

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

2020 NY Slip Op 30962(U)

April 14, 2020

Supreme Court, New York County

Docket Number: 190241/2015

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

**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 04/08/2020
MOTION SEQ. NO. 010
MOTION CAL. NO. _____**

The following papers, numbered 1 to 6 were read on defendant Kaiser Gypsum Company, 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 Kaiser Gypsum Company, Inc.'s (hereinafter "Kaiser Gypsum") motion to dismiss plaintiffs' 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. Plaintiffs' 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 Kaiser Gypsum joint compound while working as a handyman doing home renovations with his father-in-law from 1966 to approximately 1969.

Mr. Montell was deposed over the course of twelve (12) days between September 1, 2015 and October 23, 2015. His only alleged exposures to Kaiser Gypsum joint compound took place while he was working as a handyman doing home renovations in the State of California from 1966 to 1969.

Mr. Montell's only alleged exposure as it relates to Kaiser Gypsum occurred when he was working part-time as a handyman for his father-in-law in the State of California performing residential home renovations. Notable, however, he did not

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

allege any exposure to Kaiser Gypsum products within the State of New York. (Moving papers, Exhibit E, 204-211:22).

Mary D. Wright, the Assistant Secretary for Kaiser Gypsum and their corporate representative for all asbestos-related matters, who has been employed by Kaiser Gypsum since 2013, states in her affidavit supporting this motion that Kaiser Gypsum was a corporation organized pursuant to the laws of the State of Washington, where it was incorporated until May 2016. That thereafter it was incorporated in North Carolina. That Kaiser Gypsum is a resident of the State of North Carolina, and its current principal place of business is in California. Kaiser Gypsum 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. (Moving papers, Exhibit F, ¶ 2, 3, 4, 5, 6, 9, and 12).

Kaiser Gypsum argues that this Court does not have personal jurisdiction over it 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, Exhibit D, ¶ 4). Kaiser Gypsum 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, Kaiser Gypsum contends that plaintiffs' claims do not arise from any of Kaiser Gypsum's New York transactions, and that Kaiser Gypsum 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)).

Plaintiffs oppose the motion arguing that Kaiser Gypsum 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 that during the time Mr. Montell identified using Kaiser Gypsum asbestos-containing joint compound, Kaiser Gypsum's provider of joint compound was Union Carbide Corporation, which is a New York corporation that at the time had their corporate headquarters in New York, as such there is specific jurisdiction over Kaiser Gypsum under CPLR 302(a)(1). (See generally, Opp. Exhibit 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.

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 Kaiser Gypsum 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*). Kaiser Gypsum at all relevant times has been incorporated in the states of Washington and North Carolina, with its principal place of business in California. (Moving papers, Exhibit F, ¶ 6). Furthermore, the plaintiffs are unable to demonstrate “exceptional circumstances” for this Court to exercise general personal jurisdiction over Kaiser Gypsum.

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 Kaiser Gypsum under CPLR § 302(a)(1), (2), and (3). Mr. Montell did not allege exposure to any asbestos-containing Kaiser Gypsum joint compound in New York. Mr. Montell resided in the State of Washington since 1992 until his death and was exposed to Kaiser's joint compound in California (Exhibit D, ¶ 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 naval ship he worked on, the USS Sperry, was deployed from 1960 to 1965. (Moving papers, Exhibit D, ¶ 4). Mr. Montell alleges in his deposition testimony that he was exposed to asbestos-containing Kaiser Gypsum joint compound while on leave from the Navy, when he worked for his father-in-law as a handy man doing residential renovations. (Moving papers, Exhibit E, 204-211:22). During his leave, Mr. Montell was stationed in the

State of California from 1966 to 1969. Mr. Montell was never stationed in New York, did not allege exposure to asbestos-containing Kaiser Gypsum products in New York, and Kaiser Gypsum did not transact business within the State of New York.

The only facts given by the plaintiffs to establish specific personal jurisdiction over Kaiser Gypsum is that one of Kaiser Gypsum's suppliers of joint compound, Union Carbide Corporation, is a corporation incorporated in the State of New York, and that Kaiser Gypsum purchased asbestos-containing joint compound from Union Carbide Corporation which at the time was headquartered in New York City. 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 Kaiser Gypsum's in-state conduct and the claims asserted.

Kaiser Gypsum 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 Kaiser Gypsum.

Jurisdictional Discovery

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

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]).

Plaintiffs have not shown sufficient facts or establish a sufficient start to support their motion for jurisdictional discovery. Kaiser Gypsum is incorporated in North Carolina, and during the relevant period in the state of Washington and has its principal place of business in California. Mr. Montell's injuries arose out of and

were sustained in the State of California. This Court does not have personal jurisdiction over Kaiser Gypsum because Kaiser Gypsum'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 Kaiser Gypsum Company, Inc.'s, motion to dismiss plaintiffs' 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 Kaiser Gypsum Company, 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:



MANUEL J. MENDEZ
J.S.C.

Dated: April 14, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE