve Company, and Vogt Valve Company,
FMC CORPORATION,
on behalf of its former CHICAGO PUMP
& NORTHERN PUMP BUSINESSES,
FORD MOTOR COMPANY,
FOSTER WHEELER, L.L.C.,
GARDNER DENVER, INC.,
GENERAL ELECTRIC COMPANY,
GENUINE PARTS COMPANY, trading as NAPA AUTO PARTS,
GOULDS PUMPS, INC.,
HARRISBURG, INC.,
HONEYWELL INTERNATIONAL, INC.,
f/k/a ALLIED SIGNAL, INC. / BENDIX,
IMO INDUSTRIES, INC.,,
ITT INDUSTRIES, INC.,
Individually, and as successor to
BELL & GOSSETT COMPANY and
as successor to KENNEDY VALVE MANUFACTURING
Co., Inc.,
MONTELLO, INC.,
NISSAN NORTH AMERICA, INC.,
OWENS-ILLINOIS, INC.,
PFIZER, INC. (PFIZER),
PNEUMO ABEX LLC, successor in interest

to ABEX CORPORATION (ABEX),
ROPER PUMP COMPANY,
SHELL OIL COMPANY,
SPIRAX SARCO, INC.
Individually and as successor to SARCO COMPANY,
STANDARD MOTOR PRODUCTS, INC.,
TEXACO, INC.,
THE FAIRBANKS COMPANY,
TOYOTA MOTOR SALES U.S.A., Inc.,
U.S. RUBBER COMPANY (UNIROYAL),
UNION CARBIDE CORPORATION,
VIKING PUMP, INC.,
WARREN PUMPS, LLC,

Defendant(s).

Defendant Caterpillar Inc. (Caterpillar) moves (#16) for an order, dismissing all claims, counterclaims, and cross-claims on the ground that the Court lacks personal jurisdiction over Caterpillar.

Defendant Aurora Pump Company (Aurora) moves (#18) for an order, dismissing all claims, counterclaims, and cross-claims on the ground that the Court lacks personal jurisdiction over Aurora.

The following papers were read:

Notice of Motion (#16), Affirmation, and Exhibits (7)	1-9
Affirmation in Opposition and Exhibits (8)	10-18
Affirmation in Reply	19
Notice of Motion (#18), Affirmation, Exhibits (8), and Memo of Law	20-30
Affirmation in Opposition and Exhibits (13)	31-45
Affirmation in Reply and Exhibits (2)	46-48

By way of background, plaintiff was allegedly employed by various business entities in the Republic of Trinidad and Tobago (Trinidad) from approximately 1970 to 1984 as a laborer and maintenance mechanic and performed various tasks that allegedly exposed him to asbestos-containing materials and by Sears Roebuck (Sears) in White Plains, New York from approximately 1987 to 1998[1] as a brake mechanic. Plaintiff alleges that he developed mesothelioma as a result of exposure to asbestos while working with various business entities or their products in Trinidad and at Sears in New York. This action ensued. Defendant The Fairbanks Company (Fairbanks) interposed an answer with

[1] There is some conflict in the evidence as to the exact dates that plaintiff worked at the relevant businesses in Trinidad and at Sears in New York. As the exact dates are not material to the motions under consideration, the Court has settled on these dates to avoid confusion. However, by doing so, the Court is not making a factual finding as to these time periods.

various affirmative defenses as well as cross-claims for contribution and indemnification against each and every co-defendant. Subsequently, Caterpillar and Aurora moved to dismiss the action for lack of personal jurisdiction. On August 21, 2018, counsel for Fairbanks filed a notice, indicating that Fairbanks had commenced a bankruptcy proceeding. Thereafter, plaintiff moved to sever the action as it related to Fairbanks, which the Court granted on December 12, 2018. Accordingly, the Court now addresses the motions filed by Caterpillar and Aurora.

Upon a motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to establish a basis for such jurisdiction (*see America/International 1994 Venture v Mau*, 146 AD3d 40, 51 [2d Dept 2016]). Plaintiff need only make a *prima facie* showing that defendants are subject to the personal jurisdiction of the Court (*id.*). Personal jurisdiction falls into two general categories, general (CPLR 301) and specific (CPLR 302). In either category, the Court's "exercise of personal jurisdiction over a defendant is informed and limited by the U.S. Constitution's guarantee of due process, which requires that any jurisdictional exercise be consistent with 'traditional notions of fair play and substantial justice' " (*Brown v Lockheed Martin Corp.*, 814 F3d 619, 625 [2d Cir 2016], quoting *Intl. Shoe Co. v State of Wash., Off. of Unemployment Compensation and Placement*, 326 US 310, 316, 66 S Ct 154, 158, 90 L Ed 95 [1945]; *see also Banco Ambrosiano, S.P.A. v Artoc Bank & Tr. Ltd.*, 62 NY2d 65, 71 [1984]). The Court may exercise general personal jurisdiction over a corporate defendant in an action regardless of the connection of the action to New York where the corporation has consented to the jurisdiction of the Court (*see Creative Resources, Inc. v Rumbellow*, 244 AD2d 383 [2d Dept 1997]) or where the corporation is " 'essentially at home in the forum State,' [which is] typified by 'the place of incorporation and principal place of business' " (*Motorola Credit Corp. v Std. Chartered Bank*, 24 NY3d 149, 161 [2014], quoting *Daimler AG v Bauman*, 571 US 117, 137-39 & n. 19 [2014] [*Daimler*]; *see also Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011] [*Goodyear*]). Additionally, the Court may exercise specific personal jurisdiction over a corporate defendant when the action relates to the defendant's activities within the state as enumerated in CPLR 302.

In support of its motion, Caterpillar proffers evidence that it was incorporated in Delaware and that its headquarters is in Illinois. Caterpillar also proffers plaintiff's deposition testimony wherein plaintiff identified Caterpillar products as a source of alleged asbestos exposure while he was working on oil rigs in Trinidad between 1970 and 1984. Caterpillar further notes that plaintiff has not alleged that he was exposed to asbestos from Caterpillar products in New York state and that discovery has revealed no nexus between plaintiff's alleged exposure to asbestos from Caterpillar products and New York state. Based hereon, Caterpillar contends that the Court cannot exercise personal jurisdiction over Caterpillar.

In opposition, plaintiff contends that Caterpillar consented to the jurisdiction of the courts of this state by registering to do business in New York. Plaintiff also contends that the Court may exercise specific jurisdiction over Caterpillar because its products allegedly

exposed individuals in New York to asbestos in a similar fashion to the Caterpillar products that allegedly exposed plaintiff to asbestos during his work in Trinidad.

CPLR 302 provides in pertinent that, "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise [specific] personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state . . . ." (*see* CPLR 302 [a] [1]). The Second Department has explained that a court may properly exercise specific personal jurisdiction " 'even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*see Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 913 [2d Dept 2014], quoting *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks and citations omitted]). Here, plaintiff has failed to provide any evidence that Caterpillar's activities in New York have any relationship, let alone a substantial relationship, with plaintiff's claims. Thus, the Court lacks specific personal jurisdiction over Caterpillar.

Next, the Court considers whether it may exercise general personal jurisdiction over Caterpillar. Plaintiff's argument here rests on the notion that Caterpillar consented to the jurisdiction of this Court by registering to conduct business in the state. The Court is unpersuaded by this argument. Business Corporation Law (BCL) § 1301 provides that a foreign corporation[2] shall not do business in New York until it has been authorized to do so. BCL § 1304 sets forth the contents of an application of a foreign corporation to do business in New York and BCL § 1305 sets forth the "effect" of the filing of such an application. Nothing in this statutory framework requires the foreign corporation to consent to general personal jurisdiction or alerts said corporation that its application to do business in New York will have this effect. Nevertheless, there is authority for the proposition that this registration constitutes consent to the jurisdiction of the courts of New York (*Muollo v Crestwood Vil., Inc.*, 155 AD2d 420, 421 [2d Dept 1989]). However, this decision and those that hold similarly pre-date the U.S. Supreme Court's decisions in *Daimler* and *Goodyear*, which rejected the invitation to "approve the exercise of general [personal] jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business" (*Daimler*, 571 US at 137-38, internal quotation marks omitted). Additionally, the Second Department has held more recently that a party's consent to the personal jurisdiction in New York will be narrowly construed (*see Shalik v Coleman*, 111 AD3d 816, 818 [2d Dept 2013], holding that a party's consent to arbitrate disputes in New York did not afford the Supreme Court jurisdiction over the party on related claims). In light of the foregoing, the Court concludes that there is no binding authority, post-*Daimler*, that conclusively determines that the registration to do business in New York constitutes consent to the jurisdiction of the courts of New York (*see Amelius v Grand Imperial LLC*, 57 Misc 3d 835, 849 [Sup Ct 2017], *rearg denied,* [Sup Ct 2018]). The Court is, however, persuaded by the line of New York federal court cases, post-*Daimler*, which have held that mere registration as a basis for exercising general personal jurisdiction does not satisfy the due process requirements (*see Bonkowski v HP*

[2] A "foreign corporation" is any corporation that is not incorporated by or under the laws of the state of New York (General Construction Law § 66 [14]).

Hood LLC, 15 CV 4956 (RRM) (PK), 2016 WL 4536868, at *3 [EDNY 2016]; *Minholz v Lockheed Martin Corp.*, 227 F Supp 3d 249, 264 [NDNY 2016]; *Famular v Whirlpool Corp.*, 16 CV 944 (VB), 2017 WL 2470844, at *4 [SDNY 2017]; *Wilderness USA, Inc. v DeAngelo Bros. LLC*, 265 F Supp 3d 301, 310 [WDNY 2017]). Thus, the Court lacks general personal jurisdiction over Caterpillar. The Court now turns to Aurora's motion.

