Germain v American Intl. Indus.
2020 NY Slip Op 30587(U)
February 28, 2020
Supreme Court, New York County
Docket Number: 190049/2017
Judge: Manuel J. Mendez

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

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

EDDIE GERMAIN and MILDRED GERMAIN, as Personal Representatives for the Estate of MICHELLE M. GERMAIN,

Plaintiffs,

-against-

AMERICAN INTERNATIONAL INDUSTRIES, et al.,

Defendants.

INDEX NO. 190049/2017
MOTION DATE 01/28/2020
MOTION SEQ. NO. 015
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to dismiss by the NESLEMUR COMPANY for lack of personal jurisdiction and improper service.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5,6

CROSS-MOTION ☐ YES ☒ NO

Upon a reading of the foregoing cited papers it is Ordered that Defendant The Neslemur Company's (hereinafter "Neslemur") motion to dismiss Plaintiffs' claims as against it for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), and improper service is Denied.

Plaintiff, Michelle Germain, was diagnosed with mesothelioma in January 2016 as a result of her alleged exposure to asbestos. She died from the disease on August 4, 2017. It is alleged that she was exposed to Clubman talcum brand powder used by her husband, Eddie Germain, in the barbershop he worked in and later owned, in New York from about 1978 to approximately 1993.

Mrs. Germain was deposed on February 28, March 1, March 2, and March 3, 2017. She testified about her exposure history to defendant's talcum product between 1978 through approximately 1993. She alleges that her asbestos exposure occurred from being in the vicinity of Mr. Germain at his barbershop regularly and from laundering his aprons, that were covered with asbestos-containing Clubman talcum powder, for approximately 20 years (see opposition papers Exhibits 1 and 2). Mrs. Germain alleges that she was exposed to asbestos-containing Talc in defendant's Clubman talcum product when she visited her husband at the

barbershop in New York (at least bi-weekly, for a few hours each time, and then for longer periods when Mr. Germain purchased the shop). Mrs. Germain testified that she was also exposed to asbestos-containing Clubman talcum powder when she washed Mr. Germain's aprons on a weekly basis. Mrs. Germain stated that when she washed the aprons, she would shake out the aprons to remove the dust and would then place them into the washing machine. She testified that she did the washing process for the last 20 years (*See* opposition papers Exhibits 1 and 2).

Neslemur, previously "The Nestle-Lemur Company" headquartered at 66 East 34th Street, New York, N.Y. 10036, is a Delaware corporation formed on December 14, 1983, engaged in the business of manufacturing toiletry and cosmetic products, including the Clubman brand Talcum product used widely in barbershops. On June 24, 1984 the corporation was authorized to do business in New York, establishing its principal place of business at 114 Fifth Avenue, in the City and State of New York. The corporation designated the New York State Secretary of State as its agent for service of process in New York and named Mr. Harold Rand, one of its corporate officers, as its Registered agent for service of process. Mr. Rand's address was listed at the address of the corporation, 114 Fifth Avenue, New York, N.Y. 10011(see moving papers exhibit E, opposition Exhibit 8). Additionally, it maintained facilities for the manufacture of its products at 1037-51 prospect Avenue Bronx, New York and 1028-30, 1030-54 and 1030-58 Union Avenue, Bronx, New York. (see Opposition exhibit 20).

In 1987 Neslemur sold most of its assets, including the Clubman Talcum brand to American International Industries (hereinafter "AII")(see opposition Exhibit 14). Neslemur's Delaware certificate of incorporation was voided in 1991 for failure to pay franchise taxes. It was dissolved by proclamation and its authority to do business in New York was annulled on September 27, 1995 (see moving papers Exhibit E, opposition Exhibit 7).

Plaintiffs commenced this action on February 13, 2017 to recover for the injuries Mrs. Germain sustained. The Summons and Complaint were subsequently amended three times. In the initial complaint Plaintiffs did not name Neslemur, but named Lamorak, Neslemur's insurer, as a defendant. Lamorak moved to dismiss the claims against it and the parties stipulated that Plaintiffs would dismiss the claims against Lamorak and would then pursue their claims against Neslemur directly. On April 18, 2018 Plaintiffs' third amended complaint added the Defendant Neslemur (*see* moving papers Exhibit A). On April 24, 2018 Plaintiffs discontinued their action against Lamorak (see Opposition Exhibit 11).

