Matter of Grabowski v A.O. Smith Corp.
2018 NY Slip Op 31753(U)
July 25, 2018
Supreme Court, New York County
Docket Number: 190267/2017
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
IRENE GRABOWSKI, as Personal Representative of the Estate of ALEX GRABOWSKI,
Plaintiffs,

- against -

A.O. SMITH CORPORATION, *et al*,
Defendants.

INDEX NO. 190267/2017
MOTION DATE 06/06/2018
MOTION SEQ. NO. 008
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on The Scotts Miracle-GRO Company's motion to dismiss the Amended Complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendant The Scotts Miracle-Gro Company's ("Miracle-Gro") motion to dismiss Plaintiffs' Third Amended Complaint (hereinafter the "Amended Complaint") and all cross-claims against it pursuant to CPLR §3211(a)(8), is granted.

Plaintiff's deceased Alex Grabowski, a New Jersey resident his entire life, was diagnosed with mesothelioma in 2017. Plaintiff alleges Mr. Grabowski was exposed to asbestos in a variety of ways. Plaintiff alleges exposure to The Scotts Company LLC's ("Scotts") asbestos-containing products when using Scotts Turf Builder, topsoil, seed, pre-mixed soil, and miracle-gro on his family lawn in Union, New Jersey from 1957 through 2017 (Moving Papers Ex. H). Mr. Grabowski testified that he would typically apply Turf Builder three times a year, which would result in him inhaling the allegedly asbestos-containing dust that was produced (*Id*). Mr. Grabowski testified that he would purchase the Scotts Turf Builder from a nursery in Springfield, New Jersey, or from a Home Depot in Union, New Jersey (*Id*). Plaintiff commenced this action on September 11, 2017 to recover for injuries resulting from Mr. Grabowski's exposure to asbestos (*Id* at Ex. A).

Miracle-Gro is the parent company of Scotts since 2004, the year of its inception. Miracle-Gro is an Ohio limited liability company with its principal place of business in Marysville, Ohio (Affidavit of Kathiea Uttley). Scotts was a "wholly owned subsidiary" of ITT Company, an "international business conglomerate" with its headquarters in New York from 1971 to 1986 (Opposition Papers Exs. 20, 21). Plaintiff alleges that Miracle-Gro is registered to do business in New York because Scotts allegedly maintains a research facility in New York for the purpose of testing soil. Plaintiff further alleges that Miracle-Gro operates at least four facilities across New York through Scotts, has employees in New York, and is subject to New York taxes.

Miracle-Gro now moves to dismiss Plaintiff's Amended Complaint and all cross-claims against it pursuant to CPLR §3211(a)(8). Miracle-Gro contends that this Court does not have personal jurisdiction over it because Mr. Grabowski's exposures occurred outside of the State of New York, Mr. Grabowski did not reside in the State of New York, Miracle-Gro is not incorporated in New York and does not maintain its principal place of business here, therefore there is no general jurisdiction.

Furthermore, Miracle-Gro contends that Plaintiff's claims do not arise from any of Miracle-Gro New York transactions, and Miracle-Gro did not commit a tortious act within the State of New York or without the state of New York that caused an injury to person or property within the State of New York, therefore there is no specific jurisdiction. (CPLR §302[a][1], [2] and [3]). Plaintiff opposes the motion contending that this Court does have personal general jurisdiction and long-arm jurisdiction over Miracle-Gro.

"On a motion to dismiss pursuant to CPLR §3211, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 729 NYS2d 425, 754 NE2d 184 [2001]). A motion to dismiss pursuant to CPLR §3211(a)(8) applies to lack of jurisdiction over the defendant. Jurisdiction over a non-domiciliary is governed by New York's general jurisdiction statute §301, and long-arm statute §302(a).

The plaintiff bears the burden of proof when seeking to assert jurisdiction (Lamarr v Klein, 35 AD2d 248, 315 NYS2d 695 [1st Dept. 1970]). However, in opposing a motion to dismiss, the plaintiff needs only to make a sufficient start by showing that its position is not frivolous (Peterson v Spartan Indus., Inc., 33 NY2d 463, 354 NYS2d 905, 310 NE2d 513 [1974]).