In support of its motion, Aurora proffers evidence that Aurora is a brand name owned by Pentair, Inc., a corporation organized under the laws of Minnesota with its principal place of business in Minnesota. Aurora also proffers plaintiff's deposition testimony wherein he identified Aurora pumps as a source of alleged asbestos exposure while he was working on oil rigs in Trinidad between 1970 and 1984. Aurora further notes that plaintiff has not alleged that he was exposed to asbestos from any Aurora pump in New York state and that discovery has revealed no nexus between plaintiff's alleged exposure to asbestos from an Aurora pump and New York state. Moreover, Aurora contends that it did not consent to general personal jurisdiction by simply registering to conduct business in New York. Based hereon, Aurora contends that the Court cannot exercise jurisdiction over Aurora by either general or specific personal jurisdiction.

In opposition, plaintiff contends that the Court has both specific and general personal jurisdiction. Plaintiff contends that general personal jurisdiction lies because Aurora's parent company was registered to conduct business in New York when this action was commenced. Additionally, plaintiff proffers some evidence that Aurora, as a division of New York Air Brake Company between 1952 to the early 1980s (that is, during the time period that plaintiff was allegedly exposed to asbestos by Aurora pumps), was "at home" in New York as New York Air Brake Company had its principal place of business in New York. Regarding specific personal jurisdiction, plaintiff asserts that Aurora admitted in discovery that it had a sales office in New York and that its international sales came from its principal place of business in New York. Thus, plaintiff contends, the international sale of Aurora pumps, such as to Trinidad, were carried out through Aurora's New York export office. Plaintiff further contends that Aurora forfeited its right to challenge personal jurisdiction by participating in this action for almost a year before moving to dismiss.

Initially, the Court finds that Aurora did not waive its right to raise the defense of lack of personal jurisdiction. Aurora raised lack of personal jurisdiction as an affirmative defense in its answer and now moves under CPLR 3211 (a) (8). As such, Aurora's participation in this action does not constitute a waiver of this defense (*see Edwards, Angell, Palmer & Dodge, LLP v Gerschman*, 116 AD3d 824, 825 [2d Dept 2014]; *Williams v Uptown Collision, Inc.*, 243 AD2d 467, 467 [2d Dept 1997]).

Next, the Court considers whether it may exercise specific personal jurisdiction over Aurora. As noted above, the Court may exercise specific personal jurisdiction over a foreign corporation " 'so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*see Mejia-Haffner*, 119 AD3d at 913, quoting *Fischbarg*, 9 NY3d at 380 [2007] [internal quotation marks and citations omitted]). Here, plaintiff has offered some evidence that Aurora

maintained offices in New York at some point between 1935 and 1980.[3] Plaintiff has not, however, offered any evidence connecting a transaction in New York to sell an Aurora pump to an entity in Trinidad during the relevant time period. Absent such a connection, "specific [personal] jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State" (*Bristol-Myers Squibb Co. v Superior Ct. of California, San Francisco County*, 137 S Ct 1773, 1781 [2017]). Thus, the Court lacks specific personal jurisdiction over Aurora.

Lastly, the Court considers whether it may exercise general personal jurisdiction over Aurora. For the reasons set forth in connection with Caterpillar's motion, the Court finds no merit to plaintiff's contention that the Court may exercise general personal jurisdiction over Aurora because its parent company was registered to do business in New York as of the commencement of the action. The Court also finds no merit to plaintiff's contention that the Court may exercise general personal jurisdiction over Aurora because its parent company was "at home" in New York at some point prior to the commencement of the action. In determining whether the Court may exercise general personal jurisdiction over a foreign corporation, the Court must analyze its status and activities as of the commencement of the action (*see Gaboury v Cent. Vermont Ry. Co.*, 250 NY 233, 236 [1929, Cardozo, Ch. J.]; *Massaro v Wellen Oil & Chem., Inc.*, 304 AD2d 538, 539 [2d Dept 2003]). As a result, that Aurora or its parent company may have been "at home" in New York prior to the commencement of this action is irrelevant for purposes of conferring general personal jurisdiction. There is no dispute that, as of the commencement of the action, Aurora was a brand name owned by Pentair, Inc., which is a corporation organized under the laws of Minnesota with its principal place of business in Minnesota. Thus, the Court lacks general personal jurisdiction over Aurora.

To the extent not specifically addressed herein, the Court finds plaintiff's remaining arguments to be without merit. Based on the foregoing, the motions to dismiss filed by Caterpillar and Aurora are granted.

Dated: January 7, 2019
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court

[3] Plaintiff proffers Aurora's responses to interrogatories. In particular, Interrogatory 16 requested in relevant part that Aurora "[i]dentify for the period from 1935 to 1980, each distributor, dealer, wholesaler and contractor who sold distributed or used your asbestos-containing products in New York City and within a 75 mile radius of New York City." In response, Aurora raised various objections, including that "there is no way that AURORA can know whether it sold or distributed an AURORA pump that may have contained an asbestos-containing product in New York City and within a 75 mile radius of New York City." Notwithstanding this limitation, Aurora indicated that it maintained several offices in New York City during this time period, one is listed as a "branch office," another as "international," and another as a "branch sales office."