

Mougios v Autozone, Inc.

2019 NY Slip Op 35093(U)

June 28, 2019

Supreme Court, Queens County

Docket Number: Index No. 716053/18

Judge: Darrell L. Gavrin

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.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

PANAGIOTIS MOUGIOS and ANNA MOUGIOS,

Index No. 716053/18

Plaintiffs,

Motion

Date March 12, 2019

- against-

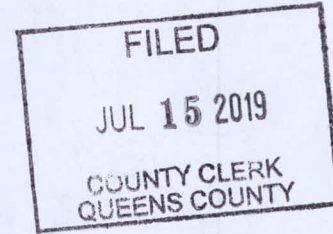
AUTOZONE, INC., BRENNTAG NORTHEAST, INC.,
CONEY ISLAND AUTO PARTS UNLIMITED., INC.,
CRC INDUSTRIES, INC., EXXONMOBILE
CORPORATION, ILLINOIS TOOL WORKS INC.
d/b/a PERMATEX, MIGHTY DISTRIBUTING
SYSTEMS OF AMERICA, INC., d/b/a MIGHTY
AUTO PARTS RADIATOR SPECIALTY COMPANY,
RWE DISTRIBUTORS, INC., SAFETY-KLEEN
SYSTEMS, INC., SUNOCO, INC. (R&M) f/k/a SUN
COMPANY, INC., and f/k/a SUN OIL COMPANY,
INC., THE ARMOR ALL/STP PRODUCTS COMPANY,
THE BERKEBILE OIL COMPANY, INC., THE
B'MASTER CORPORATION, UNITED STATES
STEEL CORPORATION, ZEP, INC.,

Motion

Cal. No. 28

Motion

Seq. No. 3



Defendants.

The following numbered papers read on this motion by defendant, Brenntag Northeast, LLC, sued herein as Brenntag Northeast, Inc. (Brenntag), to dismiss plaintiffs, Panagiotis Mougios' and Anna Mougios' (collectively referred to as plaintiffs) complaint pursuant to CPLR 3211 (a)(8), for lack of personal jurisdiction.

Papers
Numbered

Table with 2 columns: Description of paper, Page number. Includes Notice of Motion - Affirmation - Exhibits (EF 37-41), Affirmation in Opposition - Exhibits (EF 58-68), Reply Affirmation (EF 69).

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action sounding in negligence, gross negligence, breach of warranty, strict products liability, and fraudulent misrepresentation. Plaintiffs have alleged that Panagiotis

Mougiros (individually referred to as plaintiff), was an employee of non-party Rex Service Station (Sunoco), located at Hazen Street, in the County of Queens, from 1971 to 1983, and an employee of non-party MGM Enterprises (Mobil), located at 70-23 Bay Parkway, in Kings County, from 1983 to 2017. They have alleged that during these time periods, plaintiff worked directly and indirectly on a daily basis with various benzene-containing products.

Plaintiffs have alleged that defendants, Autozone, Inc., Coney Island Auto Parts Unlimited, Inc., CRC Industries, Inc., Exxonmobil Corporation, Illinois Tool Works Inc, doing business as Permatex, Mighty Distributing Systems of America, Inc., doing business as Mighty Auto Parts Radiator Specialty Company, RWE Distributors, Inc., Safety-Kleen Systems, Inc., Sunoco, Inc., (R&M), formerly known as Sun Company, Inc., and formerly known as Sun Oil Company, Inc., The Armor All/STP Products Company, The Berkebile Oil Company, Inc., The B'Laster Corporation, United States Steel Corporation, ZEP, Inc., along with Brenntag (collectively referred to as defendants), directly and through their agents and employees, manufactured, refined, designed, produced, processed, compounded, converted, packaged, sold, distributed, marketed, relabeled, supplied and otherwise placed into the stream of commerce various benzene-containing products, including but not limited to xylene, toluene, ethylbenzene, and other hydrocarbons.

Plaintiffs have further alleged that plaintiff's contact with benzene-containing products and/or raw material ingredients used in benzene-containing products that defendants placed into the stream of commerce caused him to sustain damages. Plaintiff's wife, Anna Mougiros, has alleged a derivative cause of action for loss of consortium.

Brenntag moved to dismiss the complaint, pursuant to CPLR 3211 (a)(8), which provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the court has not jurisdiction of the person of the defendant..." When making a determination on a motion made, pursuant to CPLR 3211(a), the court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Weitz v Weitz*, 85 AD3d 1153, 1153-54 [2d Dept 2011]).

