Matter of New York City Asbestos Litig.
2017 NY Slip Op 30459(U)
March 6, 2017
Supreme Court, New York County
Docket Number: 190084/2016
Judge: Peter H. Moulton

SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190084/2016
Motion Seq. 004

RICHARD S. TRUMBULL
AND MARGARET TRUMBULL

Plaintiffs,

-against-

DECISION & ORDER

ADIENCE, INC., f/k/a BMI, INC., *et al.*,

Defendants

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PETER H. MOULTON, J.S.C:

This action arises out of plaintiff Richard Trumbull's ("plaintiff") alleged exposure to asbestos fibers released from products allegedly manufactured and marketed without warning by a number of defendant entities, including defendant American Biltrite ("defendant," or "Amtico"). Defendant moves to dismiss the action pursuant to CPLR § 3211(a)(8), arguing that plaintiff lacks both general and specific personal jurisdiction as against it. Amtico is incorporated in Delaware, and maintains its principal place of business in Massachusetts. It was last registered to do business in New York in 1982. The company argues that the court lacks jurisdiction over it because plaintiff has sued it for injuries that resulted from his alleged exposure to asbestos-containing Amtico floor tile in Missouri rather than New York.

ARGUMENTS

In support of its motion, Amtico contends that it is not subject to general jurisdiction based on the United States Supreme Court's decision in *Daimler A.G. v. Bauman*, 134 S.Ct. 746 (2014), as it cannot be considered "at home" in a forum where it is neither incorporated nor maintains its principal place of business (*see also D&R Global Selections Sol v. Bodega Olegario Falcon Pineiro*, 18 AD3d 486 [1st Dept. 2015]). Further, Amtico argues that it is not subject to specific

jurisdiction because such jurisdiction requires that plaintiff's suit "arise out of or relate to the defendant's contacts with the forum" (*id.* at 748-49 *citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 [1984]). Amtico asserts that New York's long-arm statute, CPLR §302, only authorizes a court to exercise specific jurisdiction over a defendant when: (1) the tort arises in the state and from a defendant's transaction of business in the state, (2) a tortious act is committed within the state, or (3) a tortious act is committed outside of the state causing injury in the state (*see* CPLR § 302[a][l]-[3]). Amtico argues that the facts of this case do not meet the requisites of New York's long-arm statute, as the out-of-state resident plaintiff's cause of action stems from his alleged exposure to asbestos-containing Amtico floor tile at construction sites in Kansas City, Missouri, and nowhere in New York. Accordingly, Amtico argues that this court lacks specific jurisdiction to hear plaintiff's claims.

In opposition, plaintiff concedes that this court lacks general jurisdiction over Amtico, but argues that specific jurisdiction exists based on his exposure to asbestos-containing products that were marketed nationwide (including in New York), without warning, in furtherance of the same "mass tort" by numerous defendants, including Amtico. To support this argument, plaintiff cites a California Supreme Court case (*see Bristol-Myers Squibb v. Superior Court*, 377 P.2d 874 [2016]). In *Bristol-Myers*, 86 California residents and 592 residents of 33 other states sued Bristol-Myers Squibb ("BMS") and McKesson Corporation for injuries allegedly arising out of their use of the prescription drug Plavix (*id.* at 878). The plaintiffs alleged that defendants engaged in "negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale of Plavix" (*id.*). BMS argued that California courts lacked personal jurisdiction over it since the courts were attempting to adjudicate the claims of the 592 nonresident plaintiffs (*id.*). BMS was incorporated in Delaware,

headquartered in New York City, maintained substantial operations in New Jersey, maintained five research, laboratory and office facilities, employing 164 people, in California, employed 250 California sales representatives, and maintained an office to advocate for the company in California government affairs (*id.* at 879).

In *Bristol-Myers*, the California Supreme Court reviewed whether personal jurisdiction existed over BMS under a due process analysis, as the California long-arm statute authorizes jurisdiction "on any basis not inconsistent with the Constitution of [California] or of the United States." While the California Supreme Court held that it did not have general jurisdiction (*id.* at 884), it determined that California had specific jurisdiction over BMS. It first looked to BMS's "purposeful availment" in the state by marketing and advertising Plavix, employing personnel and sales representatives, contracting with a California-based pharmaceutical distributor, operating research and laboratory facilities, and even operating a California lobbying office (*id.* at 886). The court held that "[o]n the basis of these extensive contacts relating to the design, marketing, and distribution of Plavix, BMS would be on clear notice that it is subject to suit in California concerning such matters" (*id.* at 886-87).