On April 20, 2018 Plaintiffs served Neslemur by personally serving on the New York Secretary of State, pursuant to New York Business Corporation Law ("BCL") § 306, a copy of the Third Amended summons and complaint (*see* moving papers Exhibit F, opposition exhibit 13). On July 5, 2018 plaintiffs' attorneys, on two unrelated actions (Estate of Luca and Estate of Fogel) filed a Petition in the

Court of Chancery of the State of Delaware "for the appointment of a Receiver for The Neslemur Company, a Voided Delaware corporation"(see opposition Exhibit 14). On July 16, 2018 counsel for Lamorak Insurance Company, Patrick Hofer, Esq., of Clyde & Co., U.S. LLP, contacted plaintiffs' counsel on the pending Delaware Petition for the appointment of a Receiver for The Neslemur Company, Joseph Rhoades, Esq., of Rhodes & Morrow, LLC, suggesting that the Petition be dismissed without prejudice, and informing him that... " If you effect Service on Neslemur in accordance with New York law and promptly notify Lamorak by sending me a copy of your proof of service, Lamorak will defend the action and, if liability is established (or settled with Lamorak's written agreement) and bodily injury occurred during the policy period, Lamorak will pay its allocable share of covered claims subject to the limits, terms and conditions of its policy and applicable law...."(see opposition Exhibit 15).

On July 27, 2018 Plaintiff's counsel, by e-mail correspondence to defendant's counsel in New York, Peter DiNunzio, Esq., informed him that Plaintiffs had "...checked our files and noticed that we served Neslemur by Personally serving the Secretary of State under BCL§ 306 back in April. I've attached the affidavits of service to this e-mail. Please advise whether you will treat service of process as complete and whether Lamorak will proceed to answer and defend on Neslemur's behalf..."(see moving papers Exhibit F). There was no answer from Defendant's New York Counsel. Plaintiffs attempted service on Neslemur on August 17, 2018 by personally serving Harold Rand, its registered agent in New York. However, service could not be effected because Mr. Rand was deceased (see opposition Exhibit 16).

Plaintiffs, Lamorak, and Neslemur then entered into a letter agreement on November 21, 2018 that required Lamorak "...to retain counsel and defend Neslemur in this and any other New York lawsuit, if service is properly effected upon Neslemur in accordance with BCL § 307..." Paragraph 11 of the letter agreement provides that "either party may terminate it upon giving notice to the other party and the agreement will terminate 30 days thereafter..." (see opposition Exhibit 17). Plaintiffs served Neslemur by way of the New York Secretary of State pursuant to BCL § 307 on March 5, April 26, and August 21, 2019, on each occasion attempting to make the required additional service on the corporation by serving either the Delaware Secretary of State or Neslemur's registered agent in the manner contemplated by the statute (see opposition papers Exhibit 18). On each of these occasions plaintiffs served Lamorak's counsel with copies of the pleadings and proof of service, and on each occasion Lamorak's counsel declined to defend Neslemur because... "[it] had not been properly served according to the procedure outlined in the statute..."(see moving papers Exhibits G, H and I).

Neslemur now makes this motion, by order to show cause, to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). Neslemur alleges that it was not properly served because plaintiffs only attempted service upon the New York Secretary of State (BCL §306), which is not proper service upon Neslemur, a Delaware corporation that is inactive and has not been authorized to do business in New York for over 20 years. Furthermore, Neslemur is not subject to personal jurisdiction, neither under the long arm statute nor its Due Process limitations. Even if [Mrs. Germain] was injured by a Neslemur product in the State of New York, specific jurisdiction is unavailable under CPLR§ 302(a)(3) because Neslemur is an inactive entity, and so fails to satisfy the limiting provisions of the statute-i.e., it has no "persistent course of conduct" in New York, derives no revenue from "goods used or consumed or services rendered" in New York, and derives no revenue "from interstate or international commerce." Finally, even if statutory jurisdiction were available under CPLR§ 302, Due Process prohibits the exercise of specific jurisdiction because [Mrs. Germain's] alleged injuries did not arise from Neslemur's conduct in the State of New York. In sum Neslemur alleges that service was improper because it was effected pursuant to BCL §306(b) and not BCL §307, and that there is no General or Specific Jurisdiction, therefore the action should be dismissed (see moving papers).

Plaintiffs oppose the motion and alleges that service on Neslemur under BCL§306(b) was proper in accordance with BCL§1311, which specifies that an authorized foreign corporation who is dissolved or otherwise terminated may still be served pursuant to BCL §306(b). Furthermore, prior to its dissolution Neslemur was headquartered in New York, and even if it is not subject to General personal jurisdiction, it is subject to Specific personal jurisdiction because it sold a product in New York that was used by Mr. Germain in New York and by which Mrs. Germain was injured in New York.

In accordance with CPLR311(a)(1), "personal service upon a ... domestic or foreign corporation shall be made by delivering the summon... to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to BCL § 306 or 307...." (see CPLR § 311(a)(1)).