Brenntag has argued that courts in the State of New York do not have general jurisdiction over it, pursuant to CPLR 301. In their opposition papers, plaintiffs have conceded that issue and therefore determination of this court need not address it. Thus, this determination is limited to that branch of Brenntag's motion relating to the assertion of specific jurisdiction pursuant to CPLR 302. In support, Brenntag avers that this court does not have specific jurisdiction over it and that a finding that this court has in personam jurisdiction over it would violate the Due Process Clause of the Fourteenth Amendment. In opposition, plaintiffs have argued that this court has personal jurisdiction over Brenntag and argues in the alternative, that further jurisdictional disclosure is needed in order to enable plaintiffs to establish that Brenntag is subject to personal jurisdiction in the State of New York (CPLR 3211[d]).

“It is fundamental that a court must acquire personal jurisdiction over a defendant before it can render a judgment against that defendant” (*Aybar v Aybar*, 169 AD3d 137, 142 [2d Dept 2019]). “The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (*Ho v McCarthy*, 90 AD3d 710, 711 [2d Dept 2011], quoting *Calder v Jones*, 465 US 783, 788 [1984]).

CPLR 302 entitled “Personal jurisdiction by acts of non-domiciliaries,” referred to as New York’s long-arm jurisdiction statute, provides the following:

“(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise 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 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, uses or possesses any real property situated within the state...”

“Under modern jurisprudence ... [s]pecific jurisdiction ... depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation” (*Aybar v Aybar*, 169 AD3d at 143 [internal citation omitted], quoting *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915, 919 [2011]). “As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue” (*Coll. v Brady*, 84 AD3d 1322, 1322-23 [2d Dept 2011]). Thus, in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff need only make a *prima facie* showing that the defendant was subject to the personal jurisdiction of the court (*see Jacobs v 201 Stephenson Corp.*, 138 AD3d 693, 693-94 [2d Dept 2016]; *Carrs v Avco Corp.*, 124 AD3d 710, 710 [2d Dept 2015]).

However, in order “[t]o successfully oppose a motion to dismiss pursuant to CPLR 3211(a)(8), on the ground that discovery on the issue of personal jurisdiction is necessary, the plaintiff did not need to make a *prima facie* showing of jurisdiction, but instead only needed to set forth a sufficient start, and [show its] position not to be frivolous” (*Coll. v Brady*, 84 AD3d 1322, 1322-23 [2d Dept 2011][internal citation omitted]; *see Jacobs v 201 Stephenson Corp.*, 138 AD3d 693, 694 [2d Dept 2016]). In the instant case, plaintiffs have met their burden in opposition. Taking into consideration the totality of the circumstances in this matter, this court

has determined that the evidence in the limited record before it, has demonstrated that issues of fact remain regarding whether this court may exercise personal jurisdiction over defendant, Brenntag.


The record contains, among other things, a copy of the complaint, the affidavit of non-party, Melisa Steinruck (Steinruck), Brenntag's Customer Service Manager, and various copies of printouts from Brenntag's website. The complaint alleges that plaintiff was exposed to Brenntag's products in the State of New York and that he suffered injuries as a result of his exposure. Plaintiffs further allege that Brenntag "continuously, regularly, and systematically transacts business in the State of New York ... manufactured, refined, designed, produced, processed, compounded, converted, packaged, sold, distributed, marketed, re-labeled, supplied and/or otherwise placed into the stream of commerce benzene-containing products, but not limited to, benzene-containing mineral spirits used in CRC Industries, Inc. and other co-Defendants' products" to which plaintiff was exposed, proximately causing his alleged injuries.

Non-party Steinruck stated in her affidavit that "Brenntag is a chemical and ingredients solutions distributor," that "Brenntag's only sales of alleged benzene-containing mineral spirits to CRC Industries, Inc. ("CRC") occurred in the Commonwealth of Pennsylvania. Brenntag has never sold benzene-containing mineral spirits to any other CRC location. Brenntag has also never had an exclusive distributorship agreement with CRC," and that "Brenntag never sold any benzene-containing mineral spirits to any other Defendant in this action." Copies of printouts from Brenntag's website, list "Long Island/Metro/Southern NY" as its "territory" in the "Reading District." The website also lists a location of a "Branch Office" in Syracuse, New York, providing a local address and contact telephone numbers in Liverpool/Syracuse, both located in the County of Onondaga, State of New York.

Reviewing the allegations set forth in plaintiffs' complaint, accepting them as true, and affording plaintiffs the benefit of a favorable inference on the evidence contained in the extremely limited record before the court, as the opposing party, plaintiffs have adequately shown that facts "may exist" which would permit this court to exercise personal jurisdiction over Brenntag (CPLR 3211[d]; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 151-152). Therefore, plaintiffs have sufficiently demonstrated that this issue warrants further disclosure (*see Coll. v Brady*, 84 AD3d at 1322-23), and Brenntag is not entitled to the relief sought.

Accordingly, Brenntag's motion to dismiss the complaint as against it, pursuant to CPLR 3211 (a)(8), is denied.

Dated: June 28, 2019



DARRELL L. GAVRIN, J.S.C.

