

English v Avon Prods., Inc.
2020 NY Slip Op 33432(U)
October 20, 2020
Supreme Court, New York County
Docket Number: 190346/2018
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

IAS MOTION 13

Justice

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INDEX NO. 190346/2018

LINDA ENGLISH, PATRICIA RASSO,

MOTION DATE 08/07/2020

Plaintiff,

MOTION SEQ. NO. 013

- v -

AVON PRODUCTS, INC.,BRENNTAG NORTH AMERICA,
BRENNTAG SPECIALTIES, INC.,AS SUCCESSOR-IN-
INTEREST TO MINERAL PIGMENT SOLUTIONS, INC.,AS
SUCCESSOR-IN-INTEREST TO WHITTAKER CLARK &
DANIELS, INC.,CHARLES B. CHRYSTAL COMPANY,
INC.,CONOPCO, INC.,COTY, INC.,COTY US, LLC,ELI
LILLY AND COMPANY, ELIZABETH ARDEN, INC.,IMERYS
TALC AMERICA INC. F/K/A LUZENAC AMERICA,
INC.,INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST
TO WINDSOR MINERALS, INC.,PFIZER, INC.,REVLON
INC.,AS SUCCESSOR-IN-INTEREST TO ELIZABETH
ARDEN, INC.,UNILEVER UNITED STATES,
INC.,WHITTAKER CLARK & DANIELS, INC.,WHITTAKER
CLARK & DANIELS, INC. INDIVIDUALLY AND AS
SUCCESSOR TO CHARLES MATHIEU, INC. AND
METROPOLITAN TALC CO., JOHN DOE 1 THROUGH
JOHN DOE 75 (FICTITIOUS), COLGATE - PALMOLIVE
COMPANY (FOR CASHMERE BOUQUET), IMERYS TALC
AMERICA, INC.,JOHNSON & JOHNSON, JOHNSON &
JOHNSON CONSUMER COMPANIES, INC.,LUZENAC
AMERICA INC.,PROCTER & GAMBLE MANUFACTURING
COMPANY AS SUCESSOR-IN-INTEREST TO SHULTON,
INC.,KOLMAR LABORATORIES, INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 013) 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 647, 648, 649, 650, 651, 652, 653, 654, 655

were read on this motion to/for

DISMISS

Upon the foregoing documents, and after oral argument, it is ORDERED that defendant Shulton, Inc.'s motion to dismiss plaintiffs' Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant is denied.

This matter stems from plaintiff Linda English's diagnosis of Peritoneal Mesothelioma, which is alleged to have resulted from her exposure to asbestos from the use of cosmetic talcum products. Plaintiff alleges that she was exposed to asbestos contaminated talc product manufactured by defendant known as Desert Flower. Ms. English testified at her deposition that she used Desert Flower every day from 1963 until approximately 1984. Ms. English has resided in Texas her entire life, apart from five years living in Maine (Mot, Exh C at 34-36). From 1966 to 1984 Ms. English worked as a flight attendant, where she flew domestic routes to cities across the United States, including New York, where she frequently spent one or two-night layovers (*id.* at 256-257). Plaintiff testified that she would occasionally bring Desert Flower product with her and use it in New York (*id.* at 268-269).

Here, defendant Shulton moves to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Shulton contends that this court does not have personal jurisdiction over them because Ms. English did not purchase Shulton's product in New York, her illness did not develop in New York, and Shulton is not a New York based company. At the time Ms. English used Desert Flower cosmetic talc powder, Shulton was a New Jersey Corporation with its principal place of business in New Jersey and manufactured the product in New Jersey and Tennessee (Mot, Exh G).

"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 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 NY2d 409 [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(a).

The plaintiff bears the burden of proof when seeking to assert jurisdiction (*Lamarr v Klien*, 35 AD2d 248 [1st Dept 1970]). However, in opposing a motion to dismiss, a plaintiff sufficiently demonstrates that its position is not frivolous when it demonstrates that defendant engages in business in New York ([*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974] [finding that evidence that appellant applied for several permits and received permission to sell and store some of its products in New York was sufficient to show plaintiff’s position not to be frivolous and give plaintiff “further opportunity to prove other contacts and activities of defendant in New York as might confer jurisdiction under the long-arm statute”). In determining whether the Court has jurisdiction over defendant, the Court must analyze general personal jurisdiction and specific personal 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.Supp3d 513 [EDNY 2017]). To demonstrate jurisdiction pursuant to CPLR 301, the plaintiff must show 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. 2856 [2011]; see *Daimler AG v Baumann*, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; see also *Magdalena v Lins*, 123 AD3d 600 [1st Dept 2014]]. The defendant’s course of conduct must be voluntary, continuous and self-benefitting (*Ralph Cole Hardware v Ardowork Corp.*, 117 AD3d 561 [1st Dept 2014]).

