Germain v A.O. Smith Water Prod. Co.
2013 NY Slip Op 32734(U)
October 23, 2013
Sup Ct, New York County
Docket Number: 190281/12
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190281/2012
GERMAIN, SR, ROBERT
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 001
CONSOLIDATION/JOINT TRIAL (JENKINS)

INDEX NO. 190281/12
MOTION DATE _____
MOTION SEQ. NO. 001

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 10.23.13.

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

Dated: 10.23.13

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

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

[* 2]

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

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ROBERT GERMAIN, SR.

Index No. 190281/12
Motion Seq. 001

Plaintiff,

DECISION & ORDER

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, Liberty Mutual Insurance Company ("Liberty Mutual") moves pursuant to CPLR § 602 to join this action with five similarly situated actions[1] on the issue of defendant Jenkins Bros. ("Jenkins") amenability to suit.[2] Liberty Mutual further seeks dismissal of the Actions pursuant to CPLR §§ 3211(a)(1), 3211(a)(7), and 3211(a)(8) for lack of personal jurisdiction, failure to state a cause of action, and on the basis of documentary evidence on the ground that Jenkins, as a fully dissolved and liquidated corporation, does not exist. Plaintiff Robert Germain, Sr. cross-moves: (1) pursuant to CPLR 311(a)(1)[3] and Business Corporation Law

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[1] In addition to this action, plaintiff's counsel has named Jenkins as a defendant in the following asbestos personal injury actions pending in this court: *Valensi v Air & Liquid Systems Corp., et al.*, Index No. 190340/12, *Antle v A.O. Smith Water Products, et al.*, Index No. 190360/12, *Khan v 3M Company, et al.*, Index No. 190515/12, *Cunningham v 3M Company, et al.*, Index No. 190129/13. The fifth action, *Lantenschuetz v A.O. Smith Water Products*, is currently pending in Schenectady County Supreme Court under Index No. 2334/12 (collectively, the "Actions").

[2] Jenkins Bros. is named as a defendant in this action "through its Insurers Liberty Mutual Insurance Company and FM Global f/k/a Affiliated FM Global Insurance Co." (Moving Affirmation, exhibit 2).

[3] CPLR 311(a) provides, in relevant part, that "Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive

("BCL") § 306[4] for an order declaring that service of process has been properly effectuated on Jenkins in the *Antle, Valensi*, and *Lantenschuetz* cases; (2) pursuant to CPLR § 602 for an order joining the Actions under the global index number for all New York City Asbestos Litigation ("NYCAL") cases (Index No. 40000/1988) on the issue of permitting substituted service of process[5] upon Jenkins by way of service upon its insurer Liberty Mutual, in respect of this action, the *Khan* and *Cunningham* actions, and any future NYCAL action in which Jenkins is named as a defendant; and (3) for an order directing the Clerk of the Court to enter a default judgment in plaintiffs' favor against Jenkins in the *Antle, Valensi*, and *Lantenschuetz* actions for failing to timely answer or otherwise move in those cases.

Defendant Jenkins Bros., which manufactured valves that are alleged to have contained asbestos, was incorporated under the laws of New Jersey in 1907. In or about 1944 it became authorized to do business in New York as a foreign corporation by filing with the New York Secretary of State. Jenkins surrendered its authority to do business in New York in 1985. In January of 1989 Jenkins filed a voluntary petition in bankruptcy for reorganization pursuant to

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service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for- profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law; . . ."

[4] BCL 306(b)(1) provides that "[s]ervice of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee . . . ."

[5] CPLR 311(b) provides that "[i]f service upon a domestic or foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article is impracticable under paragraph one of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs."

Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. (See 11 USC § 1101, *et seq.*). Jenkins' petition was converted to a Chapter 7 liquidation proceeding (See 11 USC § 701, *et seq.*) in October of 1989. The entire proceeding was closed in 1997. Jenkins was involuntarily dissolved by the New Jersey Department of State in 2004.

