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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190149/2011
HERLIHY, ARTHUR D.
vs.
A F SUPPLY CORP.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 190149/11

MOTION DATE _____

MOTION SEQ. NO. 002

(MUNDO)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 1. 2-13

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

Dated: 1-2-13

_____, J.S.C.
HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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GAIL HERLIHY, Individually and as Executrix of the Estate of ARTHUR HERLIHY,

Plaintiffs,

-against-

A.F. SUPPLY CORP., et al.,

Defendants.

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Index No. 190149/11
Motion Seq. 002

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Defendant Munaco Packing & Rubber Co., Inc., a South Carolina corporation ("Munaco SC"), moves pursuant to CPLR 3211(a)(8) to dismiss the complaint and all cross-claims asserted against it for lack of personal jurisdiction. Plaintiffs oppose on the ground that this court has jurisdiction over Munaco SC because it is the successor-in-interest to Munaco Packing and Rubber Co., Inc., a now dissolved New York corporation ("Munaco NY") which manufactured asbestos-containing products and which is alleged to have caused plaintiffs' decedent Arthur Herlihy's asbestos-related injuries. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced on April 21, 2011 by Arthur Herlihy and his wife Gail Herlihy to recover for personal injuries allegedly caused by Mr. Herlihy's exposure to asbestos-containing products while working for the Brooklyn Boiler Repair Company of Brooklyn, New York from 1962 to 1991. In Mr. Herlihy's answers to interrogatories and at his deposition, he testified he was exposed to asbestos from products manufactured by Munaco NY.

Munaco NY was founded in the mid 1940's by William Munn. Its main office was located at 325 West 16th Street, New York, NY. During World War II, the company manufactured and supplied gaskets and packing for the Brooklyn Navy Yard. Thereafter, it manufactured gasket materials for the Brooklyn Boiler Repair Company, the General Electric Company, and the Consolidated Edison Company of New York, among others. Mr. Munn sold the company to Dennis Cullen in 1972. In 1995, Mr. Cullen formed Munaco SC in order to be closer to the company's primary client at its new location in South Carolina. Munaco NY was dissolved by Mr. Cullen approximately two years later on January 31, 1997.

Prior to Munaco SC's formation, Munaco NY had eight employees, six of whom decided to relocate to South Carolina to work for Munaco SC. Mr. Denton Taylor, who chose not to relocate, purchased the right to use the name "Munaco" in New York. He formed his own company, Denton Taylor Industries, Inc., and filed a certificate of doing business as "Munaco Packing and Rubber Company." As such, Denton Taylor Industries operated out of Munaco NY's former office space from 1995 until 2001.

Three former Munaco NY employees were deposed in connection with this action. Mr. Denton Taylor[1], who from 1988 to 1995 was responsible for "computerizing" the company, testified that when Munaco SC was formed Dennis Cullen took most of Munaco NY's machinery and equipment to South Carolina. Ms. Dianne Walsh[2], who began working for Munaco NY as a gasket cutter in 1983 and currently serves as Munaco SC's Secretary/Treasurer, testified that Munaco NY's accounts receivable and payable "came with us" when Munaco moved to South

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[1] Mr. Taylor was deposed on September 22, 2011 (Plaintiffs' exhibit 10).

[2] Ms. Walsh was deposed on April 11, 2012 (Plaintiffs' exhibit 11).

Carolina. (Plaintiffs' exhibit 11, p. 151). She testified that Munaco SC carried out the same business operations as Munaco NY, namely the manufacture, distribution and sale of gaskets and packing, among other products. Plaintiffs also deposed Munaco SC's current owner, Ms. Brenda DeWachter[3], who began working for Munaco NY in 1982 as a file clerk. She testified that Munaco NY's pension fund was continued by Munaco SC upon its formation. Both Ms. Walsh and Ms. DeWachter testified that Munaco NY and Munaco SC used the same logo.

It is undisputed that Munaco SC was not incorporated until 1995 and thus could not have directly caused Mr. Herlihy's injuries. The issue is whether Munaco SC may be deemed to have inherited the jurisdictional status of Munaco NY such that this court may adjudicate plaintiff's claims against it.

DISCUSSION

The ultimate burden in this case "rests on the plaintiff as the party asserting jurisdiction." *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dept 2003). However, courts do not generally require that plaintiffs make a *prima facie* showing of personal jurisdiction. Rather, to defeat a CPLR 3211(a)(8) motion, a plaintiff must only demonstrate that facts may exist to exercise personal jurisdiction over the defendant. *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408 (2d Dept 2005). Courts are required to view jurisdictional allegations in a light most favorable to the plaintiff and resolve all doubts in its favor. *Brandt v Toraby*, 273 AD2d 429, 430 (2d Dept 2000). However, plaintiffs must nonetheless allege jurisdictional contacts that, if proven, would be sufficient to demonstrate that the exercise of personal jurisdiction would be proper under either New York's general jurisdiction statute (CPLR 301) or New York's long-arm

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[3] Ms. DeWachter was deposed on April 11-12, 2012 (Plaintiff's exhibit 12).

statute (CPLR 302), and that the exercise of jurisdiction comports with the constitutional limits of due process. *See LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000).