To determine where a corporation is “at home” the Court must look at the place of incorporation and principal place of business (*Daimler AG*, 134 S.Ct. 746). The relevant inquiry

regarding a corporate defendant's place of incorporation and principal place of business, is at the time the action is commenced (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152 [1st Dept 1992]). Here, the Court finds that general personal jurisdiction cannot be exercised over Shulton because at the time this action was commenced, defendant was neither incorporated nor maintained their principal place of business in New York. Thus, the Court shall examine 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-Myers Squibb Co. v Superior Court of California, San Francisco*, 137 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” (*Walden v Fiore*, 134 S. Ct. 1115 [2014]).

Under CPLR 302(a)'s long arm statute, the Court 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, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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 or possesses any real property situated within the state.

In the case at bar, the Court is entitled to exercise specific personal jurisdiction under CPLR 302(a)(1) because there is a clear nexus and substantial relationship between Shulton's New York conduct and the claims asserted. Shulton has transacted business in New York and it can be argued that plaintiff's cause of action arises from Shulton's activity in New York. While the products at issue were purchased by plaintiff out of the state of New York, plaintiff has demonstrated that the product at issue has roots in New York. Plaintiff was not merely injured in New York by virtue of her use of Desert Flower. Rather, defendant engaged in relevant activities in New York while developing the business behind the talc cosmetic product.

Plaintiff has demonstrated that during the times of her exposure, Shulton conducted talc-related business activities in New York City. Plaintiff attaches promotional material produced by defendant referred to as "Story of Shulton" in which defendant explains the history of the company (Mot Exh 11). Shulton touted in its promotional material that its "Art and design, marketing and International Division headquarters are located in New York City's Rockefeller Center" (Mot, Exh 11 at 2). Shulton noted that "[u]nlike competitors who must turn to outsiders for help, Shulton calls on its own artists, design specialists (able to create prototypes in any medium), design engineers and skilled machinists," for the marketing of their products (*id.* at 7).

Plaintiff attaches the deposition of William Ward who worked for defendant's parent company Proctor and Gamble from 1971 to 2009 and testified that Shulton maintained administrative, marketing and international division offices in New York City during the 1960s

(Mot, Exh 28 at 72-73). Further, Ward testified that one of the primary suppliers of cosmetic talc to Shulton was co-defendant Whittaker Clark & Daniels (hereinafter “Whittaker”) who served as the primary supplier of talc used in Desert Flower. Whittaker was incorporated in New York until 1972 when the company was reorganized as a New Jersey Corporation (Mot Exh 15 at 7). Plaintiff has demonstrated that defendant regularly transacted business and derived revenue from goods and services rendered in New York.

This Court can exercise jurisdiction over a foreign entity such as Shulton under CPLR 302(a)(3) as there is a clear connection between New York and the specific claims at issue. The products from which Ms. English alleges exposure were developed in New York through Shulton’s marketing work and through development of the actual talc used in the product. Defendants argument that the Court cannot properly exercise jurisdiction over Shulton for the reasons set forth in the Court’s ruling in motion sequence 003 in which it dismissed the underlying action as against former defendant Johnson & Johnson is unavailing. There are factual distinctions between Johnson & Johnson and defendant Shulton. Unlike Shulton, Johnson & Johnson did not maintain offices in New York nor did it develop its product or marketing in New York during plaintiff’s alleged exposure.

Plaintiff’s opposition has successfully demonstrated that Shulton (1) transacted business within New York for the talc based product used in Desert Flower; (2) committed a tortious act of distributing asbestos-contaminated products within the state; (3) regularly conducted business in New York and derived from talc products rendered in New York; and (4) possessed headquarters situated within the state. Thus, the court has personal jurisdiction over defendant Shulton such that defendant Shulton’s motion to dismiss plaintiffs’ Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant, is denied.

Accordingly, it is

ORDERED that defendant Shulton, Inc.'s motion to dismiss plaintiffs' Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court.



<u>10/20/2020</u>			
DATE		ADAM SILVERA, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE