Cerutti v A.O. Smith Water Prods., Co.
2017 NY Slip Op 31117(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 190009/2016
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
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Index 190009/2016

IN RE NEW YORK CITY ASBESTOS LITIGATION
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DAVID CERUTTI and STEVEN CERUTTI, as Co-Executors for the Estate of ADRIANO CERUTTI, and ANITA CERUTTI, Individually

Plaintiffs,

-against-

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

Defendants
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Plaintiff Adriano Cerutti ("Mr. Cerutti" or "Plaintiff") alleges that he developed mesothelioma as a result of his alleged exposure to asbestos-containing products while working at the machine shop of the Stella D'Oro factory in Bronx, between 1963 and 2001. As is relevant to this motion he alleges exposure to asbestos as a result of his work on brake and clutch systems manufactured by Baruffaldi S.P.A. s/h/a Baruffaldi S.P.A. (hereafter "Baruffaldi" or "Defendant").

Baruffaldi Defendant moves under Case Management Order (hereafter "CMO") Section III, Paragraph B to appeal the January 13, 2017 written recommendation of Special Master Shelley Rosoff Olsen (hereafter the "Recommendation"), which directed Baruffaldi to produce its person most knowledgeable on the issue of New York sales.[1] Defendant also seeks a protective order pursuant to CPLR §3103 (a).[2] Defendant objects to the Recommendation, arguing that it incorrectly assumes that Defendant sold its products in New York. Baruffaldi asserts that because it never

[1]The Recommendation does not address where the deposition is to be held.

[2]Defendant also separately moved to dismiss this action based on lack of jurisdiction, and that motion was adjourned pending this decision.

marketed, shipped, or sold its product in New York, it cannot produce someone with knowledge of New York sales. Defendant also asserts that it (1) never owned property in New York; (2) never performed services in New York; (3) never transacted any business in New York; (4) never sold or commercialized its products in New York; and (5) never had any direct or indirect connection with New York. Thus, Defendant claims that it never "purposely availed" itself of the New York market.[3]

In support of its motion, Baruffaldi submits the affidavit of Virgilio Barbieri, who worked at Baruffaldi from 1966 through 1979, first as a mechanic designer and then as an assistant in manufacture processing. Since 1992, Barbieri was a technical expert. Barbieri explains that Defendant is an Italian manufacturer with headquarters in Tribiano, Italy (the fact of which is not disputed). He asserts in a conclusory fashion that Defendant never marketed, sold, shipped or delivered its products in New York. He further asserts in a conclusory fashion that Defendant never conducted business in New York; never committed a tortious act in New York; and never owned, used, or possessed property in New York. Barbieri also states that from 1967 to 1991, an Italian company Siemens Elettra S.P.A., now known as Siemens S.P.A. (also a defendant in this action) marketed, sold and shipped products manufactured by Defendant and was commissioned "to exclusively sell products manufactured" by Defendant.[4]

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[3]Baruffaldi also observed that Plaintiffs' opposition implicitly concedes that New York does not have general jurisdiction because the opposition does not mention *Daimler AG v. Bauman* (134 S Ct 746 [2014]) or even argue that general jurisdiction exists. Baruffaldi is correct and Plaintiffs stated at oral argument that they do not make any argument that general jurisdiction exists (3/28/17 Oral Argument Tr at 6).

[4]It is not clear whether Defendant's products were to be sold only in Italy, or whether Siemens SPA ("Siemens") had an exclusive contract to sell in Italy, which did not preclude Siemens from selling elsewhere. The affidavit provides that "Siemens was commissioned to exclusively sell products manufactured by Baruffaldi S.P.A. in Italy." The affidavit was

Baruffaldi further highlights that it provided responses to Plaintiffs' written interrogatories. It also argues that while it could no longer locate a copy of a contract between it and Siemens, that contract is irrelevant because it is between two Italian companies and related to a transaction in Italy.