Munaco SC argues it is entitled to dismissal because it is a South Carolina corporation that has no presence in New York. In opposition, plaintiffs argue that this court has personal jurisdiction over the defendant as successor-in-interest to Munaco NY. In this regard, it is settled in New York that a corporation which acquires the assets of another corporation generally is not liable for the torts of its predecessor unless it (1) impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction was entered into fraudulently to escape such obligations. *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983). The defendant argues that while the law may confer liability to a successor corporation, it does not similarly confer personal jurisdiction.

The defendant relies primarily on *Semenetz v Sherling & Walden, Inc.*, 21 AD3d 1138, 1140 (3d Dept 2005), *aff'd on other grounds*, 7 NY3d 194 (2006). In *Semenetz*, a child was injured while using a sawmill. The defendant, an Alabama corporation, had purchased all of the assets of another Alabama-based business which manufactured the sawmill. The defendant sought dismissal on the basis of lack of personal jurisdiction. The trial court ruled that under the "product line" exception, since the manufacturer was subject to long-arm jurisdiction, the defendant was likewise subject to such jurisdiction. The Third Department reversed. In this respect, the court opined (21 AD3d at 1140):

> The "product line" . . . exception[] to the successor liability rule deal[s] with the concept of tort liability, not jurisdiction. When and if [an] exception is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any

forum having in personam jurisdiction over the successor, but the exceptions do not and cannot confer such jurisdiction over the successor in the first instance.[4]

While the Court of Appeals affirmed on a different ground (*Semenetz, supra*, 7 NY3d at 202), it declined to rule on the jurisdictional issue. *Id.* at 199, n. 2 ("Because we do not adopt the 'product line' exception, we need not and do not address plaintiff's argument that personal jurisdiction may properly be imputed to a successor corporation whenever it is substantively responsible for its predecessor's allegedly tortious conduct.")

The defendant argues that the "gravamen" of the Court of Appeals' opinion "strongly counsels" against the imputation of jurisdiction on corporate successors.[5] However, the *Semenetz* case is different from this case and the defendant's reliance thereon is misplaced. In *Semenetz*, both the predecessor and the successor corporations were based in Alabama and ostensibly were the subject of an arm's length transaction. Here, the alleged predecessor company was domiciled and registered to do business in New York and apparently merely moved its business to South Carolina. More important, the Court of Appeals in *Semenetz* explicitly declined to discuss the jurisdictional issue having focused its analysis on why it rejected the plaintiff's theory of successor corporate liability based upon the product line doctrine. Unlike *Semenetz*, the case at

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[4] The "product line" doctrine in *Semenetz* was rejected by the Court of Appeals. Prior thereto, it was considered another potential exception to the general rule that a successor corporation is not liable for the torts of its predecessor. In order for such rule to apply, a party would have to show that "the injured party's remedy against the original manufacturer was destroyed by the successor's acquisition of all the predecessor's assets, the successor continued to manufacture the same line of products as the predecessor, the successor had the ability to assume the predecessor's risk-spreading role and the successor benefitted from the predecessor's goodwill." *Semenetz, supra,* at 1140.

[5] Defendant's Memorandum of Law, dated June 19, 2012, p. 14.

bar turns on the application of the four exceptions found in *Schumacher v Richards Shear Co.*, *supra*.

Moreover, several courts, including the Third Department in *Semenetz*, have explicitly acknowledged that a successor "may inherit its predecessor's jurisdictional status" based on the predecessor's transaction of business in the forum state. *Semenetz, supra*, 21 AD3d at 1140-1141 (internal citations omitted) ("While we recognize that in certain circumstances a successor corporation 'may inherit its predecessor's jurisdictional status' . . . the facts of the subject case do not fit within such a scenario"); *see Transfield ER Cape Ltd. v Indus. Carriers, Inc.*, 571 F3d 221, 224 (2d Cir. 2009) (*quoting Patin v Thoroughbred Power Boats*, 294 F3d 640, 653 [5th Cir. 2002]) ("[I]t is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court."); *In re Nazi Era Cases Against German Defendants Litig.*, 153 Fed. Appx. 819, 822 (3d Cir. 2005) ("The method by which corporations combine can render a 'successor in interest' to a prior corporation subject to personal jurisdiction under [CPLR] § 302 based on the predecessor's actions."); *Minn. Mining & Mfg. Co. v Eco Chem*, 757 F2d 1256, 1263 (Fed. Cir. 1985) ("When the successor in interest voluntarily steps into the shoes of its predecessor, it assumes the obligations of the predecessor's pending litigation if the court properly assumed jurisdiction over the predecessor and if the successor is properly served . . . . Were this not so, the owners of the property could merely transfer legal ownership of the assets from one shell corporation to another in a different jurisdiction, putting a party whose initial suit satisfied the jurisdictional requirements to the immense burden of chasing the involved assets from courtroom to courtroom."); *Time Warner Cable, Inc. v Networks Group,*

LLC, Index No. 09-CV-10059, 2010 U.S. Dist. LEXIS 93855, at *16 (SDNY Sept. 9, 2010) ("An allegation of successor liability against an entity whose predecessor is subject to personal jurisdiction can provide personal jurisdiction over the successor entity"); *Linzer v EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 213 (SDNY Nov. 13, 1995) (a successor in interest can be subject to personal jurisdiction based on the activities of its predecessor as long as the companies are one and the same and the predecessor continues to be part of the successor); *Fehl v S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977) (a successor corporation not transacting business in the state is subject to personal jurisdiction based on specific business transacted by its predecessor if the successor continued the predecessor's business under a different name).

These cases confirm that so-called successor jurisdiction may be imputed where a corporation is a "mere continuation" of another company or where there is a de facto merger between two entities. *See, e.g., In re Nazi Era Cases, supra*, at 823; *Cargo Partner AG v Albatrans, Inc.*, 352 F.3d 41, 46 n.3 (2d Cir 2003); *c.f. Schumacher, supra*. The mere continuation exception applies where "'it is not simply the business of the original corporation which continues, but the corporate entity itself.'" *Societe Anonyme Dauphitex v Schoenfelder Corp.*, No. 07-CV-489, 2007 US Dist. LEXIS 81496, at *14 (SDNY Nov. 1, 2007) (*quoting Ladjevardian v Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (SDNY May 12, 1977). "A continuation envisions a common identity of directors, stockholders and the existence of only one corporation at the completion of the transfer." *Ladjevardian, supra*, at 839. The de facto merger similarly is rooted in equity, and has the purpose of avoiding "patent injustice which might befall a party simply because a merger has been called something else." *Cargo Partner AG, supra*, at 46; *see also In Re New York City Asbestos Litigation*, 15 AD3d 254, 258 (1st Dept 2005) (purpose of de facto merger doctrine is "to ensure that a source remains to pay for the

victim's injuries"). In this respect, the First Department held in *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 (1st Dept 2001) (internal citations omitted):

> The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation . . . Not all of these elements are necessary to find a de facto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name.

The defendant asserts that these factors weigh against the imposition of successor jurisdiction, and relies on the fact that former Munaco NY employee Denton Taylor licensed the right to use the name "Munaco" in New York and continued to operate out of Munaco NY's corporate headquarters for several years after Munaco SC was formed. But the totality of the facts herein strongly suggest that Munaco SC was a mere continuation of Munaco NY, the only difference between the two being a change of location.

In this regard, the facts are that Munaco SC manufactured, distributed, and sold the same goods and products as Munaco NY to its same primary customer. Munaco SC employed six of Munaco NY's eight employees, and utilized most of Munaco NY's equipment, including gasket presses, a cutting table, steel tables, and desks. Dennis Cullen, the sole owner of Munaco NY, was also the sole owner of Munaco SC until he passed away in or about 2004. It was Dennis Cullen, not Denton Taylor, who signed dissolution papers for Munaco NY in January of 1997. This is evidence that Munaco NY was not, as defendant urges, sold to Mr. Taylor, but rather that Mr. Cullen simply continued his operation in South Carolina. A further fact evidencing this is that Munaco SC took with it to South Carolina Munaco NY's accounts receivable, accounts payable, and pension funds.

In light of these facts, and in accordance with the authorities recited above, I find that this

court may properly exercise personal jurisdiction over the continuation of such company in the form of Munaco SC. The relationship between Munaco NY and Munaco SC is such that "the jurisdictional contacts of one [may be deemed] the jurisdictional contacts of the other." *Patin, supra*, 294 F3d at 653. On this ground the motion to dismiss is denied.

Plaintiffs' request for further jurisdictional discovery is granted. CPLR 3211(d). Munaco SC maintains that it does not engage in a regular and systematic course of doing business in New York. *See Laufer v Ostrow*, 55 NY2d 305, 309 (1982). But it does not appear that plaintiffs have been given the opportunity to examine the defendant's customer lists, shipment requests, invoices, and the like. Plaintiffs should be permitted to discover such documents, subject to certain restrictions (i.e. confidentiality).

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendant Munaco Packing & Rubber Co., Inc.'s motion to dismiss is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 1.2.13

SHERRY KLEIN HEITLER
J.S.C.