Shulman v Brenntag N. Am., Inc.
2018 NY Slip Op 33068(U)
December 4, 2018
Supreme Court, New York County
Docket Number: 190025/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

JENNY SHULMAN and BRONISLAV KRUTKOVICH,
Plaintiffs,
- against -
BRENNTAG NORTH AMERICA, INC., *et al.*,
Defendants.

INDEX NO. 190025/2017
MOTION DATE 11/30/2018
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to dismiss by Imerys Talc America, Inc. and Cyprus Amax Minerals, Co.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 4
Answering Affidavits — Exhibits	5 - 8
Replying Affidavits	9

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers it is Ordered that defendants Imerys Talc America, Inc. (hereinafter individually "Imerys") and Cyprus Amax Minerals, Co.'s (hereinafter individually "CAMC") motion to dismiss the plaintiff's claims and all cross-claims asserted against them, for lack of personal jurisdiction pursuant to CPLR § 3211(a) (8), CPLR §301 and CPLR § 302 (a), is granted only to the extent of dismissing the claims and cross-claims against CAMC; the motion as to Imerys is denied.

Plaintiff, Jenny Shulman, a citizen of New York, was diagnosed with mesothelioma on or about February of 2016. Plaintiff alleges she was exposed to asbestos in a variety of ways including from the use of cosmetic talc products. Ms. Shulman's exposure - as relevant to this motion - alleges use of Revlon Inc.'s (a New York Corporation) "Jean Nate" talc powder. She alleges exposure to asbestos containing talc in Revlon Inc.'s "Jean Nate" starting around 1990 through 1997. Plaintiff asserts claims against Imerys and CAMC alleging that they supplied the raw talc to Revlon Inc. that was used to make "Jean Nate" in New York during the relevant period. This action was commenced on January 23, 2017 to recover for plaintiff's injuries resulting from exposure to asbestos (Mot., Exh. A).

The moving defendants now move to dismiss the action pursuant to CPLR §3211 (a)(8) for lack of personal jurisdiction.

Defendant CAMC was granted unopposed summary judgment on October 15, 2018 dismissing the plaintiff's complaint and all cross claims asserted against it with prejudice. The Order was served with Notice of Entry on November 2, 2018 (See NYSCEF Docket Nos. 372 and 374). The relief sought in this motion as to CAMC is granted, as all claims and cross-claims against it have already been dismissed.

Defendant Imerys alleges that it is a Delaware Corporation with its principal place of business in California, it is not a New York resident, It has no offices in New York, nor does it own or lease property in New York, it is not registered to do business in New York, has no New York address or bank account, does not mine, manufacture, research, develop, design or test talc or talcum powder in New York and has never sued anyone in New York.

Imerys seeks to dismiss the plaintiffs' claims asserted against it for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). Imery's argues that it has been found to have no liability for the talc used prior to 1979, because the talc was produced by a predecessor company for whom the moving defendant did not acquire liabilities. Imerys also argues

that this court does not have personal jurisdiction over it because the moving defendant is not incorporated in New York and does not maintain its principal place of business here, therefore there is no general jurisdiction. Furthermore, Imerys argues that plaintiffs' claims do not arise from any of the moving defendant's New York transactions, and it is unable to find records showing sales of talc to any of the named defendants in the State of New York (Mot., Patrick Downey Aff.). Imerys claims it 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, therefore there is no specific jurisdiction. (see CPLR § 302(a)(1) and (2)).

In support of their motion the moving defendant cites to Daimler v. Bauman, (134 S. Ct. 746, [2014] where the United States Supreme Court reversed the Ninth Circuit Court of Appeals and held that due process did not permit exercise of general personal jurisdiction over a German corporation in California based on the services performed in California by its United States Subsidiary, when neither the parent German corporation or the subsidiary were incorporated in California or had their principal place of business there. General jurisdiction over a corporation can only be exercised where the corporation is at home. Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business.

The moving defendant also argues that there is no specific jurisdiction over them. In support of their motion defendants cite to the decision in Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County, et al, (137 S.Ct. 1773 [June 19, 2017]), where the United States Supreme court dismissed the claims of non-California residents in a products liability action for lack of specific personal jurisdiction, where the non-residents did not suffer a harm in California and all the conduct giving rise to their claims occurred elsewhere.

In sum the moving defendants argue that this court lacks personal general and specific jurisdiction over them and therefore the claims should be dismissed.

Plaintiffs oppose the motion on the ground that there is personal jurisdiction over Imerys under New York State's long-arm statute. Plaintiffs allege that this Court has jurisdiction over the moving defendant because either Imerys or its predecessors transacted business in the state to supply goods or services in the state and their actions gave rise to Ms. Shulman's exposure. Plaintiffs allege that the moving defendant or its predecessors supplied asbestos-contaminated talc to Revlon, Inc. in New York, and directly contributed to Ms. Shulman's alleged injuries.

"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 alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y. 2d 409, 754 N.E. 2d 425, 729 N.Y.S. 2d 425 [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 CPLR §301, and the long-arm provisions of CPLR §302.

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v. Kiein, 35 A.D. 2d 248, 315 N.Y.S. 2d 695 [1st Dept., 1970] affd. 30 N.Y. 2d 757, 284 N.E. 2d 576, 333 N.Y.S. 2d 421 [1972]). However, in opposing a motion to dismiss the plaintiff needs only to make a sufficient showing that its position is not frivolous (Peterson v. Spartan Industries, Inc., 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974]).

