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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN CAVERLY and SANDRA CAVERLY,

Plaintiffs,

DECISION & ORDER
Index No. 63465/2018
Sequence Nos. 8,9,10,11,12

-against-

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

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 197-246, 248-326 were read in connection with Motion Seq 8 by defendant Watts Water Technologies, Inc ("Watts") pursuant to CPLR 3211(a)(8), to dismiss complaint for lack of personal jurisdiction; Motion Seq 9 by Watts for summary judgment pursuant to CPLR 3212; Motion Seq 10 by defendant A.O. SmithWater Products Co. ("A.O. Smith") for summary judgment dismissing all claims and cross claims; Motion Seq 11 by defendant Fulton Boiler Works, Inc. (Fulton") for summary judgment dismissing all claims and cross claims; and Cross Motion Seq 12 by plaintiffs to amend the complaint to include "Watts Regulator Co".

Plaintiffs commenced this action on August 28, 2018, against defendants seeking damages for personal injuries associated with a lung cancer diagnosis on December 18, 2017, allegedly from exposure to asbestos at various sites across New York. He worked as a plumber's apprentice, journeyman, and foreman for LJ Coppola in Westchester and Putnam Counties. As part of his job, he installed and repaired hot water and steam boilers, and that he was allegedly exposed to asbestos

from the insulation that was mixed, applied to and removed from boilers in the 1960s and 1970s. Plaintiff commenced this action to recover for personal injuries resulting from plaintiffs exposure to asbestos allegedly from defendants' products.

NOW based upon the foregoing, the motions are decided as follows:

In Motion Seq 8, Defendant Watts moves pursuant to CPLR 3211(a)(8), CPLR 301 and 302, to dismiss plaintiffs' complaint for lack of personal jurisdiction. In Motion Seq 12, plaintiff cross-moves to amend the summons and complaint to add Watts Regulator, Co. as defendant.

In support of the motion to dismiss, Watts contends that this court lacks general and specific jurisdiction over it and plaintiffs' claims should be dismissed, because it is not incorporated in New York; does not maintain a principal place of business in New York; plaintiffs claims do not arise from any of Watts products; and that the claims asserted against it were prior to 1985, which was before it even came into existence. It also claims that it could not commit a tortuous act within the State of New York that caused an injury to person or property within New York because it did not manufacture, sell or distirbute any products before 1993 and thus, there is no specific jurisdiction. Additionally, Watts argues that New York's long-arm statute and due process forbids the exercise of specific jurisditon over Watts as it did not conduct any activities in New York out of which plaitniffs alleged claims arise.

Watts raises that plaintiff did not testify to working with Watts valves at any particular job sites, but instead that he worked with or around Watts valves from 1960 until sometime in the 1990s when he left his job at LJ Coppola, a plumbing business.

Plaintiffs assert that it has been almost one year after appearing and answering plaintiffs' complaint, and only now does Watts move to dismiss the complaint for personal jurisdiction. This

issue of New York's jurisdiction over Watts has been previously decided by the Honorable Manuel J. Mendez, New York County, Index No. 190134/2018. (NYSCEF Doc NO. 452) The New York County Court considered that on December 27, 1985, Watts was incorporated in the State of Delaware to take the company public. On March 30, 2003, Watts Industries Inc. merged with Watts Water Technologies, also a Delaware Corporation and changed its name to Watts Water Technologies Inc. Watts Water Technologies, Inc.'s principal place of business is North Andover, Massachusetts. After the 2003 merger, Watts Water Technologies, Inc. became the parent company of Watts Regulator Company. The New York County court denied Watts' motion to dismiss plaintiff's complaint for lack of personal jurisdiction. That court found that plaintiff in that case had not provided proof or otherwise shown that the New York Court can exercise general personal jurisdiction over Watts, which is not incorporated nor does it have a principal place of business in New York. That court also found that plaintiff in that case made a sufficient showing that their claims of specific jurisdiction under successor liability are not frivolous, warranting denial of the 3211 (a) relief sought in this motion.

The instant issue in this case is one of personal jurisdiction. Under New York's long-arm jurisdiction statute, a court may exercise jurisdiction over a nondomiciliary who, in person or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a] [1]; see Bogal v Finger, 59 AD3d 653 [2d Dept 2009]). When a motion is made to dismiss an action for lack of personal jurisdiction, the plaintiff bears the ultimate burden of proving a basis for such jurisdiction over a defendant (Waggaman v. Arauzo, 117 AD3d 724 [2d Dept 2014]). "[P]roof of one transaction in New York is sufficient to invoke 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" (Am./Int'l 1994 Venture v Mau, 146 AD3d 40, 51–52, [2d Dept 2016]).

Conferral of long-arm jurisdiction in New York as set forth in CPLR 302(a)(3)(ii), requires "(1) that the defendant committed a tortious act outside the State; (2) that the cause of action arises from that act; (3) that the act caused injury to a person or property within the State; (4) that the defendant expected or should reasonably have expected the act to have consequences in the State; and (5) that the defendant derived substantial revenue from interstate or international commerce" (Grandelli v Hope St. Holdings, LLC, 176 A.D.3d 922 [2d Dept 2019]).

As required, Watts specifically pled lack of personal jurisdiction in its answer, and thus this court shall consider it.

Taking into consideration the parties' submissions, the record shows that Watts transacted business in New York, under the long-arm statute. Watts represents that it manufactured and distributed valves from outside of New York, in Massachusetts; that plaintiffs' underlying causes of action arise from Watt's tortious acts, ie. injured plaintiff may have been exposed to asbestos from Watts products in New York, when he inhaled hazardous dust. The court finds that the elements of long arm jurisdiction have been met, because plaintiff established that Watts reasonably should have expected its production of valves to have consequences in New York (Grandelli v Hope St. Holdings, LLC, 176 A.D.3d 922 [2d Dept 2019]). Accordingly, Watts' motion to dismiss for failure to acquire personal jurisdiction is denied.

As for plaintiffs' cross motion (Seq 12) to amend the Summons and Complaint to add Watts Regulator, Co, as defendant is granted. "As a general rule, leave to amend a pleading pursuant to CPLR 3025(b) should be freely granted in the absence of prejudice or surprise resulting from the

delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (Munoz Trucking Corp. v. Darcon Const., Inc., 153 AD3d 838, 839 [2d Dept. 2017) Plaintiff contends that Watts holds itself out as the same company as Watts Regulator, and that Watts Regulator is a wholly owned subsidiary of Watts. Plaintiff reasons that since Watts Regulator is a wholly owned subsidiary then Watts knew at the time the complaint was filed that they were named improperly.

Although plaintiffs filed their Note of Issue and Certificate of Readiness for Trial on July 19, 2019, the court finds that plaintiffs demonstrated a reasonable excuse for not having amended the complaint earlier. As the Court directs that a new party be joined in the action, and the order is not made upon the new party's motion, a supplemental summons specifying the pleading which he must answer shall be served upon him (Kaplan v Kaplan, 94 AD2d 788 [2d Dept 1983]).

Turning to the summary judgment motions, it is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's

affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). However, "evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination" (In re New York City Asbestos Litig., 7 AD3d 285 [1st Dept 2004]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hosp., 68 NY2d 320, [1986]).

Generally, in asbestos cases, in order to succeed on their claim, plaintiffs must establish that decedent was exposed to the defendant's product and that it was more likely than not that this exposure was a substantial factor in his injury (Diel v Flintkote Co., 204 AD2d 53, 54 [1st Dept 1994]). If the moving defendant makes a prima facie showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that he or she was actually exposed to asbestos fibers released from the defendant's product (Cawein v Flintkote Co., 203 AD2d 105, 106 (1st Dept 1994).

Significantly, the Court of Appeals has held "that the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic

necessity, is necessary to enable the manufacturer's product to function as intended" (Dummitt v AW Chesterton 27 NY3d 765, 778 [2016]).

Turning to Watts' motion for summary judgment, (Seq 9), its former Corporate Controller and current Chief Accounting Officer Timothy MacPhee attests that Watts did not exist prior to 1985 and that from 1985 through the 1990s Watts did not sell valves of any kind. However, as plaintiff points out, MacPhee began his employment with Watts in 2004, more than four decades after injured plaintiff's first exposure to Watts valves; and has no experience in the plumbing or valve industry. Upon this court's reading of the MacPhee affidavit, it falls far short to satisfy Watt's burden and fails to eliminate triable issues of fact.

In opposition, plaintiff identified Watts valves as ones he had contact with while working as a plumber, journeyman, and foreman, in the 1960s-1990s. He testified that a part of his job, he installed and repaired various types of valves, and that these valves were attached to various pieces of equipment including boilers. He knew the valves were made by Watts because that name was on the valve. Plaintiffs also raises that injured plaintiff testified that he was exposed to asbestos when insulators insulated the valves and swept up the mess left behind. He also testified that he removed asbestos insulation from Watts valves which caused him to be exposed to asbestos(NYSCEF Doc No. 204 pg 397).

Based upon this record, Watts has failed to present any admissible evidence sufficient to prove that its products could not have caused injured plaintiff's illness, thus failing to demonstrate prima facie entitlement to summary judgment.

Turning next to A.O Smith's Motion Seq 10, it claims that plaintiffs have failed to come forward with any proof that the injured plaintiff was exposed to any asbestos-containing product

manufactured, rebranded, sold, shipped, installed or distributed by A.O.Smith. A.O.Smith claims that the external insulation was already present or that others allegedly applied to A.O. Smith boilers. Thus, A.O. Smith' s position is that it cannot be held accountable for the injured plaintiff's injuries because it did not manufacture the asbestos-containing insulation that covered its boilers.

In support of its motion, A.O Smith offers an affidavit of its former employee Bradley Plank, A.O Smith's Product Safety Manager from 1993 through 2007, who asserts that A.O Smith did not design, manufacture, sell, supply specify, require the use of any external insulation on its boilers and external insulation was not required for A.O. Smith. Likewise, Plank represents that A.O Smith did not design or sell the use of any insulation on pipes connected to its water heaters. He attests that injured plaintiff misidentified A.O.Smith boilers as a source of exposure, because A.O. Smith boilers were preassembled at the factory and sold as a complete unit, with the jacket fully installed, and was designed to function without external insulation.

However, courts have rejected Plank's affidavits in the past, questioning his personal knowledge of the history of asbestos in the boilers years before he was even an employee, and the documents relied upon (NYSCEF Doc No. 272).

Plaintiffs point out that injured plaintiff testified at his deposition that while working as a foreman in the 1960's and 1970's, he was exposed to asbestos from external insulation applied to the exterior metal jacket of cast iron sectional boilers he identified as "A.O.Smith" that were installed in unidentified buildings in Westchester County.

Of significance, The First Department examined A.O Smith's involvement with asbestos:

"The evidence adduced at trial demonstrates that, while defendant [A.O. Smith] did not manufacture asbestos, for decades it heavily promoted the use of the type of asbestos insulation to which the decedent was exposed. Further, defendant often sold asbestos products along with its

boilers and advertised asbestos as the preferred insulation product to use for its boilers. The evidence also shows that defendant was aware of the dangers of asbestos exposure well before the decedent's first exposure in the late 1970s, and that the decedent was never advised by defendant or his employers about those dangers" (Peraica v A.O. Smith Water Prod. Co., 143 AD3d 448, [1st Dept 2016]).

Plaintiff raises that A.O Smith's own interrogatory responses establish that it shipped original boilers with asbestos components until at the earliest, the 1980s. In addition, according to plaintiff, engineering drawings, specifications, and other documents demonstrate that A.O. Smith advised its customers to insulate its boilers with asbestos, as its properties were ideal for the intended use of the boilers.

Based on this record, the court finds that A.O Smith failed to demonstrate its prima facie entitlement to summary judgment. In any event, the court finds that there are issues of fact as to if asbestos was present in A.O Smith's boilers and other products, and relating to A.O. Smith's failure to warn end users about the hazardous nature of asbestos, precluding summary judgment. A.O. Smith did not unequivocally establish that its boilers could not have contributed to the causation of injured plaintiff's illness. A.O Smith's assertions that its boilers did not require asbestos-containing insulation to operate properly is insufficient to shield it from liability.

Turning next to Motion Seq 11, Fulton Boiler Works, Inc. ("Fulton"), plaintiff alleges exposure from external insulation to a Fulton boiler in plaintiff's presence.

In support of its motion, Fulton offers the affidavit of Michael Simmons, corporate representative, attesting that plaintiff could not have encountered a Fulton boiler (NYSCEF Doc No. 243). Rather, the only type of boiler Fulton ever manufactured was a packaged boiler, which came preassembled from the factory in one piece. Mr. Simmons also asserts that an external insulation

would have no purpose on a Fulton boiler. Further, he claims that "Fulton boilers are designed with refractory material underneath the jacket of the boiler, eliminating any need for external insulation.. No Fulton catalog, manual or the like has ever suggested or recommended external insulation be applied to a Fulton boiler...Fulton has never manufactured, distributed or supplied external insulation (NYSCEF Doc No. 243).

However, Mr. Simmons only began his employment with Fulton in 1991, more than a decade after plaintiff's alleged exposure to Fulton's boilers, and it is questionable where he gained his knowledge, whether it be from conversations with other people, or otherwise.

Q: So anything that you testified to prior to 1991 has to be based upon conversations with other people or from things that you've read. Would you agree with that?

A: Yes.

(NYSCEF Doc No. 243 at pg. 22)

In light of Fulton's submissions, and the Simmons affidavit, fail to demonstrate Fulton's prima facie entitlement to summary judgment. Thus, the motion for summary judgment is denied.

Accordingly, as stated above, it is hereby

ORDERED, that Watts' motion to dismiss (Seq 8) for lack of personal jurisdiction is **denied**; and it is further

ORDERED, that plaintiffs' cross-motion (Seq 12) to amend the complaint is **granted** to add as a defendant, Watts Regulator, Co, and that plaintiffs, within thirty (30) days of service of a copy of this order, is directed to serve a supplemental summons and amended complaint upon defendants and the added party defendant, Watts Regulator, Co., which shall have twenty (20) days, upon

service of the supplemental summons and amended complaint, to serve an answer or amended answer; and it is further

ORDERED, that defendant Watts motion (Seq 9) for summary judgment is **denied**; and it is further

ORDERED, that defendant A.O. Smith's motion (10) motion for summary judgment is **denied**; and it is further

ORDERED, that defendant Fulton's motion (Seq 11) for summary judgment is **denied**; and it is further

ORDERED, that the parties are directed to appear on January 28, 2020 at 9:15A.M. in courtroom 1600, the Settlement Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601; and it is further

ORDERED, that plaintiffs shall serve a copy of this order with notice of entry upon defendants, and added defendant within ten (10) days of entry, pursuant to NYSCEF protocols, and file proof of service on NYSCEF within five (5) days of service.

This constitutes the decision and order of the court.

All matters not specifically addressed are herewith denied.

Dated: **December 16, 2019**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All parties' counsel by NYSCEF