In accordance with BCL § 306(b)(1), "service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process... Service of process on such corporation shall be complete when the secretary of state is so served..."

In accordance with BCL §307(a) In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil Practice law and Rules, a foreign corporation not authorized to do business in this state is subject to like jurisdiction. In any such case, process against such foreign corporation may be served upon the secretary of state as its agent...(b) Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or his deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee...Such service shall be sufficient if notice thereof and a copy of the process are:

(1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or

(2) Sent by or on behalf of the plaintiff to such corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.....

(c) 2. Where service of a copy of process was effected by mailing in accordance with this section, proof of service shall be by affidavit of compliance with this section filed, together with the process, within thirty days after receipt of the return receipt signed by the foreign corporation, or other official proof of delivery or of the original envelope mailed. If a copy of the process is mailed in accordance with this section, there shall be filed with the affidavit of compliance either the return receipt signed by such foreign corporation or other official proof of delivery or, if acceptance was refused by it, the original envelope with a notation by the postal authorities that acceptance was refused. If acceptance was refused, a copy of the notice and process together with notice of the mailing by registered mail and refusal to accept shall be promptly sent to such foreign corporation at the same address by ordinary mail and the affidavit of compliance shall so state. Service of process shall be complete ten days after such papers are filed with the clerk of the court. The refusal to accept delivery of the registered mail or to sign the return receipt shall not affect the validity of the service and such foreign corporation refusing to accept such registered mail shall be charged with knowledge of the contents thereof.

In accordance with BCL § 1311, " When an authorized foreign corporation is dissolved or its authority or existence is otherwise terminated or cancelled in the jurisdiction of its incorporation or when such foreign corporation is merged into or consolidated with another foreign corporation...The secretary of state shall continue as agent of the foreign corporation [after dissolution or termination of existence and authorization] upon whom process against it may be served in the manner set forth in paragraph (b) of section 306, in any action or special proceeding based upon liability or obligation incurred by the foreign corporation within this state prior to the filing of such certificate, order or decree, and he shall promptly cause a copy of such process to be mailed by registered mail, return receipt requested, to such foreign corporation at the post office address on file in his office specified for such purpose..."

Neslemur alleges that there is no jurisdiction over it because service of process was not made in accordance with BCL §307, as agreed to by the parties. It alleges that the attempts at service were deficient because plaintiffs didn't comply with the stringent requirements of the statute. Neslemur acknowledges that Plaintiffs served it in accordance with BCL §307, but alleges that even if plaintiffs served properly in accordance with the Statute (BCL §307), they failed to timely file proof of service with the clerk of the court where the action is pending, which renders service deficient. Neslemur does not dispute that it was service in accordance with BCL§ 306(b), but alleges that it is an unauthorized foreign corporation not amenable to service under BCL § 306(b).

BCL§307 applies to service of process upon foreign corporations not authorized to do business in New York. Plaintiffs' failure to strictly comply with the statutory requirements of BCL§ 307 require dismissal of their action (Flannery v. General Motors, 214 A.D.2d 497, 625 N..S.2d 556 [1st. Dept. 1995], affirmed 86 N.Y.2d 771, 655 N.E.2d 176, 631 N.Y.S.2d 135 [1995];Vannorden v. Mann Edge Tool Company, 77 A.D.3d 1157, 910 N.Y.S.2d 189 [3rd. Dept. 2010]). Use of the procedure for service on an authorized foreign corporation is not sufficient to obtain jurisdiction over an unauthorized foreign corporation (Flick v. Stewart-Warner Corp., 76 N.Y.2d 50, 555 N.E.2d 907, 556 N.Y.S.2d 510 [1990]; Stewart v. Volkswagen of America, Inc., 81 N.Y.2d 203, 613 N.E.2d 518, 597 N.Y.S.2d 612[1993]). Notice received by means other than those authorized by the statute cannot serve to bring the defendant within the jurisdiction of the court (Meyer v. Volkswagen of America, Inc., 92 A.D.2d 488, 459 N.Y.S.2d 82 [1st. Dept. 1983]).

It is well settled that personal jurisdiction over a dissolved corporation may be obtained through service upon the secretary of state. The dissolution of the corporation shall not affect any remedy available to or against such corporation for any right or claim existing or any liability incurred before such dissolution (Business Corporation Law §1006(b);Bruce Supply Corp., v. New Wave Mechanical, Inc., 4 A.D.3d 444, 773 N.Y.S.2d 408 [2nd. Dept. 2004]; NYCTL 1998-2 Trust v. Cooper Third Associates, et al., 176 A.D.3d 727, 110 N.Y.S.3d 429 [2nd. Dept. 2019]).