Defendant also claims that Plaintiffs are attempting to establish that New York has jurisdiction over it "because one of BARUFFALDI's products made its way to New York." Defendant asserts that "even if Siemens sold and shipped a BARUFFALDI product to New York, a claim that we do not concede, New York would still lack jurisdiction over BARUFFALDI pursuant to J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011)." Defendant notes that in that case, a British company manufactured a 3-ton metal shearer that was sold to a New Jersey company by an Ohio distributor and caused injury in New Jersey. While the British manufacturer regularly attended trade shows in the United States, it never attended one in New Jersey. The United States Supreme Court held that New Jersey lacked jurisdiction over the British company because the British company did not "purposely avail" itself of the New Jersey market. Defendant observes that New York courts have applied *J. McIntyre* to New York's long arm statute, citing *Darrow v. Hetronic Deutschland* (119 AD3d 1142 [3d Dept 2014]); *Waggaman v. Arauzo* (117 AD3d 724 [2d Dept 2014]) and *Carrs v. Avco Corp.* (124 AD3d 710 [2d Dept 2015]).

In opposition, Plaintiffs highlight Mr. Cerutti's identification of Baruffaldi brakes and clutches on many of the automated lines used in the factory production, including the breadstick line, which Mr. Cerutti installed, maintained and repaired (NYSCEF Doc. 209, Plaintiff's deposition at 96, 110, 260, 266) and which he identified as a source of his asbestos exposures (*id.* at 111, 264-65,

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translated from Italian to English; the translation from one language to another may have caused this ambiguity.

271). Plaintiffs point to Mr. Cerutti's testimony that those products had been installed at Stella D'oro in the 1970s (*id.* at 261) and continued to come into Stella D'oro "until [he] retired" (*id.* at 318). Plaintiffs also point out that Mr. Cerutti ordered new Baruffaldi brakes of various sizes "through the stockroom" at Stella D'oro, and "on the small one we had to replace more often" (*id.* at 267-68). They note Mr. Cerutti's testimony that the new Baruffaldi brakes "came in most of the time in a wooden box, crate, you know, whatever the size was" (*id.* at 273) and the box would contain "the clutch and the brakes" (*id.* at 274). Plaintiffs point to Mr. Cerutti's description of the Baruffaldi clutches in different sizes "about twelve inches and six inches" (*id.* at 277).

Plaintiffs also maintain Barbieri's affidavit merely states that Baruffaldi commissioned Siemens to sell Baruffaldi products, and only Baruffaldi products, in Italy but Barbieri does not indicate whether any other distributor also sold Baruffaldi's products in Italy. More significantly, Plaintiffs argue, Barbieri's affidavit says nothing about whether Baruffaldi relied upon other distributors, including distributors for markets within the United States. Thus, Plaintiffs argue that nothing in the affidavit is inconsistent with distribution to the United States – or to New York, as Mr. Cerutti's testimony established must have occurred.

Plaintiffs distinguish Defendant's argument under *J. McIntyre* (that no personal jurisdiction exists because an isolated product fortuitously "made its way" to the forum state), and point to evidence that reflects that far more than one isolated product made its way to New York. Plaintiff cites to Baruffaldi's website which indicates that, regarding such products as brakes and machine tools, the company "sells this product line and provides service all over the world thanks to sales managers and technical services operating in the most industrialized Countries" (NYSCEF Doc. 211). They further note the company's statement that "Baruffaldi has developed a sales and service

organization all over the world. . . . Furthermore, thanks to a net of agents and distributors, it is ensured a direct contact in many countries" (*id.*). Defendant's website also displays, among its "net of agents and distributors," an entity located in Houston, Texas (*id.*). Thus, Plaintiffs maintain that they made a sufficient start which supports their entitlement to the deposition ordered by the Special Master, under such cases as *Venegas v. Capric Clinic* (2017 NY Slip Op. 00936 at *1 [1st Dept 2017] ["In opposition to the doctor's showing of the lack of personal jurisdiction over him . . . plaintiff made a 'sufficient start' to warrant discovery concerning whether the doctor has jurisdictional contacts with the State of New York sufficient to support the exercise of jurisdiction under CPLR 302(a)(1)"]).

In reply, Baruffaldi asserts that contrary to Plaintiffs' suggestion, *J. McIntyre* is not distinguishable on the basis that more than one Baruffaldi product found its way to New York. Defendant stresses that *J. McIntyre* held that a transaction by a distributor-- a separate legal entity- - is insufficient to support specific jurisdiction over a foreign manufacturer. Defendant stresses that *J. McIntyre* was equally clear that purposeful availment with the forum State is necessary. Defendant maintains that merely sending products to the United States is not alone sufficient to justify personal jurisdiction in New York. This is true, Defendant maintains, even if the foreign defendant knows or expects that its products will wind up in a particular forum. Citing Plaintiff's deposition, Defendant also asserts that Mr. Cerutti had no personal knowledge as to the origins of the products from the stockroom.

Baruffaldi further stresses that snapshots of its current website in 2017 are totally irrelevant and prejudicial to prove and/or even provide an inference of a global sales initiative by Baruffaldi during the time of Mr. Cerutti's employment. The best Plaintiffs can do, Defendant argues, is point

to an alleged distributor in Texas and even if this distributor bought Baruffaldi products and then sold them to New York, Defendant asserts that would still not support personal jurisdiction.

Discussion

The Special Master correctly found that the deposition was warranted. At oral argument, Plaintiffs honed their jurisdictional argument to CPLR § 302 (a) (3). Plaintiffs made a sufficient start based on Mr. Cerutti's specific identification of Defendant's products. The Barbieri affidavit is conclusory and even if certain statements are undisputed, Plaintiffs are entitled to discover how Defendant's products made their way to New York, whether directly or through an intermediary distributor or agent of Defendant, and the nature of those relationships.[5] *J. McIntyre* only involves a distributor.[6] Defendant acknowledged at oral argument that agents are treated differently for purposes of specific jurisdiction (3/28/17 Oral Argument Tr at 11-12). Additionally, even a distribution agreement can support jurisdiction over a non-domiciliary under certain circumstances. For example, in *Darrow*, cited by Defendant, the Court found that jurisdiction existed over a German company because it "targeted New York consumers through a network of distributors that rendered it likely that its products would be sold in New York" which would not offend due process if defendant's allegedly defective merchandise was the source of injury to a New York resident (119 AD3d 1142, *supra*).[7]

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[5]While Plaintiffs have not specifically disputed that Defendant does not own property in New York, Plaintiffs do take issue with Barbieri's other statements.

[6] According to LEXIS *J. McIntyre* is cited by 1,609 cases and articles.

[7]As noted by *UTC Fire & Security Americas Corp. v NCS Power, Inc.* (844 F Supp 2d 366 [SDNY 2012]) because no opinion in *J. McIntyre* commanded five votes, Justice Breyer's concurrence controls. He declined to adopt the plurality's holding that the mere foreseeability that goods could wind up in a particular state could never form a basis for the exercise of personal

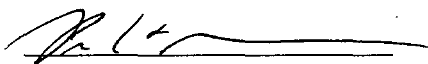
I also do not read the Recommendation as concluding that Defendant in fact sold the products at issue directly or indirectly to New York. The Special Master's Recommendation stated "No contract has been located. Plaintiff may depose a person most knowledgeable on the issue of NY sales." This language is shorthand for allowing Plaintiffs to depose Defendant in order to determine how Defendant's products could have made their way to New York, whether directly or through an intermediary distributor or agent, as this discovery is required to support specific jurisdiction under CPLR § 302 (a) (3).

It is hereby

ORDERED that the motion is denied and the Recommendation is confirmed.

This constitutes the Decision and Order of the Court.

Dated: May 19, 2017



J.S.C.

HON. PETER H. MOULTON
J.S.C.

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jurisdiction; his concurrence did not foreclose the possibility that a court might exercise jurisdiction where there is a "regular course of sales" of defendant's goods in the forum state, or "something more."