Next, the court determined that the non-California residents' claims arose from or were related to BMS's California contacts, stating that "plaintiffs' complaints [alleged that] BMS sold Plavix to both the California plaintiffs and the nonresident plaintiffs as part of a common nationwide course of distribution," and that "BMS has not taken issue with that characterization, nor has it asserted that either the product itself or the representations it made about the product differed from state to state" (*id.* at 888). "Thus, the nonresident plaintiffs' claims bear a substantial connection to BMS's contacts in California" (*id.*). It also found an additional state connection in that BMS maintained research and product development facilities in California, which was "related

to plaintiffs' claims that BMS engaged in a course of conduct of negligent research and design that led to [the plaintiffs'] injuries, even if those claims do not arise out of BMS's research conduct in this state." Thus, "taking into account all of BMS's activities in this state and their relation to the causes of action at issue here, we conclude that the second element of specific jurisdiction is met, and hence, absent a showing to the contrary by BMS, it would be consistent with due process for it to be subject to litigation in this state concerning injuries allegedly caused by its product Plavix, including those injuries occurring out of state" (*id.* at 889). The court further noted that "courts may, consistent with the requirements of due process, exercise specific personal jurisdiction over nonresident plaintiffs' claims in this action, which arise from the same course of conduct that give rise to California plaintiffs' claims: BMS's development and nationwide marketing and distribution of Plavix" (*id.* at 894).

Relying on *Bristol-Myers*, plaintiff argues that beyond his Amtico exposures in Missouri, plaintiff was exposed in New York to asbestos-containing products manufactured by numerous other defendants, also subject to jurisdiction, all in furtherance of the same mass tort: the negligent and reckless nationwide distribution without warning of their ultrahazardous asbestos-containing products. In plaintiff's view, Amtico manufactured for sale in New York the same vinyl asbestos floor tiles it sold in Missouri, solicited business in New York, and had a showroom in New York all in furtherance of propagating asbestos-containing products within the forum without warning, and in the same vein as other defendants. For instance, plaintiff claims that while he was employed as an account manager for Owens-Illinois, Inc., which had plants located in New York in the early 1970s, he was exposed secondhand to asbestos due to his close proximity to asbestos furnace insulation, electrical panels insulated with asbestos materials, and asbestos components in powerhouse compressors and boilers (*see* Plaintiff's Affirm in Opp. at ¶ 8). Plaintiff also testified

to his particularized exposures in the "New York metro area" to "to particles in the air" from asbestos materials on equipment including "valves, pumps, filters that had asbestos components." At the time of these exposures, plaintiff argues that Amtico marketed its ultrahazardous asbestos products nationwide and, along with the other defendants in this case, purposefully participated in propagating in New York and elsewhere the very same mass tort that resulted in his injuries. Indeed, plaintiff contends that "[p]recisely as was the case in the mass tort *Bristol-Myers* litigation, Amtico purposefully and massively targeted the New York market for distribution of its ultrahazardous vinyl asbestos 'Amtico' floor tile product" (*see* Plaintiff's Affirm in Opp. at ¶ 15).

Plaintiff further states that "Amtico's marketing in, and revenues derived from, the New York market supported its marketing and revenues derived from Missouri, its mass tort scheme was fully unified at the multi-state level, identical in content, and its efforts within and outside New York were fully entangled and interdependent" (*see* Plaintiff's Affirm in Opp. at ¶ 84). Plaintiff underscores an October 31, 2005 deposition by Merrill M. Smith, a former Senior Vice-President at Amtico during the period of plaintiff's exposure as indicative of the scope of the company's marketing operations. At his deposition, Smith acknowledged that vinyl asbestos Amtico floor tile was sold "throughout the full forty-eight states at that time," including in the "New York region" (*see* Plaintiff's Affirm in Opp. at ¶ 21). Smith continued that Amtico then sold "millions of square feet" of ultrahazardous Amtico "primarily [in] the Metropolitan areas of New York, Philadelphia and Boston" (*id.*). Plaintiff also annexes to his opposition the deposition testimony of various other plaintiffs in separate lawsuits, including the deposition of Murray Blonder, taken in November 22, 2011, which attests to Blonder working alongside workers installing Amtico asbestos tile in Far Rockaway, New York, in the early 1960s (*id.* at ¶ 25). Plaintiff likewise includes an advertisement by Rochester Linoleum & Tile Centers, a New York

corporation, from 1964 promoting the sale of its stock of "Amtico Vinyl Asbestos – Discontinued Patterns" as further evidence of Amtico's immersion in the New York market. Plaintiff also attaches to its opposition portions of Amtico's 1964 "Installation & Specification Manual for Amtico Floorings," which promotes the marketing and sale of the vinyl asbestos floor tiles, and announces on its final page that its showroom on Madison Avenue in New York City is a primary site for obtaining "[t]he finest in . . . vinyl asbestos" flooring (*id.* at ¶ 25).

Plaintiff further argues that Amtico's reading of the Court of Appeals' decision in *Licci v. Lebanese Canadian Bank, SAL*, 20 NY3d 327 (2012), is misplaced. Indeed, plaintiff relies on *Licci* to suggest that "New York's long-arm jurisdictional statute supports, and is not offended by, the exercise of specific jurisdiction in this case" (*see* Plaintiff's Affirm in Opp. at ¶ 63).

In reply, defendant asserts that *Bristol-Myers* is inapposite, because there are no resident plaintiffs in this action. Rather, defendant argues that New York has no connection to plaintiff or to Amtico. Defendant further argues that plaintiff misinterprets New York's long-arm statute and the Court of Appeals' ruling in *Licci*. Defendant also argues that even if its advertising and selling of products at showrooms in New York in the 1960s and 1970s were sufficient to establish jurisdiction, plaintiff's argument would still fail because jurisdiction is established at the time a suit is brought, not at the time of an allegedly tortious action. In support of that proposition defendant cites a host of cases analyzing jurisdiction under CPLR § 301 rather than CPLR § 302 (*see e.g. Edelman v. Tattinger*, 8 AD3d 121 [1st Dept. 2004]). Finally, defendant reiterates its arguments that it would be unreasonable for this court to assert specific personal jurisdiction over Amtico based on the record of the company's tenuous connections to New York.

DISCUSSION

"Although a plaintiff is not required to plead and prove personal jurisdiction in the complaint, where jurisdiction is contested, the ultimate burden of proof rests upon the plaintiff" (*Pichardo v. Zayas*, 122 AD3d 699, 700-01 [2d Dept. 2014]; *see also Ring Sales Co. v. Wakefield Engineering, Inc.*, 90 AD2d 496, 497 [2d Dept. 1982]). A plaintiff may establish personal jurisdiction by showing either general jurisdiction, where the defendant's affiliations with the forum state are so continuous and systematic as to render them essentially "at home" in the state or specific jurisdiction, where the defendant has sufficient contacts relating to the underlying controversy under New York's long-arm statute (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 [2011]). Here, plaintiff concedes that defendant is not subject to general jurisdiction based on *Daimler*, as it cannot be considered "at home" in New York since it is neither incorporated nor maintains its principal place of business within the state.

In order to establish specific jurisdiction under CPLR § 302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction (*Pichardo*, 122 AD3d at 701). The Court of Appeals has interpreted the latter prong to require that there be "an 'articulable nexus,' or 'substantial relationship' between a defendant's in-state activity and the claim asserted" (*McGowan v. Smith,* 52 NY2d, 268, 272 [1981]; *Johnson v. Ward*, 4 NY3d 516, 519 [2005]; *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; and *Licci*, 20 NY3d 327, 339 [2012]). Indeed, [a]t a minimum [there must be] a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former" (*see Licci*, 20 NY3d at 339).

Under CPLR § 302(a)(2), "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent. . . commits a tortious act within the state ...."

(*see* CPLR § 302[a][2]). CPLR § 302(a)(2) has been construed to apply only when the defendant's wrongful conduct is performed in New York. (*Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 NY2d 443, 465 [1965]).

