

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ROBERT ANDREW MCELHANEY,) ASBESTOS
)
Plaintiff,) C.A. No. 12C-03-236 ASB
)
v.)
)
KELLY-MOORE PAINT CO., et al.,)
) TRIAL BY JURY OF TWELVE
Defendants.) DEMANDED

Submitted: July 26, 2013
Decided: August 14, 2013

Upon Defendant Kelly-Moore's Motion to Dismiss
GRANTED

Kara Hager, Esquire, Napoli Bern Ripka Shkolnik LLP, Wilmington, Delaware, *Attorney for Plaintiff.*

Armand Della Porta, Jr., Esquire, Ana Marina McCann, Esquire, Jessica L. Tyler, Esquire, and Sarah A. Roberts, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, *Attorneys for Defendant Kelly-Moore Paint Co.*

DAVIS, J.

INTRODUCTION

This is a personal injury action brought by Plaintiff Robert Andrew McElhaney against multiple defendants including Defendant Kelly-Moore Paint Co. ("Kelly-Moore"). Mr. McElhaney alleges he was exposed to asbestos from products manufactured, distributed, sold, removed, installed or used by the defendants, including Kelly-Moore. Mr. McElhaney alleges that he developed and suffers from lung cancer as a result of that exposure. Mr. McElhaney believes he was exposed to asbestos from Paco, a compound product Kelly-Moore produced in

the 1970s. Mr. McElhaney is a resident of Ohio and alleges he was exposed to asbestos in West Virginia. Kelly Moore is a California incorporation with a registered agent for service located in California. Before the Court is Kelly-Moore's Omnibus Motion to Dismiss for Lack of Personal Jurisdiction (the "Motion"). For the reasons stated in this Opinion, the Motion, as to Mr. McElhaney, is **GRANTED**.

PROCEDURAL BACKGROUND

Kelly-Moore filed the Motion on August 9, 2012. Mr. McElhaney filed a Brief in Opposition to the Motion on October 5, 2012. The Motion was scheduled to be heard by the Court on August 30, 2012, September 13, 2012, January 10, 2013, February 14, 2013, and March 14, 2013. The Court was unable to hear the Motion on those dates due to either scheduling conflicts or an overabundance of scheduled asbestos motions to be heard on each date. On March 7, 2013, the Court granted a stay of proceedings pending resolution of the Motion.

The Motion was scheduled to be heard on April 11, 2013 when the Court determined it could resolve the Motion, in part, without need for a hearing. The Court advised counsel for the parties they need not appear. Upon reviewing the Brief in Opposition to the Motion, the Court found that Mr. McElhaney proffered competent evidence to demonstrate that jurisdiction over Kelly-Moore might exist, warranting a grant of limited discovery.¹ Accordingly, on April 19, 2013, the Court issued an Order granting Mr. McElhaney 60 days to conduct discovery for the limited purpose of determining jurisdictional ties of Kelly-Moore to Delaware.

On April 26, 2013, Kelly-Moore moved for reargument on the Motion. Kelly-Moore filed a supplemental correspondence on May 1, 2013. On June 17, 2013, the Court heard the Motion for Reargument, which it granted, and then allowed reargument on the Motion. The

¹ See *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1139 (Del. Ch. 2008); *Am. Scheduling, Inc. v. Radiant Sys., Inc.*, 2005 WL 736889, at *1 (Del. Ch. Feb. 9, 2005).

Court ordered Kelly-Moore to open its document repository to Mr. McElhaney's counsel and to respond to interrogatories. The Court also ordered Mr. McElhaney to provide supplemental briefing as to Kelly-Moore's amenability to jurisdiction upon completion of the limited jurisdictional discovery.

Mr. McElhaney filed a brief in opposition to the Motion on July 1, 2013. On July 2, 2013, Kelly-Moore filed a letter requesting the opportunity to file a reply brief. Despite the irregularity of such additional briefing, the Court allowed it given the issue and the expressed need of the attorneys to fully join, contest and argue the issue before the Court issued its decision on the Motion. On July 8, 2013, Mr. McElhaney requested to file a sur-reply if the Court allowed Kelly-Moore's request for a reply. Kelly-Moore filed its Reply Brief on July 9, 2013. Mr. McElhaney filed his Sur-Reply on July 22, 2013. Kelly-Moore then filed a letter to the Court regarding Mr. McElhaney's sur-reply on July 26, 2013.

