

Barber v A.O. Smith Water Prods. Co.

2020 NY Slip Op 30884(U)

March 25, 2020

Supreme Court, New York County

Docket Number: 190241/2015

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

**KAREN BARBER, as Executrix for the Estate of
JAMES R. MONTELL,**

Plaintiff,

-against-

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

Defendants.

INDEX NO. 190241/2015
MOTION DATE 03/18/2020
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on defendant Viking Pump, Inc.'s motion to dismiss for lack of personal jurisdiction:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	<u>1-3</u>
Answering Affidavits - Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers it is Ordered that defendant Viking Pump, Inc.'s (hereinafter "Viking") motion to dismiss plaintiff's claims as against it for lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8) is granted, and the complaint and all cross-claims against this defendant are severed and dismissed. Plaintiff's cross-motion for jurisdictional discovery is denied.

Plaintiff, James R. Montell, was diagnosed with mesothelioma in January 2015 as a result of his alleged exposure to asbestos. He died from this disease on April 25, 2016. It is alleged that he was exposed to asbestos-containing components of Viking pumps from 1970 to approximately 1975.

Mr. Montell was deposed over the course of twelve (12) days between September 1, 2015 and October 23, 2015. His only alleged exposures to Viking pumps took place while he was in the U.S. Navy aboard the USS Sperry from 1970 to 1975.

Mr. Montell boarded the USS Sperry in San Diego, California, where the ship was based in 1970; In 1974, the ship was overhauled for 4 to 6 months in Portland, Oregon. He alleged exposure to Viking pumps aboard the USS Sperry from 1970 to 1975. Notable, however, he did not allege any exposure to Viking products within the State of New York. (Moving papers, Exh. D, 160:10-162:3, 183:16-185:20).

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

Scott Kunkle is the PE Lab Manager and has been employed by Viking since 1979. Viking is a corporation organized pursuant to the laws of Delaware, where it is incorporated. Viking is a resident of the State of Iowa, and its current principal place of business is in Cedar Rapids, Iowa. Viking does not currently have any offices in the State of New York and has never been registered as a foreign corporation authorized to do business in New York. They have never manufactured products in New York and never owned or paid taxes for real estate in New York. (Kunkle Aff., ¶ 2, 3, 4, 5, and 6).

Viking argues that this Court does not have personal jurisdiction over them because Mr. Montell's exposure occurred outside of the State of New York, Mr. Montell has never resided in the State of New York, and until his death resided in the state of Washington. (Moving papers, Exh. E). Viking 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, Viking contends that plaintiff's claims do not arise from any of Viking's New York transactions, and that Viking 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)).

Plaintiff opposes the motion arguing that Viking 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. Plaintiff further argues that during the time the USS Sperry was being built, Viking maintained a district office located in New York City, from which it allegedly acquired asbestos to place in its products, and as such there is specific jurisdiction over Viking under CPLR 302(a)(1), or (a)(2). (See generally, Opp. Exh. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18).

"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.

The plaintiff bears the burden of proof when seeking to assert jurisdiction. (Lamarr v. Klein, 35 A.D.2d 248, 315 N.Y.S.2d 695 [1st Dept. 1970]). However, in opposing a motion to dismiss, the plaintiff needs only to make a sufficient start by showing that its position is not frivolous. (Peterson v. Spartan Indus., Inc., 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 [1974]).

General Jurisdiction:

“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.Supp.3d 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 [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*).

This Court cannot exercise general personal jurisdiction over Viking because it is not incorporated in New York, nor does it have its principal place of business in the State of New York. Absent “exceptional circumstances” a corporation is at home where it is incorporated or where it has its principal place of business.” (Daimler, *supra*). Viking is incorporated in Delaware with its principal place of business in Iowa. (Kunkle Aff. ¶ 2). Furthermore, the plaintiff is unable to demonstrate “exceptional circumstances” for this Court to exercise general personal jurisdiction over Viking.

Specific Jurisdiction:

“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-Meyers 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 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 the 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 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 plaintiffs’ 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 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]).

This Court cannot exercise specific personal jurisdiction over Viking under CPLR § 302(a)(1), (2), and (3). Mr. Montell did not allege exposure to any asbestos-containing Viking pumps in New York. Mr. Montell resided in the State of Washington since 1992 until his death and was diagnosed and treated with mesothelioma in the State of Washington. (Moving papers, Exh. C, ¶ 4). Prior to moving to Washington in 1992, Mr. Montell resided on the west coast, mainly in the State of California and the State of Washington during the time the USS Sperry was deployed from 1970 to 1975. (Moving papers, Exh. C, ¶ 4). Mr. Montell alleges in his deposition testimony that he was exposed to asbestos-containing Viking pumps while serving in the U.S. Navy on the USS Sperry. (Moving papers, Exh. D, 183:16-21; 323-332). During his service, Mr. Montell was stationed in the State of California and the State of Oregon, aboard the USS Sperry from 1970 to 1975. Mr. Montell was never stationed in New York, did not allege exposure to asbestos-containing Viking products in New York, and Viking did not transact business within the State of New York.

The only facts given by the Plaintiffs to establish specific personal jurisdiction over Viking is that Viking had an office in the State of New York, and at that office Viking 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 [1st Dept. 2017]). Furthermore, 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 [1st Dept. 2015]).

Thus, there is no articulable nexus or substantial relationship between Viking's in-state conduct and the claims asserted.

Viking has established that long-arm jurisdiction should not be exercised over it under CPLR 302(a)(1), (2), and (3), and this Court lacks jurisdiction over Viking.

Jurisdictional Discovery

Plaintiff cross moved for jurisdictional discovery. Plaintiff seeks discovery to determine the nature of Viking's sales, distribution, and finances in the State of New York at the time of Mr. Montell's alleged exposure to asbestos from Viking'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 [1st 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 [1st 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]).

Plaintiff has not shown sufficient facts or establish a sufficient start to support their motion for jurisdictional discovery. Viking is incorporated in Delaware and has its principal place of business in Iowa. Mr. Montell's injuries arose out of and were sustained in the States of California and Oregon. This Court does not have personal jurisdiction over Viking because Viking'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 that are currently not known establishing personal jurisdiction. 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 [1st Dept. 2017])

Accordingly, for the foregoing stated reasons, it is ORDERED that defendant Viking Pumps, Inc.'s, motion to dismiss plaintiff's complaint against it pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, is granted, and it is further


ORDERED that the complaint and all crossclaims against defendant Viking Pumps, Inc., are severed and dismissed, and it is further,

ORDERED that plaintiff's cross-motion for jurisdictional discovery is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

Dated: March 25, 2020



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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