Finally, CPLR § 302(a)(3) provides for personal jurisdiction over anyone who "commits a tortious act without the state causing injury to person or property within the state," if one of two enumerated additional requirements are met: 1) the non-domiciliary regularly solicits business or engages in continuous conduct within the state; or 2) the non-domiciliary reasonably expects their acts to have consequences in the state and derives substantial revenue from interstate commerce (*see* CPLR § 302[a][3]).

I. Specific Jurisdiction Under CPLR § 302

The court finds that Amtico is not subject to specific jurisdiction under New York's long-arm statute.

At the outset, it is worth noting that plaintiff does not address the applicability of CPLR § 302 in his opposition. Plaintiff's reliance on *Bristol-Myers* to the exclusion of actually addressing the relevant provisions of New York's long-arm statute, is misplaced. As Amtico points out, the California Supreme Court's decision in *Bristol-Myers* rested on California's long-arm statute, which is separate and distinct from New York's long-arm statute. California's long-arm statute broadly authorizes jurisdiction "on any basis not inconsistent with the Constitution of [California] or of the United States" (*Bristol-Myers*, 377 P.2d at 878). Conversely, New York's long-arm statute, CPLR § 302, narrowly authorizes a court to exercise specific jurisdiction over a defendant when: (1) the tort arises in the state and from a defendant's transaction of business in the state, (2) a tortious act is committed within the state, or (3) a tortious act is committed outside of the state causing injury in the state (*see* CPLR § 302[a][1]-[3]).

CPLR § 302(a)(1), which is triggered where a defendant transacts business in New York and the cause of action asserted arises from that activity, does not apply here. Even if Amtico's contacts in New York were sufficient to establish that the company transacted business within the state, there is no evidence that plaintiff's injuries arose from any transaction of business in New York, especially where plaintiff's exposure to Amtico tiles occurred exclusively in Missouri. Plaintiff's only testimony with respect to his encounters with Amtico floor tile relates to his alleged exposure to said tiles at residential construction sites in Kansas City, Missouri between 1959 and 1963 (Tr. 375-76; 384-85). He does not allege exposure to Amtico floor tiles in New York. As such, as defendant notes, the alleged duty owed by Amtico to plaintiff as well as the alleged breach of that duty, all arose or occurred out-of-state, demonstrating the absence of an articulable nexus or substantial relationship between defendant's New York activity and the claim asserted (*see Pichardo*, 122 AD3d at 701; *McGowan*, 52 NY2d at 273).

CPLR § 302(a)(2), which applies where a tortious act is committed within the state, is also inapplicable based on the facts of this case. As previously stated, this provision has long been construed to apply where the defendant's wrongful conduct is performed in New York (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 465 [1965]). In this case, plaintiff alleges that he was exposed to Amtico's floor tile entirely outside of New York. As such, jurisdiction does not lie under this provision.

Finally, plaintiff does not demonstrate that Amtico is subject to personal jurisdiction under CPLR § 302(a)(3), which provides for personal jurisdiction where one "commits a tortious act without the state causing injury to person or property within the state." For this provision to apply, it must also be established that the non-domiciliary:

(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.

(*see* CPLR § 302[a][3][i]-[ii]).

Unlike CPLR § 302(a)(1), CPLR § 302(a)(3) does not require that a cause of action *arise from* a defendant's out-of-state activity. Here, it is undisputed that defendant's alleged tortious actions – namely the inclusion of asbestos in its floor tiles that plaintiff was subsequently exposed to – occurred in Missouri rather than in New York, thus satisfying the out-of-state requirement under this provision. Plaintiff, however, does not allege that his exposure to asbestos-containing floor tile in Missouri caused "injury to person or property within the state." Plaintiff was diagnosed with mesothelioma in New York in October of 2015, and while he received some medical treatment within New York, plaintiff makes no argument as to how defendant's actions caused "injury to person or property within the state" (*see* CPLR § 302[a][3]).

Even assuming, without deciding, that Amtico's alleged tortious conduct in Missouri caused injury within New York, plaintiff has not demonstrated that either the first or second jurisdictional subset of CPLR § 302(a)(3) has been met. To obtain jurisdiction over an alleged tortfeasor, subdivision (a)(3)(i) requires that said tortfeasor "regularly 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" (CPLR § 302[a][3][i]). The court has not found any cases addressing whether this provision is construed at the time of an alleged tortious action or at the time a suit is brought. Notably, however, cases decided under New York's general jurisdiction

statute, CPLR § 301, refer in the present tense to companies' business transactions at the time a suit is brought (*see Lancaster v. Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 156 [1st Dept. 1992]; *see also Edelman v. Tattinger*, S.A., 8 AD3d 121 [1st Dept. 2004]["relevant inquiry under 301 is whether defendants were **doing business in New York at the time the action is brought**"][emphasis added]).[1] Moreover, when it was enacted, the Legislature limited CPLR § 302 (a)(3)(i) jurisdiction to extend only to those "who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere" (12th Ann Report of NY Jud Conf, at 343). This requirement has been interpreted to necessitate some ongoing activity within New York (*see Ingraham v. Carroll*, 90 NY2d 592, 597 [1997]). Logically then, it follows that some existing rather than past presence is required, since it would be unreasonable to expect a company without current transactions within a state to respond to a lawsuit there. With respect to the nature of a company's business transactions in a state, something more than the "one shot" single business transaction described in CPLR § 301(a)(1) is required to meet either the solicitation of business or the persistent course of conduct prongs (*see* 12th Ann Report of NY Jud Conf, at 343). The "substantial revenue" prong can be satisfied on the basis of a sizeable percentage of New York revenue in comparison to the defendant's overall revenue, or alternatively, a large dollar amount of revenue generated in New York (*see Tonns v. Spiegel's*, 90 AD2d 548 [2d Dept. 1982][4-7% sales in New York generating between $40,000 - $113,000]; *Allen v. Canadian General Electric Co.*, 65 AD2d 39 [3d Dept 1978][1% sales in New York, generating nine million dollars]). Here, plaintiff has made no

[1] It is worth noting that the *Lancaster* court further noted that under CPLR § 302(a)(1), it is not the defendant's activities at the time that an action is commenced that are significant, but instead that the defendant had some business contacts within the state and that the cause of action sued upon arose from those contacts (*Lancaster*, 177 AD2d at 158). Notably, the court did not observe that the same applies to either CPLR § 302(a)(2) or CPLR § 302(a)(3).

showing that at the time that his lawsuit was initiated, it could be said that Amtico "regularly does or solicits business ... in the state" or "engages in any other persistent course of conduct ... in the state" (*see* CPLR § 302 [a][3][i]). As previously stated, neither Amtico's operation of a lone showroom nor its past advertising in New York in the 1960s and 1970s are sufficient to establish a current and ongoing presence within the state. Even Smith's deposition testimony annexed to plaintiff's opposition, which states that Amtico may have sold asbestos-containing products in New York at the time of plaintiff's exposures, is unavailing as it does not relate to Amtico's present day course of conduct within the state. Additionally, while the company may have previously generated portions of its revenue in New York, plaintiff has failed to show that it presently "derives substantial revenue from goods used or consumed or services rendered in the state" (*see* CPLR § 302 [a][3][i]). As such, CPLR § 301(a)(3)(i) is inapplicable here.

If the provisions of CPLR § 302 (a)(3)(i) are not met, a plaintiff may pursue jurisdiction against a defendant under CPLR § 302 (a)(3)(ii), assuming that the defendant commits a tortious act outside the state that causes an injury to a person or property within the state. This provision requires the satisfaction of two prongs. To establish jurisdiction, a plaintiff must demonstrate that the nonresident tortfeasor: (1) "expects or should reasonably expect the act to have consequences in the state"; and (2) "derives substantial revenue from interstate or international commerce" (CPLR § 302 [a][3][ii]). As with CPLR § 301(a)(3)(i), the court has not found any cases addressing whether this provision is construed at the time of an alleged tortious action or at the time a suit is brought. In *Ingraham*, the Court of Appeals observed that "[t]he first prong is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to New York to answer for tortious conduct committed elsewhere" (90 NY2d 592 at 598). In *LaMarca v. Pak-Mor Mfg. Co.*, 95 NY2d 210 [2000], the Court of

Appeals went on to suggest that this provision is designed to narrow "the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character'" (95 NY2d at 215; *quoting*, *Ingraham*, 90 NY2d, at 599, *supra*; *quoting* 12th Ann Report of NY Jud Conf, at 342-343]). It has been observed that CPLR § 302(a)(3)(ii) has a "bigness requirement" designed to assure that the defendant is "economically big enough" to defend suit in New York (Siegel, *NY Prac 88*, at 136 [2d ed]). As such, CPLR § 302(a)(3)(ii) by implication also seems to require that a company have an existing presence within a state at the time that it is sued.