It is undisputed that Liberty Mutual has standing to bring this motion on behalf of Jenkins insofar as the Actions seek to collect against insurance policies issued to Jenkins by Liberty Mutual in the 1970's.[6] As set forth in *Saratoga Cnty. Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 (2003), "New York courts have treated standing as a common-law concept, requiring that the litigant have something truly at stake in a genuine controversy." The insurance policies at issue require Liberty Mutual to defend and indemnify Jenkins for tortuous conduct committed by Jenkins prior to Jenkins' dissolution, including the time periods complained of in these Actions.[7]

DISCUSSION

I. Service of process in *Antle, Valensi,* and *Lantenschuetz.*

Plaintiffs' counsel[8] had unsuccessfully attempted to serve Jenkins with process at addresses in Connecticut, New York, and Pennsylvania. They were also unable to serve Jenkins through CT Corporation System, which had formerly acted as Jenkins' agent for service of process in New

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6 The six plaintiffs at issue commenced their respective actions against Jenkins on the ground that it failed to warn them of the hazards associated with asbestos exposure from its valves and that such failure to warn was a proximate cause of their injuries.

7 See plaintiff's exhibit B at #LM-JB-000029; plaintiff's exhibit C at #LM-JB-000061; plaintiff's exhibit D at #LM-JB-000138; plaintiff's exhibit E at #LM-JB-000156.

8 The plaintiffs in the Actions are all represented by the same counsel.

York.

Thereafter plaintiffs' counsel identified and located Jenkins' former Treasurer, Mr. Thomas Martin, and former registered agent for service of process in Connecticut, Mr. Michael Widland. Plaintiff alleges that pursuant to CPLR 311(a) process was served on Jenkins in the *Antle*, *Valensi*, and *Lantenschuetz* matters by personal service on Mr. Martin and that service of process was also effectuated on Jenkins in the *Valensi* matter by personal service on Mr. Widland. CPLR 311(a) permits service of process on a corporation by personal service on a corporate officer, including the treasurer. *Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 272 (1980). Such service fulfills the "statutory aim [of CPLR 311] since their 'positions are such as to lead to a just presumption that notice to them will be notice to the * * * corporation.'" *Id.* (quoting *Tauza v Susquehanna Coal Co.*, 220 NY 259, 269 [1917]).

Liberty Mutual asserts that because Jenkins liquidated its assets approximately 16 years ago by way of the Chapter 7 bankruptcy proceeding[9] and was dissolved by proclamation of the New Jersey Secretary of State in 2004, there is no corporate entity which can be served. In support Liberty Mutual relies on a letter dated April 29, 2013 to the State of Connecticut Commercial Recording Division in which Mr. Widland resigned as an agent for service of process for Jenkins, noting that it had been out of business for almost 25 years. (Plaintiff's exhibit V). Likewise, the record indicates that Mr. Martin has declined to accept any further process, mailings, or default

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[9] There is no question that notwithstanding liquidation a corporate debtor cannot be discharged in a Chapter 7 proceeding (11 USC § 727[a][1]); nor do Chapter 7 proceedings dissolve a corporation, which must occur under state law. *See* Jackson v Corporategear, LLC, 04-cv-10132, 2005 WL 3527148, at *4 (SDNY Dec. 21, 2005).

notices.[10] In the cases cited by the parties on this issue[11], the defendant corporation's were sued at most a few years after they had dissolved. Here, far more time had passed between Jenkins' dissolution and the filing of the complaint, and thus it is reasonable to question whether service on Jenkins' former officers would satisfy due process. "[T]he guiding principle must be one of notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Raschel v Rish, et al.*, 69 NY2d 694, 696 (1986) (quoting *Mullane v Central Hanover Trust Co.*, 339 US 306, 314 [1950]) In the circumstances of this case, the court will at this time hold in abeyance decision on the issue whether Jenkins was validly served in the *Antle, Valensi,* and/or *Lantenschuetz* actions by service on its former treasurer, Mr. Martin, and its former agent, Mr. Midland[12], and accordingly declines to hold Jenkins in default for failing to answer the complaints served on Messrs. Martin and Midland in those matters.

II. Joinder

"'[A] motion seeking a joint trial pursuant to CPLR 602(a) rests within the sound discretion of the trial court.'" *Alizio v Perpignano*, 78 AD3d 1087, 1088 (2d Dept 2010) (quoting *Glussi v Fortune Brands*, 276 AD2d 586, 587 [2d Dept 2000]).[13] Generally, in order to join actions for trial,

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10 See Plaintiff's June 12, 2013 Memorandum of Law, p. 8.

