

<b>Theophil v A.O. Smith Water Prods. Co</b>
2022 NY Slip Op 32594(U)
July 25, 2022
Supreme Court, New York County
Docket Number: Index No. 190463/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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INDEX NO. 190463/2018

WILLIAM THEOPHIL,

MOTION DATE 08/02/2021

Plaintiff,

MOTION SEQ. NO. 005

- v -

A.O. SMITH WATER PRODUCTS CO, AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC., AMERICAN BILTRITE INC, ARCONIC, INC, ARMSTRONG INTERNATIONAL, INC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BEAZER EAST, INC., BLACKMER, BMCE INC., BURNHAM, LLC, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTEED CORPORATION, CLEAVER BROOKS COMPANY, INC, CLYDE UNION, INC, CONSOLIDATED EDISON COMPANY, COURTER & COMPANY INCORPORATED, CRANE CO., CRANE CO. INDIVIDUALLY AND AS SUCCESSOR TO PACIFIC VALVES, CROLL REYNOLDS ENGINEERING CO., INC, CROSBY VALVE LLC, CROWN BOILER CO., CUPPLES PRODUCTS CORPORATION, DANA COMPANIES, LLC, DOMCO PRODUCTS TEXAS, INC., ELECTROLUX HOME PRODUCTS, INC., FLOWSERVE US, INC., FMC CORPORATION, FORT KENT HOLDINGS, INC., FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC., GOULDS PUMPS LLC, GRINNELL LLC, H.H. ROBERTSON COMPANY, HACON, INC., IMO INDUSTRIES, INC, ITT LLC., KEELER-DORR-OLIVER BOILER COMPANY, KOHLER CO, LENNOX INDUSTRIES, INC, MARIO & DIBONO PLASTERING CO., INC, MILTON ROY COMPANY, MORSE DIESEL, INC., NORTHROP GRUMMAN CORP. AS SUCCESSOR, O'CONNOR CONSTRUCTORS, INC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), RESEARCH-COTTRELL INCORPORATED, RILEY POWER INC, SEQUOIA VENTURES, INC., SLANT/FIN CORPORATION, SPIRAX SARCO, INC., SUPERIOR BOILER WORKS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION CO., INC, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UNITED CONVEYOR CORPORATION, VIKING PUMP, INC., WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-

DECISION + ORDER ON MOTION

WYLAIN COMPANY, YUBA HEAT TRANSFER LLC, PORT  
AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 360, 361, 362, 363, 364, 365, 366, 367, 368, 384, 385, 386, 387, 388, 389, 390, 391, 392, 411, 412, 413

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that defendant O'Connor Constructors, Inc.'s (hereinafter referred to as O'Connor) motion for summary judgment and motion to dismiss for lack of personal jurisdiction is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff's alleged exposure to asbestos, resulting in his diagnosis of mesothelioma. Plaintiff worked at the 59th Street Powerhouse in the late 1960s. He was employed by Almirall & Alford & Swift, in which his main responsibilities included scraping the gaskets, cleaning the pumps, and re-piping the pumps. Plaintiff also worked in the vicinity where the boilers were being insulated and refurbished. Plaintiff contends that O'Connor was responsible for the boiler's insulation. Conversely, O'Connor asserts that Plaintiff "cannot point to any evidence that [Plaintiff] ever encountered O'Connor's employees at any point in his life and thus cannot demonstrate that he was exposed to asbestos from a product for which O'Connor would owe a duty to warn." Memorandum Of Law In Support Of O'Connor Constructors Inc.'s Motion For Summary Judgment Or In The Alternative, To Dismiss For Lack Of Personal Jurisdiction, p. 1. O'Connor also raises lack of personal jurisdiction as an affirmative defense in their Answer to Plaintiff's complaint, arguing that since Plaintiff cannot proffer any evidence that he encountered an asbestos containing product through an O'Connor employee, Plaintiff cannot show he was owed a duty to be warned by O'Connor within the state

of New York. *See Id.* O'Connor moves for summary judgment and to dismiss on lack of personal jurisdiction. Plaintiff opposes and O'Connor replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action". *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'". *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

Here, O'Connor surmises that they have met their prima facie burden because Plaintiff cannot proffer fact witnesses nor sworn testimony that O'Connor's products contributed to Plaintiff's alleged exposure to asbestos. *See Memorandum Of Law In Support, supra*, at p. 5. O'Connor references Plaintiff's interrogatories, in which they do not identify O'Connor and plaintiff working with or around O'Connor employees. *See Id.* However, the Appellate Division, First Department, in *Koulermos v A.O. Smith Water Products*, 137 AD3d 575, 576 (1st Dept 2016) held that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment". The case at bar is strikingly similar to *Koulermos*,

as O'Connor failed to present any evidence establishing that O'Connor did not sell, distribute, or benefit from any product that contributed to Plaintiff's exposure to asbestos. Rather, O'Connor solely argues entitlement to judgment as a matter of law by relying upon gaps in Plaintiff's proof. Further, O'Connor is prohibited from curing their failure to demonstrate a prima facie case by submitting new evidence in their reply. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion. This rule is generally employed in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply, thereby shifting to the nonmoving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond". *Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 (1st Dept 2006) (internal citations and quotations omitted). Because O'Connor has failed to meet their initial burden, they are not entitled to summary judgment as a matter of law.

Turning to the portion of the instant motion in which O'Connor seeks dismissal of this action arguing that this Court lacks general and specific personal jurisdiction, O'Connor first contends that Plaintiff does not have general jurisdiction, as general jurisdiction is applicable where a defendants' contacts within the state "are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919, (2011). "Aside from an exceptional case, a corporation is at home only in a state that is the company's place of incorporation or its principal place of business". *Lowy v Chalkable, LLC*, 186 AD3d 590, 592 (2nd Dep't 2020) (internal quotations and citations omitted). O'Connor has proffered evidence that their principal place of business and place of

incorporation is located in Massachusetts. *See* Notice Of Motion, Exh. F, Printout Of O'Connors' Business Entity Summary from the Secretary of State of Massachusetts. Plaintiff has failed to proffer evidence that O'Connors' contacts with New York were sufficiently continuous and systematic. Therefore, this Court finds that there is no general jurisdiction over O'Connor.

As for specific jurisdiction, CPLR §302(a) explicitly states that “a court may exercise personal jurisdiction over any non-domiciliary. . . who. . . (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. . . or (3) commits a tortious act without the state causing injury to person or property within the state. . . if [they] (i) regularly [do] 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 in the state”. The Court of Appeals has held that “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 (1988). Further, “there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.” *Bristol-Myers Squibb Co. v Superior Ct. of California, San Fran. Cty*, 137 S Ct 1773, 1780, (2017) (internal quotations and brackets omitted).

In the instant matter, O'Connor contends that there is no specific jurisdiction, as “[n]either Plaintiffs’ complaint nor the discovery responses allege that his injuries arose from

any conduct by O'Connor occurring in New York." Memorandum Of Law In Support, *supra*, at p. 9. O'Connor also asserts that Plaintiff "never testified to any asbestos exposure from an O'Connor employee, and in fact, did not even mention O'Connor at his deposition." *Id.* However, Plaintiff provides in their opposition that "O'Connor was a New York mechanical contractor that was responsible for numerous construction projects that involved asbestos, including, most notably, construction at Con Ed powerhouses where the [P]laintiff worked." Plaintiff's Opposition To Defendant OCC's Motion To Dismiss For Lack Of Personal Jurisdiction, p. 1, ¶ 2. "Moreover, O'Connor had a New York office although it approximately a 40 minute train ride from Manhattan in Mamaroneck." *Id.* at p. 1, ¶ 4. It is clear that Plaintiff demonstrated there was a connection between the alleged exposure of asbestos and the business O'Connor was conducting in New York, as well as the undisputed fact that O'Connor was using real property within New York State. The Court notes that O'Connor has failed to proffer any evidence other than Plaintiff's alleged deficiencies in their complaint and discovery. Thus, personal jurisdiction has been established and the instant motion to dismiss is denied.

Accordingly, it is

ORDERED that defendant O'Connor Constructors, Inc.'s motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that defendant O'Connor Constructors, Inc.'s motion to dismiss for lack of personal jurisdiction is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the court.

7/25/2022

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