The test of whether a defendant expects or should reasonably expect his act to have consequences within New York is an objective rather than a subjective one (*see Brown v. Erie-Lackawanna R.R. Co.,* 54 Misc.2d 225 [1967]). Moreover, the statutory requirement of foreseeability relates to forum consequences generally and not to the specific event which produced the injury within the State (*see Allen v. Auto Specialties Mfg. Co.*, 45 AD2d 331, 333 [3d Dept. 1974). The statute does not require the defendant to foresee the specific consequences in New York of its allegedly tortious act (*id.*). All that must be found is that "the presence of defendant's product in New York with some potential consequence was reasonably foreseeable rather than fortuitous" (*id.*; *quoting Tracy v. Paragon Contact Lens Labs.*, 44 AD2d 455 [3d Dept. 1974]).

Under these facts, there is no basis to conclude that Amtico should have foreseen that its alleged tortious act of including asbestos in its floor tiles in Missouri would have consequences in New York. Indeed, nothing in the record suggests that Amtico should have anticipated that its customers or end-users would handle its products in Missouri and subsequently travel to New

York. As such, the foreseeability prong of CPLR § 302(a)(3)(ii) has not been met under the facts of this case.

Similarly, the interstate commerce/substantial revenue component of CPLR § 302 (a)(3)(ii) is also not satisfied here. In *LaMarca*, the interstate commerce/substantial revenue component was satisfied where a Texas corporation maintained facilities in Virginia, advertised in a national trade magazine, made sales of its products for distribution throughout the United States, and had a distributor and direct representative in New York (95 NY2d at 213). Additionally, the company's annual revenue in the year of the accident was over 18 million dollars, $500,000 of which was derived from New York. (*id.*). Here, Amtico alleges that its past rather than its present sales in New York generated roughly 2.0% to 2.3% of its profits. However, there is no evidence of current sales and the company was last registered to do business in New York in 1982. Additionally, there is no evidence measuring the scope of Amtico's alleged business in New York relative to an ongoing national campaign and the present distribution of its products elsewhere. Accordingly, the court finds that CPLR § 302(a)(3) cannot be a basis for personal jurisdiction over Amtico.[2]

II. *Bristol-Myers*

Even if this court were to disregard New York's long-arm statute and focus solely on plaintiff's analysis under *Bristol-Myers*, a California Supreme Court case to which it is not bound

[2] Constitutional principles of due process similarly preclude a finding of personal jurisdiction here. The Due Process Clause of the United States Constitution requires "minimum contacts" and maintenance of "fair play and substantial justice" (*LaMarca*, 95 NY2d at 216). To show that Amtico has "minimum contacts" with New York sufficient to satisfy the Due Process Clause, it must be established that it "purposefully availed itself of the privilege of conducting activities within the forum State" (*id.*). Additionally, considering the traditional notions of fair play and substantial justice "is in essence another way of asking what is reasonable" (*id.* at 217). Considering the record before the court, which does not establish that jurisdiction can be exercised against Amtico under New York's long-arm statute, it would be unfair to extend jurisdiction against the company under the premise that it purposefully availed itself of conducting business within New York. As such, the fundamental principles of due process would be offended and substantial justice thwarted by the exercise of jurisdiction over Amtico.

to follow, jurisdiction still cannot be established. In keeping with *Bristol-Myers*, plaintiff argues that this court is able to exercise jurisdiction over Amtico based on the company purposefully availing itself of the New York market. Plaintiff attempts to analogize the instant case to *Bristol-Myers* on this ground are unpersuasive. In *Bristol-Myers*, BMS' purposeful activities in California included what the court termed "extensive contacts": 1) the employment of hundreds of personnel and sales representatives within the state; 2.) contracting with a California-based pharmaceutical distributor; 3.) operating research and laboratory facilities within the state; 4.) marketing and advertising in the state; and 5.) maintaining an office for California-based lobbying (*Bristol-Myers*, 277 P.3d at 886). The same cannot be said here, where Amtico's contacts within New York are far less expansive, consisting mainly of the company's advertising within the forum in the 1960s and 1970s and operation of a showroom (*McGowan*, 52 NY2d at 270). Moreover, plaintiff's emphasis on such contacts is diminished by the fact that Amtico is no longer registered to do business in New York, and was last registered to do business in New York in 1982 - over thirty years ago.

Plaintiff's characterization of his case as a "mass tort" akin to *Bristol-Myers* is also unpersuasive. Such a parallel cannot be drawn based on the facts of this case. As defendant highlights, the *Bristol-Myers* case involved 678 plaintiffs, all suing two defendants for the same alleged tortious conduct occurring in 34 states (*see Bristol-Myers*, 377 P.3d at 878). The court used that rationale to litigate nonresident plaintiffs' claims against BMS since BMS' acts were part of a "nationwide course of conduct" (*id.* at 888). Notably, the *Bristol-Myers* court considered the fact that BMS did not challenge its findings with respect to the practical aspects of litigating claims related to a "nationwide course of conduct." Here, however, there are only two aggrieved parties – plaintiff and his wife, both of whom are nonresidents. As such, plaintiff attempts to anchor his

claims to the diverse injuries of other people in New York that are not part of this lawsuit. In furtherance of that argument, plaintiff argues that Amtico "aggressively marketed its injurious product in New York and caused the injuries of **scores of individuals similarly situated to Mr. Trumbull"** (*see* Plaintiff's Affirm in Opp. at ¶ 16-17) (emphasis added). Plaintiff's emphasis on individuals "similarly situated" to him is an unsuccessful attempt to obscure the fact that unlike *Bristol-Myers*, here there are no similarly situated plaintiffs in this action. Plaintiff unpersuasively substitutes "individuals similarly situated to Mr. Trumbull" in place of the resident plaintiffs that provided the jurisdictional anchor in *Bristol-Myers.* As such, the link between nonresident and resident claims that was present in *Bristol-Myers* is absent here.[3]

Moreover, while plaintiff alleges that Amtico may have sold asbestos-containing floor tile in New York, plaintiff's only testimony concerning New York exposures relates to products other than floor tile. In seeking to broaden jurisdiction here, plaintiff has failed to indicate how Amtico's alleged breach is related to the alleged breaches of other companies that neither manufactured nor sold floor tile (*id.* at 892). The only common thread between the products of other defendants and Amtico's floor tile seems to be their alleged asbestos content, which is too broad a connection to confer jurisdiction. Endorsing such a broad jurisdictional exercise is at odds with New York's long-arm statute, since plaintiff's analysis would seemingly endorse jurisdiction in practically all states, without limitation. New York's long-arm statute requires a more exacting analysis. This prevents jurisdiction from being found in all cases, including those with a remote or non-existent connection to the forum. By arguing that this court should adopt the "mass tort" rationale of

[3] Additionally, unlike *Bristol-Myers*, plaintiff's case is not one wherein there is an unrebutted assumption that certain New York plaintiffs would benefit from the inclusion of nonresident plaintiffs. Therefore, the judicial efficiency considerations that factored into the Bristol-Myers court's decision to merge nonresident and resident plaintiffs do not apply on these facts. In any event, those considerations cannot circumvent either the CPLR or due process, as discussed.

Bristol-Myers, plaintiff is asking this court to ignore New York's long-arm statute and broaden jurisdiction so vastly as to ignore any meaningful statutory limits to its exercise. The court refuses to do so here.[4]

III. *Licci*

Finally, plaintiff relies on *Licci v. Lebanese Canadian Bank, SAL*, 20 NY3d 327 (2012), to asset that "New York's long-arm jurisdictional statute supports, and is not offended by, the exercise of specific jurisdiction in this case." In *Licci*, the plaintiffs were several dozen United States, Canadian and Israeli citizens who resided in Israel and were injured, or their family members were injured, in rocket attacks allegedly launched by Hezbollah in 2006 (*id.* at 330). The plaintiffs brought suit in New York against Lebanese Canadian Bank ("LCB"), alleging that LCB and co-defendant American Express Bank (AmEx) assisted Hezbollah in the attacks by facilitating international monetary transactions in New York (*id.* at 330-31). In support of their chosen forum, the plaintiffs asserted that personal jurisdiction over LCB was appropriate under New York's long-arm statute, CPLR 302(a)(1) (*id.* at 331). While LCB was headquartered in Beruit, it maintained a correspondent banking account with AmEx in New York (*id.* at 332). Plaintiffs alleged that LCB used the AmEx account to transfer several million dollars through dozens of international wire transfers that enabled Hezbollah to launch its rocket attacks (*id.*). LCB moved to dismiss based on lack of personal jurisdiction (*id.*).

The *Licci* Court concluded that a foreign bank's use of a New York correspondent bank account to effect "dozens" of wire transfers on behalf of a foreign client constituted a "transaction"

[4] There are circumstances in New York where courts have endorsed the exercise of jurisdiction over a non-domiciliary where no tortious action occurred within the state. Such exercises of jurisdiction have arisen in products liability cases based on the application of market share principles whereby a manufacturer, by its participation in the national market of a product, should "reasonably expect" its act of selling in the national market to have consequences in the state (*see e.g. In the Matter of New York County DES Litigation* [*Carrano v. Abbott Labs*], 202 AD2d 6 [1st Dept. 1994]). This case is not a case in which market share principles apply.

of business within the meaning of CPLR 302(a)(1) (*id.* at 334). In doing so, the Court stated that "determining what facts constitute 'purposeful availment' is an objective inquiry," requiring a court "to closely examine the defendants contacts for their quality" (*id.* at 338). The *Licci* Court held that the allegation of a foreign bank's "repeated use of a correspondent account in New York on behalf of a client - in effect, a 'course of dealing' - showed] purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States" (*id.* at 338-39).

The *Licci* court also reviewed whether plaintiffs' claims under the Anti-Terrorism Act, Alien Tort Statute or for negligence or breach of statutory duty in violation of Israeli law arose "from LCB's transaction of business in New York" within the meaning of CPLR 302(a)(1) (*id.* at 339). As mentioned in defendant's papers, the *Licci* Court stated that this second prong of jurisdictional inquiry requires that, "in light of all the circumstances, there must be an 'articulable nexus' or 'substantial relationship' between the business transaction and the claim asserted" (*id.*). "[A]t a minimum, [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" (*id.*). "In effect, the 'arise-from' prong limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction" (*id.* at 339-40). "Where this necessary relatedness is lacking, we have characterized the claim as 'too attenuated' from the transaction, or 'merely coincidental' with it" (*id.* at 340). In finding that the claims at issue in *Licci* were sufficiently connected to the transaction, the Court noted that LCB arguably violated duties owed to plaintiffs under various statutes during the use of the New York account, establishing the "articulable nexus" or "substantial relationship" necessary for purposes

of personal jurisdiction (*id.*). Plaintiff attempts to analogize the instant case to *Licci* by noting that Amtico "aggressively marketed its injurious product in New York and caused the injuries of scores of individuals similarly situated to Mr. Trumbull" (*see* Plaintiff's Affirm in Opp. at ¶ 16-17).

Plaintiff's comparison fails, because the *Licci* plaintiffs asserted a specific act - LCB's use of the New York correspondent bank account to make multiple wire transfers in furtherance of the financing of Hezbollah's terrorist rocket attacks – which provided the substantial New York relationship necessary to confer jurisdiction against LCB (*Licci*, 20 NY3d at 338-40). Conversely, here there is no articulable nexus between Amtico's single jewelry showroom and office as well as intermittent marketing in the 1960s and 1970s that ties those activities to plaintiff's alleged exposure to asbestos floor tile in Missouri. Absent such a showing, plaintiff cannot successfully advance the argument that Amtico's New York-specific marketing caused it to breach its duty of care to plaintiff, a nonresident, who alleges exposure to its asbestos-containing floor tile outside of New York. Accordingly, the facts of *Licci* do not comport with the instant matter.

It is hereby,

ORDERED that defendant's motion is granted, and plaintiff's claims as against it are dismissed for lack of both general and specific personal jurisdiction.

This constitutes the Decision and Order of the Court.

March 6, 2017

HON. PETER H. MOULTON
J.S.C. J.S.C.