11 *Cives Steel Co. v Unit Builders, Inc.*, 262 AD2d 164 (1st Dept 1999); *Ortiz v Green Bull, Inc., et al.*, 10-cv-3747, 2011 U.S. Dist. LEXIS 131598 (SDNY Nov. 14, 2011).

12 The court need not hold a *Traverse* hearing on this issue in light of my decision herein to allow substituted service on Jenkins via Liberty Mutual (see Section IV, *infra*).

13 CPLR 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue . . . and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

there must be a "plain identity between the issues involved in the two controversies." *Vigo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157, 161 (1970). "Consolidation or joint trials are 'favored by the courts in serving the interests of justice and judicial economy.'" *Bruno v Capetola*, 101 AD3d 785, 786 (2d Dept 2012) (quoting *Flaherty v RCP Assoc.*, 208 AD2d 496, 498 [2d Dept 1994]).

That branch of Liberty Mutual's motion which seeks to join the issue of Jenkins' amenability to suit is granted insofar as it pertains to the *Germain, Antle, Valensi, Cunningham*, and *Khan* matters. Good cause has been shown why the five matters pending in New York County should be joined in this regard and plaintiff does not oppose joinder on this issue.[14] In accordance with plaintiff's application, the court will consider the issues of Jenkins' amenability to suit and substituted service on Jenkins via Liberty Mutual in a global NYCAL context (Index No. 40000/1988). I decline to include the *Lantenschuetz* matter as it is pending in a court of coordinate jurisdiction in Schenectady County.[15]

Accordingly, the *Germain, Antle, Valensi, Cunningham,* and *Khan* matters are hereby joined for such purposes, and this court's determination thereon shall apply to all NYCAL matters overseen by plaintiff's counsel herein in which Jenkins is a defendant.

III. Jenkins' Amenability to Suit

Liberty Mutual argues that plaintiffs cannot obtain a judgment against Jenkins because it is not amenable to suit and as such they are prohibited from recovering damages from Liberty Mutual

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[14] Since the court declines to hold Jenkins in default in the *Antle, Valensi,* and *Lantenschuetz* matters, plaintiff's objection to their joinder is moot.

[15] The court is aware of its authority under CPLR 602(b), but the papers do not indicate that the parties have notified Justice Aulisi, who is presiding over *Lantenschuetz* in Schenectady County, of this motion or the issues herein.

pursuant to New York's Insurance Law and the insurance policies at issue. In this regard, New York Insurance Law § 3420 grants an injured party a cause of action against a tortfeasor's liability insurer if a judgment obtained against the insured remains unsatisfied.[16] Consistent with this statute, the insurance policies hereunder require that prior to commencing a direct action against Liberty Mutual the injured party must first obtain a judgment against Jenkins; they further declare that the bankruptcy or insolvency of the insured does not relieve Liberty Mutual of its obligations.[17]

Jenkins was incorporated in New Jersey and is subject to New Jersey's Business Corporation

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[16] New York Insurance Law § 3420 provides in relevant part:

(a) No policy or contract insuring against liability for injury to person . . . shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

(1) A provision that the insolvency or bankruptcy of the person insured, or the insolvency of the insured's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract.

(2) A provision that in case judgment against the insured or the insured's personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

[17] Plaintiff's exhibit B at #LM-JB-000029, ¶ 5. "Action against company. No action shall lie against the company, unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

Act, N.J. Stat § 14A:1-1, *et seq.* Pursuant to N.J. Stat. § 14A:12-1(g), Jenkins was automatically dissolved on July 28, 2004 by proclamation of the New Jersey Secretary of State for failure to file annual reports. (Moving Affirmation, exhibit 12). Under N.J. Stat. § 14A:12-9, Jenkins' corporate existence continued despite its dissolution.[18]

Liberty Mutual contends that once the winding up process of a dissolved New Jersey corporation is completed there is no longer a corporation against which suits may be commenced.

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[18] N.J. Stat. § 14A:12-9, entitled "Effect of dissolution", provides:
(1) Except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business except for the purpose of winding up its affairs by
(a) collecting its assets;
(b) conveying for cash or upon deferred payments, with or without security, such of its assets as are not to be distributed in kind to its shareholders;
(c) paying, satisfying and discharging its debts and other liabilities; and
(d) doing all other acts required to liquidate its business and affairs.
(2) Subject to the provisions of subsection 14A:12-9(1), and except as otherwise provided by court order, the corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred. In particular, and without limiting the generality of the foregoing,
(a) the directors of the corporation shall not be deemed to be trustees of its assets and shall be held to no greater standard of conduct than that prescribed by section 14A:6-14;
(b) title to the corporation's assets shall remain in the corporation until transferred by it in the corporate name;
(c) the dissolution shall not change quorum or voting requirements for the board or shareholders, nor shall it alter provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws;
(d) shares may be transferred until the record date of the final liquidating distribution or dividend to shareholders;
(e) the corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred;
(f) no action brought against any corporation prior to its dissolution shall abate by reason of such dissolution.
(3) The right of the corporation to sell its assets and the right of a shareholder to dissent from such sale shall be governed by Chapters 10 and 11 in the same manner as if dissolution had not occurred.
(4) A dissolved corporation may condition the payment to its shareholders
(a) of any partial liquidating distribution or dividend on the surrender to it of the share certificates on which the distribution or dividend is to be paid for endorsement to reflect such payment; or
(b) of the final liquidating distribution or dividend on the surrender to it for cancellation of the share certificates on which the distribution or dividend is to be paid.

In this regard, section (1) of N.J. Stat. § 14A:12-9, upon which Liberty Mutual relies, establishes a finite post-dissolution list of activities that a dissolved corporation is permitted to undertake for the purpose of winding up its business. The activities identified in section (2) of N.J. Stat. § 14A:12-9, which include the ability to sue and be sued as if dissolution had not occurred, are subject to no such limitation because they do not constitute the carrying on of business of the dissolved corporation. If Liberty Mutual's interpretation of New Jersey law is that a dissolved corporation is only amenable to suit until it is finished winding up its affairs were correct, the ability to sue and be sued would be included under N.J. Stat. § 14A:12-9(1), not N.J. Stat. § 14A:12-9(2). Similarly, if all of the activities listed in N.J. Stat. § 14A:12-9(2) were intended to be limited to the winding up process, the New Jersey Legislature would have had no reason to draft two subsections to address this issue.

Liberty Mutual relies heavily on *Global Landfill Agreement Grp. v 280 Dev. Corp., et al.,* 992 F.Supp 692 (DNJ 1998), in which the court granted a dissolved corporation's motion to dismiss pursuant to N.J. Stat. § 14A:12-9 because it had wound up its affairs prior to the commencement of the action. The court held that "[o]nce the corporation finishes [the winding up] process, it ceases to exist. A corporation may not be sued in perpetuity." *Id.* at 695.

The *Global* court observed that the plaintiff "pointed to no authority in New Jersey or in this district to support the position that a corporation which has wound up and distributed all of its assets is subject to suit." *Id.* Yet an analogous issue had already been addressed by the New Jersey Supreme Court in *Hould v John P. Squire & Co.*, 81 NJL 103 (1911). In *Hould*, the sheriff attempted to serve the summons on the defendant corporation's agent but was informed that the corporation had voluntarily dissolved. The court determined that service on the agent was

nonetheless proper. In so doing, the court interpreted N.J. Stat. § 14:13-4[19], the predecessor to N.J. Stat. § 14A:12-9, and concluded that "corporations of this state are suable in tort after and notwithstanding dissolution, on causes of action theretofore arising." *Id.* at 106.