<u>General Jurisdiction</u>:

" 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 [E.D.N.Y. 2017]). " 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 v. Bauman, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; Goodyear Dunlop Tires Operations, S.A., v. Brown, 564 U.S. 915,

131 S.Ct. 2846, 180 L.Ed2d 796 [2011]; BNSF Railway Co., v. Tyrrell, 137 S.Ct. 1549 [2017])." In BNSF Railway Co., v. Tyrrell (137 S.Ct. 1549 [May 30, 2017]) the United States Supreme Court dismissed the claim for lack of General personal jurisdiction of non-Montana residents , who were not injured in Montana, where defendant Railroad was not incorporated in Montana, nor maintained its principal place of business there.

This court could not exercise General Personal jurisdiction over Imerys because it is not incorporated, nor has a principal place of business in the State of New York. Defendant Imerys is a Delaware corporation, with its principal place of business in the State of California.

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, 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 its jurisdiction over it. The mere fact that this conduct affects a plaintiff with connections with a foreign state does not suffice to authorize jurisdiction (See Bristol Myers Squibb Co., Supra; Walden v. Fiore, 134 S. Ct. 1115 [2014])." "To justify specific personal jurisdiction over a non-resident defendant, a plaintiff must show that the claim arises from or relates to the defendant's contacts in the forum state" (In re MTBE Products Liability Litigation, 399 F.Supp2d 325 [S.D.N.Y. 2005]).

"Application of New York's long-arm statute requires that (1) defendant has purposefully availed itself of the privilege of conducting activities within the state by either transacting business in New York or contracting anywhere to supply goods or services in New York, and (2) the claim arises from that business transaction or from the contract to provide goods or services" (Mckinney's CPLR 302(a)(1)).

"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 plaintiff's 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"(see 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 can exercise specific personal jurisdiction over the moving defendants under CPLR § 302(a)(1) because there is an articulable nexus or substantial relationship between their in state conduct and the claims asserted. This section of the statute is triggered when a defendant transacts business in New York and the cause of action asserted arises from that activity. The moving defendant provides the affidavit of Patrick Joseph Downey the New Product Development Engineering Director at Imerys. Mr. Downey states in his affidavit that "after a diligent search of records of cosmetic talc," he could find "no record of any sales of cosmetic talc to Revlon in the State of New York" or

to Johnson & Johnson or Johnson & Johnson Consumer Inc. (Mot. Downey Aff., NYSCEF Doc. No. 371).

Plaintiffs meet their burden in opposing the motion by providing Imerys' response to interrogatories and Mr. Downey's Declaration in an action in Superior Court in the State of California, *Herford v. AT & T Corp. et al,* JCCP Case No. 4674, LASC Case No. BC 646315 (Opp. Exhs. 47 and 15). Plaintiff argues that even if Imerys is not directly involved or does not have its own records, it is liable as a successor to other entities that sold talc to Revlon a New York company. The response to interrogatory 5, para. H, in *Herford v. AT & T Corp.*, Mr. Downey states that Imerys was incorporated on April 2, 1992 as Cyprus Talc Corporation, on June 30, 1992 the name was changed to Luzenac America Inc. and in 2011 the name was changed to Imerys (Opp. Exh. 47). Mr. Downey states in paragraph 7 of his declaration that Imerys had no records of a predecessor entity selling to Revlon prior to 1979, but that Imerys had sales records indicating that it "supplied talc to Revlon for the first time in 1979" (Opp. Exh.15). In 1987, Revlon, a New York company acquired Charles of the Ritz, Ltd. (COTR) and its products which included "Jean Nate" (Opp. Exh. 16). In another California action, *Allen v. Brenntag North America, Inc. et al.*, Case No. DR 180132, Imery's in its "Responses to Plaintiff's Form Interrogatories Set One," under "Preliminary Statement" states in relevant part:

> "During the alleged exposure period for Jean Nate (mid 1970s to 2008), Cyprus Mines Corporation d/b/a Cyprus Industrial Mines supplied cosmetic grade talc to Charles of the Ritz from 1979-1980 and from 1982-1986. Cyprus Mines Corporation d/b/a Cyprus Industrial Mines supplied cosmetic grade talc to Revlon from 1987 until 1992, and Luzenac America, Inc. supplied cosmetic grade talc to Revlon from 1992-1993, in 1997 and in 1999. (Opp. Exh. 21)

Plaintiffs have shown that during the periods relevant to Ms. Shulman's exposure - 1990 through 1997 - Imery's has conceded in the California actions that its predecessors - for whom it retained liability - provided talc products to Revlon, a New York corporation. It is alleged that Ms. Shulman's injury arose from the use of Revlon's "Jean Nate" talc powder containing the asbestos-contaminated talc shipped into New York by the moving defendants.

Plaintiff has met its burden and established that long-arm jurisdiction should be exercised over the moving defendants under CPLR 302(a)(1). Accordingly, the motion by Imerys Talc of America, Inc. to dismiss for lack of personal jurisdiction is denied.

Accordingly, it is ORDERED that defendants' Imerys Talc America, Inc., and Cyprus Amax Minerals, Co.'s motion to dismiss plaintiffs' claims and all cross-claims asserted against them, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8), CPLR §301 and CPLR § 302(a), is granted only as to dismissing the claims and cross-claims against Cyprus Amax Minerals, Co., and it is further,

ORDERED that the plaintiffs' claims and all cross-claims against Cyprus Amax Minerals, Co., are severed and dismissed, and it is further,

ORDERED that the motion to dismiss the plaintiffs' claims and all cross-claims against defendant Imery's Talc America, Inc., is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: December 4, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE