Witte v Algoma Hardwoods, Inc.
2021 NY Slip Op 30579(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 190011/2020
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

---X

JAMES E. WITTE and HOLLY WITTE,

Plaintiff,

- v -

ALGOMA HARDWOODS, INC., et al.,

Defendant.

---X

INDEX NO. 190011/2020

MOTION DATE 08/07/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78

were read on this motion to/for DISMISS .

Before the Court is defendant T.M. Cobb Company's ("Cobb") motion to dismiss plaintiffs' Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant and plaintiffs' cross-motion to compel Cobb to respond to plaintiffs' discovery and produce its corporate representative for depositions. Defendant's motion is denied and plaintiffs' cross-motion is granted.

This matter stems from plaintiff James Witte's diagnosis of mesothelioma, which plaintiffs allege resulted from Mr. Witte's exposure to asbestos from his work supervising the renovation of an old theatre and studio on 81street and Broadway in Manhattan, New York. Plaintiff alleges that he was exposed to asbestos from dust created from the installation of fire doors manufactured by Cobb.

Here, Cobb moves to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Cobb contends that this court does not have general jurisdiction over Cobb because Cobb is not domiciled in New York, is not incorporated in New York, and has never maintained a place of business in New York. Further, defendant avers that because Cobb has

zero suit-related contracts with the State of New York, plaintiffs cannot meet their burden under the Long Arm Statute. Cobb argues that plaintiffs also cannot establish specific jurisdiction pursuant to CPLR 302(a)(2) because plaintiff cannot establish that Cobb committed a tortious act within New York, and there is no evidence Mr. Witte suffered an injury in New York as a result of a Cobb product.

"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 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 Cobb 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 form 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.

Here, defendant contends that this court does not have general jurisdiction over Cobb and submits the affirmation of Jeffrey Cobb, the President of Cobb in support of its motion (Mot, Aff in Support). Mr. Cobb affirmed that Cobb is and always has been a California corporation with its principal place of business, which has always been based in Southern California, presently located in Riverside (Aff in Support at 2, ¶¶5-6). Further, Mr. Cobb affirmed that "Cobb's distribution and manufacturing facilities are located exclusively in the following California cities: Riverside, Sacramento, San Bernardino, and Stockton" (*id.* at 2, ¶8). Defendant argues

that specific personal jurisdiction cannot stand, as there is no nexus between the alleged Cobb's goods, Mr. Witte's injury and the State of New York.

In opposition, plaintiffs argue that defendant is subject to jurisdiction under CPLR 302(a)(1) based upon Mr. Witte's exposure to Cobb's asbestos-containing fire doors. Plaintiffs aver that Cobb has transacted business in New York and that plaintiff's cause of action arises from Cobb's activity in New York. Plaintiffs allege that Cobb committed a tortious act in New York by supplying asbestos-containing products to New York, or by selling asbestos-containing products that it could foresee being used in New York. To defeat a motion to dismiss for lack of jurisdiction under CPLR 3211(a)(8), a plaintiff need only show that jurisdiction "may exist" (*Hessel v. Goldman, Sachs & Co*., 281 A.D.2d 247, 248 [1st Dept. 2001]).

Here, plaintiff testified that he encountered defendant's asbestos containing product while working in New York. Mr. Witte testified that in his capacity as Vice-President for sales and production for Teletape New York during the late 1960s through 1973, he supervised the construction of studios where he was exposed to asbestos (*id.* at 95-96). One of these studios was at 81st Street and Broadway, which his team "tore it apart and rebuilt it" (*id.*). Mr. Witte testified that during this process he was exposed to asbestos and that there was "a lot of dust. A lot of old insulation. Everything went in new . . . new walls and new doors and fire doors" (*id.* at 97, ¶¶8-21). Plaintiff identified the new fire doors installed at the 81st Street studio as being manufactured by Cobb (Mot, Exh D at 106, ¶25-107, ¶¶1-5). At issue here is whether Mr. Witte's testimony, that he was present while Cobb doors were installed at the 81st Street site in New York, is sufficient to establish jurisdiction under CPLR 302(a)(2).

This Court can exercise jurisdiction over a foreign entity such as Cobb under CPLR 302(a)(3) only if there is a clear connection between New York and the specific claims at issue.

