

Conaway v ABB, Inc.

2020 NY Slip Op 30806(U)

March 17, 2020

Supreme Court, New York County

Docket Number: 190332/2018

Judge: Manuel J. Mendez

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.

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

GLEND A CONAWAY, Individually and as
Administratrix of the Estate of PRESTON
CONAWAY JR., deceased,

INDEX NO. 190332/2018
MOTION DATE 03/04/2020
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

Plaintiffs,

-against-

ABB, INC., formerly known as Brown Boveri, et al.,

Defendants.

The following papers, numbered 1 to 7 were read on this motion pursuant to CPLR § 3211(a)(8), to dismiss for lack of personal jurisdiction, alternatively, pursuant to CPLR § 327(a) to dismiss for forum non conveniens by ABB, Inc.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-6</u>
Replying Affidavits _____	<u>7</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendants ABB, INC.'s (hereinafter "ABB") motion pursuant to CPLR § 3211(a)(8) to dismiss Plaintiffs claim against them for lack of personal jurisdiction or alternatively pursuant to CPLR § 327(a) for forum non conveniens, is denied.

Plaintiff, Preston Conaway Jr., was diagnosed with mesothelioma on July 24, 2018. Mr. Conaway died in October 2019. It is alleged that Mr. Conaway's exposure to asbestos was from the use of ITE electrical equipment while employed as an electrician. ITE Circuit Breaker Company and I-T-E Imperial Corp. are precursor entities to ABB. (Opp ¶ 3). Mr. Conaway was deposed over the course of three days on September 24, 25, and 26, 2018, and his de bene esse testimony was given on December 6, 2018.

Plaintiffs commenced this action on August 15, 2018 to recover for injuries resulting from Mr. Conaway's exposure to asbestos. ABB filed its verified answer with cross-claims on September 7, 2018. (Moving papers, Exh. 7). This action's initial trial date was set for November 12, 2019, but upon the death of Mr. Conaway, the trial date was adjourned and is now set for March 19, 2020.

ABB now moves to dismiss the action pursuant to CPLR § 3211(a)(8) for lack

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

of personal jurisdiction and CPLR § 327(a) for forum non conveniens.

Defendants allege that ABB is a Delaware corporation since 1980 and has its principal place of business in the State of North Carolina since 2009. From 1980 to 2009, ABB's principal place of business was in Connecticut. (Moving papers, Exh. 14). ABB alleges that they are not New York residents and Plaintiffs never resided, worked, or were exposed to asbestos from ABB's products in New York.

ABB argues that this Court does not have personal jurisdiction over them because Mr. Conaway's exposure occurred outside of the State of New York, Mr. Conaway has never resided in the State of New York, and until his death resided in the state of Florida. ABB further argues that they are not incorporated in New York and do not maintain their principal place of business here, thus there is no general jurisdiction. Furthermore, ABB contends that Plaintiffs claims do not arise from any of ABB's New York transactions, and that ABB 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, and therefore, there is no specific jurisdiction. (see CPLR § 302(a)(1), (2), and (3)).

"On a motion to dismiss pursuant to CPLR § 3211, the Court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiffs the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory." (Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A motion to dismiss pursuant to CPLR § 3211(a)(8) applies to lack of jurisdiction over the defendant. Jurisdiction over a non-domiciliary is governed by New York's general jurisdiction statute CPLR § 301, and long-arm statute CPLR § 302.

Plaintiffs oppose the motion arguing that ABB voluntarily participated in the litigation of this action and their participation constituted submission to the jurisdiction of the Courts of New York, which is a predicate for personal jurisdiction. Plaintiffs further argue in opposition to the motion that the motion was filed on February 20, 2020, more than nine (9) months after the Note of Issue was filed on May 23, 2019, rendering it untimely and procedurally defective. In support of this argument, plaintiffs refer to the NYCAL Coordinating Judge Motion and Trial Part Rules, which provides that dispositive motions shall be made within 45 days from the date of filing of the Note of Issue. (See NYCAL Coordinating Judge Motion and Trial Part Rules – A. Trials, subsection B. Requests for Judicial Intervention (RJI) and Notes of Issue, subsection 5).

ABB provides no explanation for waiting approximately nine (9) months after the Note of issue was filed and past the deadline – until July 8, 2019 – for filing a dispositive motion. ABB's lack of due diligence in filing this motion in a timely manner renders the excuse for the delay merely perfunctory, warranting denial of the motion.

Forum non conveniens:

ABB alternatively seeks to have this Court dismiss Plaintiffs' complaint against them on the ground of forum non conveniens. They argue that there is no nexus between Plaintiffs' claims and New York and that the relevant factors – specifically that plaintiffs were residents of Florida, Mr. Conaway's alleged exposure to asbestos occurred outside of New York, Mr. Conaway's diagnosis and medical treatment were in Florida, and all documents and potential witnesses are located outside of New York – warrant dismissal.

Plaintiffs argue that ABB by proceeding in this action, obtaining and completing discovery approximately seventeen months prior to seeking forum non conveniens relief, and waiting until after the case was assigned two trial dates, is a waiver of the relief sought by ABB.

Forum non conveniens is an “equitable doctrine whereby a court in its discretion may decline to exercise jurisdiction over a transitory cause of action upon considerations of justice, fairness, and convenience.” (Martin v. Mieth, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 [1974]). CPLR § 327(a) effectuates “a transfer of an action to a more convenient forum which the court finds will best serve the ends of justice and the convenience of the parties. Such a motion addressed to the discretion of the court, requires a balancing to determine whether or not jurisdiction should be retained.” (Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept. 1979]). CPLR § 327(a) applies the doctrine of forum non conveniens flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case. (Phat Tan Nguyen v. Banque Indosuez, 19 A.D.3d 292, 797 N.Y.S.2d 89 [1st Dept. 2005]). The burden to prove that the action, although jurisdictionally sound, would be better adjudicated elsewhere pursuant to CPLR § 327(a), is on the defendant challenging the forum to demonstrate relevant private or public interest factors. (Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 [1984]; Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A., 26 A.D.3d 286, 810 N.Y.S.2d 172 [1st Dept. 2006]).


ABB filed this motion on February 21, 2020, more than seventeen months after Mr. Conaway's de bene esse deposition on December 6, 2018, when the relevant information and facts to make this motion was obtained, and more than twenty-one months after the commencement of this action on August 15, 2018. ABB waited over a year and a half after Mr. Conaway's last deposition, which provided sufficient information for the making of this motion, before seeking this relief. The delay in moving to dismiss on the grounds of forum non conveniens is substantial enough to consider dismissal on this ground, waived. (See Bussanich v. United States Lines, 74 A.D.2d 510, 424 N.Y.S.2d 449, Corines v. Dobson, 135 A.D.2d 390, 521 N.Y.S.2d 686 [1st Dept. 1987], and Creditanstalt Investment Bank AG, v. Chadbourne & Parke LLP, 14 A.D.3d 414, 788 N.Y.S.2d 104 [1st Dept. 2005]).

Furthermore, this motion is untimely because it was made more than 45 days after the plaintiffs filed the Note of Issue and after the Court had assigned this case two trial dates.

Accordingly, it is ORDERED that defendant ABB, INC.'s, motion to dismiss plaintiffs' complaint against them pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, alternatively pursuant to CPLR § 327(a) to dismiss for forum non conveniens, is denied.

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

Dated: March 17, 2020



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE