

**Koenig v ABB, Inc.**

2020 NY Slip Op 30065(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 190210/2014

Judge: Manuel J. Mendez

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**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**

**PATRICIA KOENIG, as Personal Representative  
for the Estate of WILLIAM KOENIG, and  
PATRICIA KOENIG, Individually,**

**INDEX NO. 190210/2014  
MOTION DATE 12/18/2019  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_**

**Plaintiffs,**

**-against-**

**ABB, INC. as successor in interest to ITE  
CIRCUIT BREAKERS, INC., et al.,**

**Defendants.**

The following papers, numbered 1 to 6 were read on this motion to dismiss by PNEUMO ABEX LLC for lack of personal jurisdiction and cross motion for jurisdictional discovery.

	<b>PAPERS NUMBERED</b>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 2</u>
Answering Affidavits — Exhibits _____	<u>3-5</u>
Replying Affidavits _____	<u>6</u>

**CROSS-MOTION  YES  NO**

Upon a reading of the foregoing cited papers it is Ordered that Defendant Pneumo Abex LLC's (hereinafter "Abex") motion to dismiss Plaintiffs' claims as against it for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), is granted, the complaint and all cross-claims against this Defendant are dismissed. Plaintiffs' cross-motion for jurisdictional discovery is denied.

Plaintiff, William Koenig, was diagnosed with and died from mesothelioma, which is alleged to have resulted from his exposure to asbestos. It is alleged that he was exposed to asbestos when he came in contact with Abex's asbestos-containing brake products while working as an auto mechanic from 1970 to 1979. Plaintiff alleges that the injuries were caused by being in the presence of Abex's brake products as they were removed and replaced at service stations that were located throughout different cities of Massachusetts.

Mr. Koenig moved to the State of Massachusetts in the late 1960's and was residing in Michigan in January 2004 when he was diagnosed with mesothelioma.

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

Plaintiffs commenced this action on July 10, 2015 against various defendants, including Defendant Abex, to recover for the injuries Mr. Koenig sustained. On August 7, 2015, Abex filed acknowledgement of service, an answer to the verified complaint, affirmative defenses which included an affirmative defense based on lack of personal jurisdiction, and cross claims. (See moving papers Exhibit A and B).

On September 28, 2015 Plaintiffs served answers to interrogatories which contained a Chart 'A' that described Mr. Koenig's specific exposure history. The relevant portions of Chart 'A', written by Plaintiffs' attorney, disclosed that Mr. Koenig was exposed to asbestos from his time as a brake mechanic in Queens, New York from 1955 to 1958 and while doing boiler work and renovations on residences in Salem, Massachusetts from 1962 to 1980. The interrogatories were not answered under oath, and without further consistent evidence, the only reliable evidence is the deposition of Mr. Koenig's Son. Mr. Koenig's son, William T. Koenig, was deposed on February 25 and April 21 of 2016. At the depositions, where he was questioned by Abex's counsel, he stated under oath the nature of his father's exposure to Abex products. (See moving papers Exhibit C). When William T. Koenig was asked by Abex's counsel if he had any personal knowledge of his father's previous work during his time as a brake mechanic in Queens, New York, William T. Koenig stated he does not and that happened before he was born. Mr. Koenig's son only testified to having knowledge of his father's work with asbestos-containing brake pads when his father worked in Beverley, Hamilton, and Salem, Massachusetts. (See opposition papers Exhibit 2 pg. 233-242).

In its answer, Abex asserted a number of affirmative defenses and cross claims, which included an affirmative defense asserting that "there is no in personam jurisdiction over Abex in New York." Abex makes this motion, by order to show cause, to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8).

Defendant is not contesting service. It argues that this court does not have personal jurisdiction over Abex because Mr. Koenig's exposure occurred outside of the State of New York, at a time when he did not reside in the State of New York, and Abex is not incorporated in New York and does not maintain its principal place of business here. Plaintiffs' claims do not arise from any of Abex's New York transactions, and Abex 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. (See CPLR § 302(a)(1), (2), and (3)).

In support of its motion, Abex cites to the decision in *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County, et al.*, (137 S.Ct. 1773 [2017]), where the United States Supreme Court dismissed the claims of non-California residents in a products liability action for lack of specific personal jurisdiction, where the non-residents did not suffer a harm in California, and all the conduct giving rise to their claims occurred elsewhere. They also point to *BNSF*

*Railway Co., v. Tyrrell*, 137 S.Ct. 1549 [2017]), which affirmed the holding in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014], where the United States Supreme court dismissed the claim for lack of general personal jurisdiction of non-Montana residents, who were not injured in Montana, where defendant Railroad was not incorporated in Montana, nor maintained its principal place of business there. Abex also cites to *McGowan v. Smith*, (52 N.Y.2d 268 [1981]), where the New York Court of Appeals affirmed the dismissal of the claims brought by a New York resident plaintiff, who was injured in Canada by the explosion of a fondue pot the plaintiff had purchased in New York State, against a Japanese trading company.

The court in *McGowan* held that “(1) several visits which representatives of the trading company made to New York for purposes of general marketing research and ascertaining what type of products might be salable in New York could not form the predicate for exercising in personam jurisdiction over the trading company, and (2) the injury did not occur in New York so as to give a New York court jurisdiction on a theory that the company had committed a tortious act outside of New York which resulted in an injury in New York.” Finally, Defendants cite to *Longines-Wittnauer Watch Co. v. Barnes and Reinecke, Inc.*, (15 N.Y.2d 443 [1965]), which held that CPLR § 302(a)(2) has been narrowly construed to apply only to torts committed within the State of New York.

In sum, Defendant Abex argues that this court lacks specific and general personal jurisdiction over it and therefore the claims should be dismissed.

Plaintiffs oppose the motion on the ground that there is personal jurisdiction over the Defendant under the New York State long-arm statute. In addition, Plaintiffs cross move for discovery on the jurisdictional issues.

“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, [E.D.N.Y. 2017]). “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. A court may assert general jurisdiction over a foreign corporation to hear any and all claims against it when its affiliations with the State are so ‘continuous and systematic’ as to render it essentially at home in the forum State. (*Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 180 L.Ed2d 796 [2011]; *BNSF Railway Co., v. Tyrrell*, 137 S.Ct. 1549 [2017]).”

“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. (See *Bristol-Myers Squibb; Walden v. Fiore*, 134 S. Ct. 1115 [2014]).”

This court cannot exercise general personal jurisdiction over the defendant Abex because it is not incorporated, nor does it have its principal place of business in the State of New York. Abex is a Delaware corporation, with its principal place of business in the State of Texas. This Court cannot exercise specific personal jurisdiction under CPLR § 302(a)(1) because there is no articulable nexus or substantial relationship between its in state 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. This Court cannot exercise specific personal jurisdiction under CPLR § 302(a)(2), because Abex has not committed a tortious act within the State. All of the alleged exposures to defendant’s product occurred in the State of Massachusetts. Exercise of specific jurisdiction under this section requires a defendant to be physically present in New York.

“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 v. Encarnacion*, *Supra*).

More is required than just an injury in New York. The plaintiff must establish that the defendant either “(1) 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 (2) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” (See CPLR § 302(a)(3)).

Abex argues that CPLR § 302(a)(3) is inapplicable because the injury did not occur in the state of New York. It argues that Mr. Koenig was exposed to their product in Massachusetts, that Massachusetts is the situs of the injury, and the fact that the Mesothelioma manifested itself from asbestos-containing brake pads alleged to be sold out of Abex’s New York office is of no consequence. Since the exposure and the injury -the original event- all took place outside of the State of New York and at a time the plaintiff was not a resident of the State of New York, the New York court cannot exercise jurisdiction. (see *Bristol-Myers Squibb v. Superior*

Court of California, San Francisco, Supra; BNSF Railway Co., v. Tyrrell, Supra; McGowan v. Smith, Supra; Lebron v. Encarnacion, Supra).

Plaintiffs argue that the Defendants from 1967 through at least 1977 continually transacted to sell asbestos-containing brakes to various distributors out of the New York office, which was then used to create and distribute asbestos-containing Abex products that Mr. Koenig used. (See opposition Exhibits 2, 3, 4, and 5).

“Application of New York’s long-arm statute requires that (1) defendant has purposefully availed itself of the privilege of conducting activities within the state by either transacting business in New York or contracting anywhere to supply goods or services in New York, and (2) the claim arises from that business transaction or from the contract to provide goods or services”. (McKinney’s CPLR § 302(a)(1)).

“Jurisdiction is proper under the transacting of business provision of New York’s long-arm statute even though the defendant never enters New York, so long as the defendant’s activities in the state were purposeful and there is a substantial relationship between the transaction and the claim asserted. (McKinney’s CPLR § 302(a)(1), *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 68 N.E.3d 1, 45 N.Y.S.3d 276 [2016]).

“A non-domiciliary defendant transacts business in New York when on their own initiative the non-domiciliary projects itself into this state to engage in a sustained and substantial transaction of business. However, it is not enough that the non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff’s cause of action must have an “articulable nexus” or “substantial relationship with the defendant’s transaction of business here. At the very least there must be a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim. This inquiry is relatively permissive and an articulable nexus or substantial relationship exists where at least one element arises from the New York contacts.”(see *D& R. Global Selections, S.L., v. Bodega Olegario Falcon Pineiro*, (29 N.Y.3d 292, 78 N.E.3d 1172, 56 N.Y.S.3d 488 [2017] quoting *Licci v. Lebanese Can. Bank, SAL*, (20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 [2012])).

Mr. Koenig’s exposure to asbestos occurred in Massachusetts and at a time he was not a New York resident. He moved out of New York years before his exposure to Abex’s asbestos-containing brake pads. If Plaintiffs claim that the original event that caused Mr. Koenig’s injury was exposure to Abex’s asbestos-containing brake pads in Massachusetts, then this event is clearly traceable to a specific place and time, which is not New York. Plaintiffs injury did not occur in New York and there was no “articulable nexus” or “substantial relationship” with the Defendant’s transaction of business in New York. Thus, this Court cannot exercise jurisdiction over Abex consistent with due process standards.

Lastly, Plaintiffs cross moved for jurisdictional discovery. Plaintiffs seek discovery to determine the nature of Abex's sales, distribution, and finances in the State of New York at the time of Mr. Koenig's exposure to asbestos from Abex's products.

In order to be entitled to jurisdictional discovery, the movant must show that the requested discovery could present existence of essential facts establishing jurisdiction that are not yet known. (*FIMBank P.L.C. v. Woori Finance Holdings Co. Ltd.*, 104 A.D.3d 602, 962 N.Y.S.2d 114 [1<sup>st</sup> Dept. 2013]; *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 [Court of Appeals 1974]; *Copp v. Ramirez*, 62 A.D.3d 23, 874 N.Y.S.2d 52 [1<sup>st</sup> Dept. 2009]). A motion for jurisdictional discovery must establish a "sufficient start" showing that discovery could establish jurisdiction over the non-moving party. (*Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 [Court of Appeals 1974]).

Plaintiffs have not shown sufficient facts or a sufficient start to support their motion for jurisdictional discovery. Defendant Abex is incorporated in Delaware and has its principal place of business in Texas. Mr. Koenig's injuries arose out of and were sustained in Massachusetts. This Court does not have personal jurisdiction over Abex because Abex's connection to the State of New York is not substantial and there is no articulable nexus. Plaintiffs have not shown that jurisdictional discovery could prove the existence of essential facts establishing personal jurisdiction over Abex that is currently not known. The only facts given by the Plaintiffs to establish personal jurisdiction over Abex is that Abex had an office in the State of New York, and at that office Abex negotiated and contracted to sell asbestos during the time in question. Negotiations and contracting to do business in the State of New York is not enough to constitute a "sufficient start." (*IMAX Corp. v. The Essel Group*, 154 A.D.3d 464, 62 N.Y.S.3d 107 [1<sup>st</sup> Dept. 2017]). In conjunction, the listing of a New York office and telephone number, without more, is insufficient to confer personal jurisdiction. (*Minella v. Restifo*, 124 A.D.3d 486, 3 N.Y.S.3d 322 [1<sup>st</sup> Dept. 2015]). The original event that caused Mr. Koenig's injury was in Massachusetts, thus the situs of the injury was not in New York State and there is no basis for specific personal jurisdiction or jurisdictional discovery.

Accordingly, for the foregoing stated reasons, it is ORDERED that the motion to dismiss is granted and the case is dismissed, and it is further

ORDERED that the cross-motion for jurisdictional discovery is denied, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

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

Dated: January 6, 2020

  
\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
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