PARTIES' CONTENTIONS

Kelly-Moore contends that it is not subject to personal jurisdiction in Delaware because jurisdiction is not proper under Delaware's long arm statute and Kelly-Moore lacks sufficient minimum contacts in Delaware to satisfy the Due Process Clause of the Fourteenth Amendment. Kelly Moore argues that: (1) it is not and has never been a Delaware Corporation; (2) its principal place of business is located in San Carlos, California; (3) it generally operates west of the Mississippi River and -- other than purchasing products from a Delaware corporation decades ago -- has never done business in the State of Delaware; (4) it has never sold or shipped products to the State of Delaware; and (5) it has never maintained a bank account, owned real property, solicited business, or sold its products to any company or person located in the State of

Delaware. Kelly-Moore argues that its purchase of raw materials from a Delaware corporation 30 to 40 years ago is insufficient to support jurisdiction.

Mr. McElhaney contends that Kelly-Moore has sufficient current contacts with Delaware to subject it to personal jurisdiction in this Court. Mr. McElhaney alleges the following contacts: (1) Kelly-Moore's current President and CEO sits on the American Coatings Association ("ACA") Board, and the ACA governs an education foundation which is an educational, non-profit Delaware corporation; (2) Kelly-Moore sells in its catalogs ladders manufactured by Werner Co., a Delaware limited liability company and subsidiary of a Delaware corporation; and (3) Kelly-Moore engaged in a persistent course of conduct by purchasing materials for use in its Paco products between 1970 and 1977 which were manufactured by Delaware corporations or distributed from Delaware. Mr. McElhaney also contends that Kelly-Moore is subject to jurisdiction under stream-of-commerce theory because Kelly-Moore has evidenced an intent to serve the entire United States without exclusion of Delaware.

In support of his position, Mr. McElhaney has supplied the Court with: a shipping pricelist which includes the rate to ship items to Delaware; sales invoices from Delaware corporations dated 1970 to 1977; and a Kelly-Moore catalog page featuring Werner ladders.

DISCUSSION

To determine whether it has personal jurisdiction over a nonresident defendant, the Court must: (1) assess whether the Delaware long arm statute applies; and, if so, (2) determine whether application of the statute comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.² Plaintiff bears the burden of establishing personal jurisdiction

² *In Re Chambers Development Co., Inc. Shareholders Litigation*, 1991 WL 179335; 19 Del. J. Corp. L. 242, 252 (Del. Ch. May 20, 1993).

over a defendant.³ Where there is conflicting evidence, the Court must construe such evidentiary conflicts in plaintiff's favor.⁴

Delaware's long arm statute, 10 *Del. C.* § 3104, sets forth in subsection (c) that a nonresident establishes legal presence within the State of Delaware when the nonresident:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; *or*
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.⁵

Subprovision (c)(4) pertains to general jurisdiction in cases, like this one, where the cause of action is unrelated to the relevant Delaware contacts.⁶ To exercise jurisdiction under 10 *Del. C.* § 3104(c), the Court must find that a defendant has "current contacts with Delaware" and that those contacts "'are so extensive and continuing that it is fair and consistent with state policy to require that [they] appear here and defend a claim even when that claim arose outside of this state and causes injury outside of this state.'"⁷

³ See *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 986 (Del. Super. 2000).

⁴ *In Re Chambers Development Co., Inc. Shareholders Litigation*, 19 Del. J. Corp. L. at 252.

⁵ *Id.*

⁶ *Id.*

⁷ *Reid v. Siniscalchi, L.L.C.*, 2874-VCN, 2011 WL 378795, at *10 (Del. Ch. Jan. 31, 2011) (citations omitted).

For the Court’s application of the long arm statute asserting general jurisdiction to comport with due process, a defendant’s activities within the State must be “continuous and systematic.”⁸ Contacts are typically sufficient to comport with due process if:

(a) the defendant regularly advertises his products or services in the state or (b) carries on some other continuous course of activity there or (c) derives substantial revenue from goods used or consumed or from services rendered in the state. It is not necessary that this activity amount to the doing of business.⁹

Additionally, to satisfy due process when the Court applies the long arm statute, a defendant “should reasonably anticipate being haled into” this Court.¹⁰

Stream of commerce theory is a source of specific jurisdiction which is available in addition to the long arm statute. Its application is analogous to application of subsection (c)(4) of the long arm statute.¹¹ Stream of commerce theory

requires that there be evidence of some intent or purpose on behalf of the manufacturer to serve the Delaware market. . . . Only when the manufacturer's product enters the forum state and injures a consumer therein is it acceptable to exercise jurisdiction over the manufacturer under [stream of commerce] theory.¹²

Contrary to Mr. McElhaney’s assertion that a manufacturer or distributor of goods must evidence an intent not to serve a particular state’s market in order to avoid jurisdiction, the case law Mr. McElhaney cites stands for the premise that a defendant must affirmatively exhibit some intent or purpose to serve the Delaware market.¹³ Like the long arm statute, application of the stream of commerce theory must also comport with the requirements of due process.¹⁴

The Court finds that Mr. McElhaney’s asserted bases for this Court to exercise personal jurisdiction over Kelly-Moore are insufficient to satisfy the long arm statute and the

⁸ *In Re Chambers Development Co.*, 19 Del. J. Corp. L. at 253 (citing *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).

⁹ *Id.* at 252.

¹⁰ *Pandora Jewelry, Inc. v. Stephen's Jewelers, LLC*, CPU4-10005767, 2012 WL 2371043, at *3 (Del. Com. Pl. June 22, 2012).

¹¹ *See Boone v. Oy Partek Ab*, 724 A.2d 1150, 1157 (Del. Super. 1997).

¹² *Id.* (citing *World-Wide Volkswagen*, 444 U.S. 286, 297 (1980)).

¹³ *Id.*

¹⁴ *See id.* at 1157, 1161.

requirements of due process. The participation of Kelly-Moore's president and CEO on the board of an entity which governs a non-profit Delaware corporation is simply too attenuated to subject Kelly-Moore to jurisdiction in this State.¹⁵ It in no way establishes contacts by Kelly-Moore with Delaware that can fairly justify that Kelly-Moore be subjected to personal jurisdiction in Delaware. The same is true for Kelly-Moore featuring products in its catalogs which are manufactured by a Delaware corporation; such publication, without transaction of business within Delaware, is insufficient to meet the requirements of the long arm statute.

The timing of defendant's contacts with Delaware are of the utmost importance.¹⁶ In order to make a finding of general personal jurisdiction, the Court must find that a defendant engaged in sufficient activities in Delaware to establish a general presence.¹⁷ A general presence, however, is not everlasting. When a defendant only has general jurisdictional contacts with a state the defendant may subsequently withdraw from that state for jurisdictional purposes.¹⁸ Mr. McElhaney has failed to demonstrate that Kelly-Moore has sufficient current contacts with Delaware. Mr. McElhaney's cited contacts are from the 1970s. Moreover, Mr. McElhaney would have to show that those contacts, in addition to being current, are regular, persistent, or the source of substantial revenue.¹⁹

Mr. McElhaney just has not met the standards of the long arm statute to establish that Kelly-Moore is subject to general jurisdiction within Delaware. The Court also notes that Mr. McElhaney's asserted bases for general jurisdiction fail to satisfy the requirements of due process. The contacts are just too random, dated or attenuated. As such, the Court holds that

¹⁵ *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 3184-VCP, 2008 WL 4057745, at *6 (Del. Ch. Sept. 2, 2008) (declining to assert jurisdiction over a foreign corporation that participated in the formation of a Delaware limited liability company).

¹⁶ *Boone*, 724 A.2d at 1156.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 10 *Del. C.* § 1034(c)(4).

Mr. McElhaney failed to show that the contacts were systematic or continuous enough to satisfy constitutional due process.

Finally, the Court holds that Kelly-Moore is not subject to personal jurisdiction under the stream of commerce theory. Delaware courts have recognized that the stream of commerce theory does not fit neatly under either section 3104(c)(1) or section 3104(c)(4).²⁰ The stream of commerce theory takes into account both the relationship between the defendant and the forum and the relationship between the controversy and the forum.²¹ For the stream of commerce theory to apply here, Mr. McElhaney must show some nexus between his claim against Kelly-Moore and the business that Kelly-Moore transacted or performed in Delaware. Mr. McElhaney presents no persuasive evidence to satisfy the stream of commerce theory of personal jurisdiction. Without a showing that Kelly-Moore intended for its products to enter Delaware or that its products did in fact enter Delaware and cause injury, this Court's assertion of jurisdiction over Kelly-Moore in reliance on the stream of commerce theory would be improper. Furthermore, it would not comply with due process, as Kelly-Moore has no basis by which it should reasonably anticipate being haled into this Court.

²⁰ *Boone*, 724 A.2d at 1157-58.

²¹ *Id.*

CONCLUSION

In sum, Mr. McElhaney has failed to demonstrate a basis for the Court to properly assert personal jurisdiction over Kelly-Moore, even after the Court's provision for discovery to ascertain such a basis. Therefore, for the reasons stated, Kelly-Moore's Motion to Dismiss is **GRANTED**, and Kelly-Moore is **DISMISSED** from this case.

IT IS SO ORDERED.

Eric M. Davis
Judge