The *Hould* decision was cited with approval in *Int'l Union of Operating Engineers, Local 68, AFL-CIO v RAC Atlantic City Holdings, LLC, et al.*, No. 11-cv-3932, 2013 US Dist. LEXIS 11413 (DNJ Jan. 29, 2013), which was decided 15 years after *Global Landfill* by the same District Court of New Jersey. In *Int'l Union*, the plaintiff sought to nullify a New Jersey Limited Liability Company's ("LLC") dissolution so that the LLC could be sued in the action. The court denied that request, holding that "New Jersey's LCC Act does not allow cancelled entities to be served, prosecute, or defend suit." *Id.* at *30. However, the court unequivocally held that the New Jersey Legislature did not place the same limitation on suits against dissolved corporations (*Id.* at *34)[20]:

> [T]he New Jersey legislature had the choice to create such a right of action but chose not to. *Compare* N.J. Stat. Ann. § 42:2B-50 (prohibiting suits against an LCC following its cancellation) *with* N.J. Stat. Ann. § 14A:12-9(2)(e) (a provision in New Jersey's Corporation Act which allows legal actions "by and against the corporation in the same manner [after it has been dissolved] as if dissolution did not occur."); *see also Johnson v Four States Enters., Inc.*, 355 F. Supp. 1312, 1318 (E.D. Pa. 1972), *aff'd*, 495 F.2d 1368 (3d Cir. 1974) ("[U]nder New Jersey Law, a corporation after dissolution may be sued for a cause of action in tort [or contract] arising before such dissolution, and process may be served on the registered agent of the corporation.") (*citing Hould v. John P. Squire & Co.*, 81 N.J.L. 103, 79 A. 282 (N.J. 1911)).

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[19] According to *Higi v Elm Tree Village*, 114 N.J. Super. 88, 92 (1971), N.J. Stat. § 14:13-4 provided that "[a]ll corporations, whether they expire by their own limitation or be annulled by the legislature or be otherwise dissolved, shall be continued bodies corporate for the purposes of prosecuting and defending suits by or against them, of enabling them to settle and close their affairs, of disposing of and conveying their property and of dividing their capital, but not for the purpose of continuing the business for which they were established."

[20] *C.f.* McKinney's Cons Laws of NY, Book 1, Statutes, § 240 ("where a law expressly described a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").

The majority of courts that have ruled on this issue have agreed that a New Jersey corporation is amenable to suit even after the winding up process has been completed. *See In re Krafft-Murphy Co.*, 62 A3d 94, 103 (Del Ch 2013) (New Jersey "statutorily provide[s] for the endless continuation of a dissolved corporation."); *Gilliam v Hi Temp Prods., et al.*, 260 Mich App 98, 123 (2003) ("Unlike Michigan, California, New Jersey, and Alaska have not followed the Model Business Corporation Act (1984) by establishing time limits for claims against a dissolved corporation."); *Johnson v Four States Enterprises, Inc.*, 355 F. Supp. 1312, 1319 (ED Pa. Dec. 13, 1972), *aff'd* 495 F2d 1368 (3d Cir. 1974) ("under New Jersey Law, a corporation after dissolution may be sued for a cause of action in tort arising before such dissolution . . . ."); *Dr. Hess & Clark, Inc. v Metalsalts Corp.*, 119 F. Supp. 427, 429 (DNJ Mar. 4, 1954) (noting that "New Jersey has, by statute, preserved the right of suit" against dissolved corporations); *Newmark v Abeel*, 102 F. Supp. 993 n.1 (SDNY Mar. 3, 1952) (dissolved New Jersey corporations are subject to suit "for an indefinite period").

Liberty Mutual's reliance on this court's decision in *Herlihy v A.F. Supply Corp*, Index No. 190149/11 (Sup. Ct. NY Co. Jan. 10, 2012) is misplaced. This court dismissed the *Herlihy* complaint against an Alabama corporation which had dissolved in 2007 pursuant to Alabama law. Alabama law provides that a dissolved Alabama corporation is competent to be sued for only two years after publication of its dissolution notice. (See Ala. Code §§ 10A-2-14.01 - 10A-2-14.05). While survival statutes similar to the one at issue in *Herlihy* are utilized by a number of states, no such statute exists in New Jersey.

Accordingly, the court declines to follow *Global Landfill*. Instead, and consistent with *Hould, Int'l Union*, and the plain meaning of N.J. Stat. § 14A:12-9, I find that New Jersey Law

permits suit against Jenkins. In turn, the plaintiff may seek to obtain a judgment against Jenkins and consequently commence a direct action against Liberty Mutual under New York Insurance Law § 3420.

IV. Substituted Service on Jenkins via Liberty Mutual

CPLR 311(b)[21] vests this court with the discretion to direct an alternative method for service of process should it determine that the methods set forth in CPLR 311(a) are "impracticable."[22] Here, plaintiffs' counsel has clearly satisfied this standard in light of their efforts.

In "devising appropriate forms of alternate service", courts "have wide latitude to 'fashion . . . means adapted to the particular facts of the case before [them].'" *Snyder v Energy Inc.*, 19 Misc. 3d 954, 960 (NY Civ. Ct. 2008) (quoting *Dobkin v Chapman*, 21 NY2d 490, 498 [1968]).[23] It is settled that substituted service may be effectuated on a defendant's liability insurer if it is the real party-in-interest and is contractually bound to defend and indemnify the defendant. *See Cives Steel Co. v Unit Builders, Inc.*, 262 AD2d 164 (1st Dept 1999); *Rego v Thom Rock Realty Co.*, 201 AD2d 270, 270 (1st Dept 1994); *Esposto v Ruggerio*, 193 AD2d 713, 714 (2d Dept 1993); *Saulo v Noumi*, 119 AD2d 657 (2d Dept 1986). In fact, substituted service of this nature has been explicitly permitted in New York state asbestos actions. *See Cobb v Polaroid*, Index No. 3677/10 (Sup. Ct.

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21 See n.3, *supra*.

22 Professor David D. Siegel has characterized CPLR 311(b) as allowing "the court to invent a method upon a showing that the plaintiff can't make timely service on the corporation by the prescribed methods." (Siegel, New York Practice [5th ed.], p. 117).

23 While the *Dobkins* court addressed substituted service on individuals pursuant to CPLR 308(5), that statute was the legislative model for CPLR 311(b). The rationale for *Dobkin* and its progeny applies equally here. *See* Legislation Report, COMMITTEE ON CIVIL PRACTICE LAW AND RULES, Report No. 144, S. 6812, A. 11024 (1998) ("CPLR 311(b) allows a plaintiff seeking to serve any of the entities covered by CPLR 311(a) to effect substituted service in a similar manner as is provided for substituted service upon a natural person under CPLR 308(5).")

Oswego Co. Aug. 10, 2011); *Massorana v A.C.&S., Inc., et al.*, Index No. 6035/02 (Sup. Ct. Onondaga Co. Aug. 30, 2004).[24] Under the circumstances of this case, I find that substituted service upon Jenkins via Liberty Mutual is the most effective and efficient means to apprise Jenkins of this action and all other NYCAL actions in which it is named as a defendant.

CONCLUSION

The court has considered Liberty Mutual's remaining contentions and finds them to be without merit. Accordingly, it is hereby

ORDERED that Liberty Mutual's motion to dismiss the complaint as against Jenkins in the *Germain*, *Antle, Valensi, Cunningham*, and *Khan,* and *Lantenschuetz* actions is denied in its entirety; and it is further

ORDERED that plaintiff's motion for an order directing the Clerk of the Court to enter a default judgment in its favor against Jenkins in the *Antle, Valensi*, and *Lantenschuetz* actions is denied in its entirety; and it is further

ORDERED that within 20 days of entry of this order, plaintiffs' counsel is directed to serve copies of the complaints in the *Germain*, *Antle, Valensi, Cunningham*, and *Khan* actions on Jenkins by substituted service on Liberty Mutual, and proof of such service shall be deemed good and sufficient service as to Jenkins; and it is further

ORDERED that copies of this decision shall be placed in the *Germain*, *Antle, Valensi, Cunningham*, and *Khan* files under their respective existing index numbers, and a copy shall be placed in the global NYCAL file bearing Index No. 040000/1988; such order shall be deemed to

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[24] Plaintiff's exhibits X & Y, respectively.

bear the following caption:

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NEW YORK CITY ASBESTOS LITIGATION **Index No. 40000/1988**

This document applies to:

ALL BELLUCK & FOX, LLP CASES IN WHICH JENKINS BROS. IS A DEFENDANT

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and it is further

ORDERED that the Clerk is directed to mark his records accordingly.

This constitutes the decision and order of the court.

DATED: 10.23.13

SHERRY KLEIN HEITLER
J.S.C.