North v Adam Opel AG
2015 NY Slip Op 32794(U)
September 15, 2015
Supreme Court, Albany County
Docket Number: AOI228/2014
Judge: Richard T. Aulisi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LARRY NORTH and
CLAUDIA NORTH,

Plaintiffs,

-vs-

ADAM OPEL AG, et al.,

Defendants.

DECISION AND ORDER

Index #A01228/2014
RJI #01-14-115902

The plaintiffs commenced the within action to recover damages for personal injuries allegedly incurred by Larry North, resulting from his exposure to various asbestos containing products. The plaintiffs commenced this action on December 10, 2014, by filing a summons and complaint in the Albany County Clerk's Office. Issue was subsequently joined and discovery has been conducted pursuant to an expedited schedule. This matter is currently scheduled for trial commencing October 6, 2015.

The defendant, Adam Opel AG (Opel), has made a motion to dismiss the plaintiffs' complaint, pursuant to CPLR §3211, for lack of personal jurisdiction. The defendant seeks to dismiss the motion on the theory that this Court has neither general nor specific personal jurisdiction over it because it has no principal place of business in New York State and the plaintiffs' complaint is devoid of any allegations of Opel engaging in any in-state activity. Subsequently, the plaintiffs opposed the defendant's motion on the basis that further discovery is necessary on the issue of personal jurisdiction.

The plaintiff, Larry North, was diagnosed with malignant mesothelioma in June of 2014. He alleges that he has developed mesothelioma as a result of his exposure to various asbestos containing materials. For the purpose of the within motion to dismiss, he alleges his exposure occurred because of his work on various automobiles. The plaintiff provided a list of vehicles at his deposition that he recalled working on. Of the 19 vehicles listed, plaintiff avers that he owned a 1972 Opel GT which he acquired used from a private sale in or about 1980. Plaintiff

alleges that he was exposed to asbestos containing materials from the 1972 Opel GT because of the brake work he performed on it.

Defendant is a foreign corporation located in Germany that manufactures vehicles. For the purposes of its general personal jurisdiction argument, the defendant relies on Daimler AG v Bauman (134 S.Ct. 746 [2014]), alleging that a corporation is only subject to general jurisdiction when it is incorporated in or has a principal place of business in the forum state, or is deemed to be otherwise "at home" in that state. Defendant submitted an affidavit and a supplemental affidavit from Joerg Bienzelser, who is Senior Counsel of Product Development & Engineering at Opel in its legal department. In his affidavits, Mr. Bienzelser avers that the defendant has never been incorporated or had a principal place of business in New York. Plaintiffs, in their opposition papers, appear to concede that this Court does not have general personal jurisdiction over the defendant. Conversely, the plaintiffs argue that specific personal jurisdiction can be established pursuant to New York State's long-arm statute (*see* CPLR 302).

Although the defendant avers that in 1972 a total of 12,805 units of the Opel GT were wholesaled to General Motors Corporation (GM), a United States company, it maintains that it had no further involvement beyond the sale. Defendant did not have any control over where the units were sold. Furthermore, the defendant does not have any information, within its current records, regarding where the units were shipped[1]. Nevertheless, the defendant argues that the plaintiffs need to, but will be unable to, demonstrate a substantial nexus between the alleged acts of the defendant and New York State.

Defendant contends that Mr. North cannot recall from whom he purchased the vehicle and where the purchase occurred. Moreover, the defendant alleges that the plaintiffs have failed to present any evidence of where the vehicle was manufactured and how it got to New York. In his affidavits, Mr. Bienzelser avers that defendant has never owned, operated or controlled dealerships in New York or the United States of America; does not have (or had) any authorized or franchised dealerships in New York; does not conduct any operations in New York and was

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[1] Upon review of the papers, it appears more probable than not that the wholesale units were sent to the state of Michigan.

not involved in any way in the marketing of Opel GTs in the United States or in the production or distribution of any marketing materials. Additionally, the defendant argues that due process requires that it be sued in New York based on its affiliation with the state and it should not be "haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts" (Burger King Corp. v Rudzewicz, 471 US 462, 472 [1985][internal quotation marks omitted]).

Pursuant to CPLR § 302(a)(3)(ii), a court may exercise personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to [a] person . . . within the state . . . if [the non-domiciliary] expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Since the plaintiffs are seeking to assert personal jurisdiction, they bear the burden of showing it (*see* Urifrer v SB Builders, LLC, 95 AD3d 1616 [3d Dept 2012]). The plaintiffs, however, are not required to make a prima facie showing of personal jurisdiction, but only need to demonstrate that they have made a sufficient start to warrant further discovery (*see* Gottlieb v Merrigan, 119 AD3d 1054 [3d Dept 2014]). Thus, if the plaintiffs can show that unavailable facts may exist giving the Court jurisdiction over the defendant and that their pleadings do not advance a frivolous position against the defendant, they may defeat the instant motion to dismiss (*see* Dine-A-Mate v J.B. Noble's Rest., 240 AD2d 802, 804 [3d Dept 1997]).

When considering the papers, the plaintiffs have "not established that additional discovery would disclose facts 'essential to justify opposition'" (Bouley v Bouley, 19 AD3d 1049, 1051 [4th Dept] quoting CPLR § 3211[d]). As support, plaintiffs submitted, among other documentation, General Motors Corporation's 2014 10-K, magazine articles published in the United States about Opel vehicles, marketing materials with "Opel" written on them and "Opel" advertisements.[2] Said papers fail to provide "any reasonable explanation as to why the facts essential to justify opposition to dismissal of [the complaint] could not be stated" (Atlas Feather Corp. v Pine Top Ins. Co., 128 AD2d 578 [2d Dept 1987]). Moreover, the plaintiffs' arguments

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[2] The Court notes that the Opel corporation referenced in the plaintiffs' submissions may be a separate corporation from the defendant Adam Opel AG. On its face, the plaintiffs' submissions do not specifically identify defendant as the branch of "Opel" indicated or that the defendant had any involvement in the production of said materials.

are speculative; therefore, the Court is not obligated to permit further discovery on the issue of personal jurisdiction (*see* Klein v Jamor Purveyors, 108 AD2d 344 [2d Dept 1985]). Based on the foregoing, the Court determines that the evidence proffered by the plaintiffs does not warrant a sufficient start to necessitate further discovery (*see* Gottlieb v Merrigan, 119 AD3d 1054 [3d Dept 2014]).

The Court also notes that extensive discovery has been conducted on the merits. In his deposition testimony, Mr. North could not identify the manufacturer of the brakes that he removed from the 1972 Opel GT automobile and with respect to the new brakes that Mr. North put on the car, these brakes were not manufactured by the defendant, Opel. Thus, Mr. North was unable to identify any asbestos component (brakes) of the defendant that he may have removed from the 1972 Opel GT. The plaintiffs are relying upon circumstantial evidence in assuming that the brake materials were the original equipment on the vehicle, where the record reveals that Mr. North purchased the car when it was eight years old and had 25,000 miles on it.

Accordingly, the defendant's motion to dismiss the plaintiffs' complaint for lack of personal jurisdiction is granted, without costs.

This writing constitutes a Decision of the Court.

Signed this 15th day of September, 2015, at Johnstown, New York.

HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

MARLENE J. DION
Deputy County Clerk

10/02/2015