Neslemur, a dissolved foreign corporation which was previously authorized to conduct business in the State of New York is amenable to service of process pursuant to BCL §306(b), for the liabilities or obligations incurred by it within this state prior to its dissolution (see BCL §1311, CPLR 311(a)(1)). Since the plaintiffs' cause of action arose before Neslemur's voidance or dissolution, and since it has not denied that it received service of process from the secretary of state, plaintiffs have met their burden of establishing that personal jurisdiction has been acquired over it (Gutman v. Club Mediterranee International, Inc., 218 A.D.2d 640, 630 N.Y.S.2d 343 [2nd. Dept. 1995]). Furthermore, where a foreign corporation authorized to do business in the State is mistakenly served under the more stringent procedures of the BCL§ 307, rather than under BCL §306, personal delivery of process to the Secretary of State in Albany is sufficient for the completion of service and the irregularities caused by proceeding under the wrong section should be disregarded (Bevilacqua v. Bloomberg, L.P., 70 A.D.3d 411, 895 N.Y.S.2d 347 [1st. Dept. 2010]).

Accordingly, jurisdiction was acquired over Neslemur, a dissolve foreign corporation authorized to do business in New York, in accordance with CPLR 311(a)(1), by service on the Secretary of State pursuant to BCL§306(b). That the parties mistakenly thought that service was required pursuant to BCL§307 is of no moment. That plaintiffs failed to file proof of service with the clerk of the court after serving Neslemur in accordance with BCL § 307 does not divest the court of jurisdiction over it.

"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 [EDNY 2017]). To obtain jurisdiction pursuant to CPLR §301, the plaintiff must show that the defendant's "affiliations with [New York] are so continuous and systematic as to render them essentially at home in" New York (Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S. Ct. 2846 [2011]; Daimler AG v Bauman, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014], Magdalena v Lins, 123 AD3d 600, 999 NYS2d 44 [1st Dept. 2014]). "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" (Daimler AG, *supra*). Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business (*Id*).

This court cannot exercise general personal jurisdiction over Neslemur because it is not incorporated in New York, nor does it currently have its principal place of business in the State of New York. Neslemur is a dissolved Delaware corporation. Plaintiffs contention that Neslemur subjected itself to general jurisdiction because it was previously headquartered in New York is unavailing since only "continuous and systematic" contacts can establish general personal jurisdiction (Daimler AG, *supra*). Furthermore, the Plaintiff is unable to demonstrate "exceptional circumstances" for this Court to exercise general personal jurisdiction over Neslemur.

"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" (*Id*; 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, ...; or (3) commits a tortious act without the state causing injury to person or property within the state, ..., 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" (CPLR §302[a]).

"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 NY3d 316, 68 NE3d 1, 45 NYS3d 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"(D& R. Global Selections, S.L., v Bodega Olegario Falcon Pineiro, 29 NY3d 292, 78 NE3d 1172, 56 NYS3d 488 [2017] *quoting* Licci v Lebanese Can. Bank, SAL, 20 NY3d 327, 984 NE2d 893, 960 NYS2d 695 [2012]).

This court can exercise specific personal jurisdiction over Neslemur under CPLR §302(a)(1) and (2) because there is an 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 or commits a tortious act within the state that causes injury within the state, and the cause of action asserted arises from that activity. Mrs. Germain's exposure to asbestos occurred in New York, at a time Neslemur was headquartered in New York and manufactured its products in New York. Mr. and Mrs. Germain testified that Mr. Germain purchased Clubman talcum powder in New York and used Clubman talcum powder for at least 20 years in New York. Plaintiffs injury occurred in New York and there was an "articulable nexus" or "substantial relationship" with the Defendant's transaction of business in New York.

Neslemur also committed a tortious act within New York causing injury to persons in New York. Neslemur marketed and sold asbestos-containing Clubman talcum powder to the New York Market (*see* opposition papers Exhibit 6)thereby committing a tortious act within, and causing injury to persons in, New York. Mrs. Germain stated she was injured from exposure to asbestos-containing Clubman Talc purchased and used in New York. It is alleged that Mrs. Germain's injury arose from the use of the Clubman talc purchased and used by Mr. Germain in New York. It is also alleged that at the time of the injury Neslemur was transacting business in New York, where it had its corporate headquarters, and where it operated several factories to manufacture its products.

Plaintiff has established that long-arm jurisdiction should be exercised over Neslemur under CPLR §302(a)(1) and (2). Thus, this Court may exercise jurisdiction over Neslemur consistent with due process standards.

Accordingly, the motion to dismiss for improper service and lack of personal jurisdiction is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: February 28, 2020

MANUEL J. MENDEZ
J.S.C.

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