In Reply, defendant notes that the Court of Appeals has long held that the location where the allegedly defective product was manufactured is the state where the tort occurred with respect to CPLR § 302(a)(2) (*Longines-Wittnauer Watch Co. v. Barnes & Reinecke*), 15 N.Y.2d 443, 465 [1965][finding that the tortious act was committed in Kansas when a defective tank was manufactured in Kansas and exploded in New York]). Defendant argues that the tortious act is the manufacturing of the product in California, not the incident that resulted in the injury in New York (*Myers v. Dunlop Tire & Rubber Corp*., 40 A.D.2d 599, 601 [1st Dep't 1972] [holding that "[t]he tortious act, the negligent manufacture of the tire, occurred in the State of New York."]).

The Court notes that defendant has demonstrated that the Court does not have General Jurisdiction over Cobb; however, with regards to specific jurisdiction, New York's long-arm statute is "a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1998][internal citations omitted]). At issue here is whether Cobb ever distributed, marketed, sold, or delivered its products in New York.

Plaintiffs argue that further discovery is necessary in order to determine whether or not Cobb purposefully availed itself of the New York Market. Plaintiffs argue that the affidavit of Mr. Cobb is self serving and does not reduce the likelihood that defendant sold its products to a distributor who retailed the asbestos containing fire doors within New York. Plaintiffs successfully demonstrate "that they made a sufficient start which supports their entitlement to the deposition" (*Cerutti v. AO. Smith Water Prods. Co*., Index No. 190009/2016, 2017 WL 2225197 [Sup. Ct., NY County, Moulton, J. May 19, 2017] [finding that "plaintiffs made a sufficient start

based on [plaintiff's] specific identification of Defendant's products"]). The Court in *Cerutti* found that an affidavit from defendant's employee, which asserted that defendant never, marketed, sold, shipped, or delivered its products in New York and that defendant never conducted business in New York; committed a tortious act in New York; and never owned, used, or possessed property in New York, was conclusory (*id.* at 6).

Here, like the defendant in *Cerutti*, Cobb submits a conclusory affidavit by Mr. Cobb which is nearly identical to that submitted by the defendant in *Cerutti* (Mot, Aff in Support). "Plaintiffs are entitled to discover how Defendant's products made their way to New York, whether directly or through an intermediary distributor or agent of Defendant, and the nature of those relationships" (*Cerutti* at 6). The Court notes that in order to determine whether plaintiff has specific jurisdiction over defendant it is necessary to further investigate "how defendant's products could have made their way to New York, whether directly or through an intermediary distributor or agent, as this discovery is required to support specific jurisdiction under CPLR § 302 (a) (3)" (*id.* at 7). Similar to *Cerutti,* no contract has been located in regards to the sale of the Cobb doors. As such, plaintiff is entitled to depose Cobb's corporate representatives in order to better determine whether Cobb distributed its product either directly or indirectly through an agent to New York.

Thus, defendant's motion to dismiss for lack of jurisdiction is denied without prejudice to renew upon the completion of further discovery. Plaintiff's cross-motion for an order, pursuant to CPLR 302, compelling the defendant Cobb to respond to Plaintiffs' jurisdictional discovery, and (2) producing its corporate representative for deposition is granted. Counsel for Cobb must produce a corporate representative of Cobb with knowledge of Cobb's product distribution, for

deposition whether in person, or in light of COVID-19, conducted remotely via Skype, Zoom, Microsoft Teams, or a service agreed upon by both parties, on or before April 8, 2021.

Accordingly, it is

ORDERED that defendant Cobb'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 without prejudice to renew upon completion of the discovery listed herein; and it is further

ORDERED that plaintiff's cross-motion for an order, pursuant to CPLR 302, compelling the defendant Cobb to respond to Plaintiffs' jurisdictional discovery, and to produce its corporate representative for deposition is granted; and it is further

ORDERED that a corporate representative of defendant Cobb shall appear for deposition as noted above on or before April 8, 2021; and it is further

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

This Constitutes the Decision/Order of the Court.

2/16/2021			
DATE		**ADAM SILVERA, J.S.C.**	

CHECK ONE:	[ ] **CASE DISPOSED**	[X] **NON-FINAL DISPOSITION**	
	[ ] **GRANTED** [x] **DENIED**	[x] **GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ] **SETTLE ORDER**	[ ] **SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**	[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**