General Jurisdiction:

"General Jurisdiction permits a court to adjudicate any cause of action against the defendant, wherever arising, and whoever the plaintiff" (Lebron v. Encarnacion, 253 F.Supp3d 513 [EDNY 2017]). To demonstrate jurisdiction pursuant to CPLR §301, the plaintiff must show that the defendant's "affiliations with [New York] are so continuous and systematic as to render them essentially at home in" New York (Goodyear Dunlop Tires Operations, S.A. v Brown, 131 S. Ct. 2846 [2011]; Daimler AG v Bauman, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014], Magdalena v Lins, 123 AD3d 600, 999 NYS2d 44 [1st Dept. 2014]). "For a corporation the paradigm forum for general jurisdiction, that is the place where the corporation is at home, is the place of incorporation and the principal place of business" (Daimler AG, *supra*). Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal place of business (*Id*).

This Court cannot exercise General Personal jurisdiction over Miracle-Gro because it is not incorporated, nor does it have its principal place of business in the State of New York. Miracle-Gro is an Ohio corporation, with its principal place of business in the State of Ohio. Plaintiff's contention that Miracle-Gro subjected itself to general jurisdiction because its subsidiary Scotts was once a "wholly owned subsidiary" of ITT Company, an "international business conglomerate" with its headquarters in New York from 1971 to 1986 is unpersuasive. Miracle-Gro did not exist until November 2004, and regardless, the relevant time frame for judicial inquiry under §301 is at the time of service of the summons and complaint (Andros Compania Maritima S.A. v Intertanker, Ltd., 714 F. Supp. 669 [SDNY 1989]; Reply Papers Affidavit of Katheia Uttley). Furthermore, Plaintiff's contention that Miracle-Gro is "at home" in New York because it is on the New York Stock Exchange is unavailing (Stroud v Tyson Foods, Inc., 91 F. Supp. 3d 381 [EDNY 2015]). Finally, the Plaintiff is unable to demonstrate "exceptional circumstances" for this Court to exercise General Personal Jurisdiction over Miracle-Gro.

Foreign Corporation registered to do business in New York:

Plaintiff argues that Miracle-Gro has consented to general jurisdiction in the State of New York because Scotts registered with the Secretary of State as a foreign corporation and appointed the New York State Secretary of State as an agent for the service of process. Miracle-Gro itself is not registered to do business in New York. "A foreign corporation is not present on the basis of control unless there is in existence at

least a parent-subsidiary relationship. The control over the subsidiary's activities must be so complete that the subsidiary is, in fact, merely a department of the parent" (Delagi v Volkswagenwerk AG of Wolfsburg, 29 NY2d 426, 328 NYS2d 653, 278 NE2d 895 [1972]; *see also* Pub. Adm'r of Cty. of N.Y. v Royal Bank of Canada, 19 NY2d 127, 278 NYS2d 378, 224 NE2d 877 [1967]). The four factors to determine whether a subsidiary is a mere department of the parent are: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree that the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control of the subsidiary's marketing and operational policies (Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F.2d 117 [2d Cir. 1984]).

The Plaintiff does not allege or present evidence that Scotts is merely a department of Miracle-Gro. Furthermore, Miracle-Gro maintains separate officers and directors (Reply Papers Affidavit of Katheia Uttley). Miracle-Gro did not consent to general jurisdiction because Scotts registered with the Secretary of State as a foreign corporation and appointed the New York State Secretary of State as an agent for the service of process.

Arguendo, even if the Plaintiff alleged or presented any evidence that Scotts was merely a department of Scotts Miracle-Gro, *Daimler* has changed the law for exercising general jurisdiction over a defendant. After *Daimler*, general jurisdiction can only be exercised where the defendant corporation is at home, that is its place of incorporation or its principal place of business (Daimler, *supra*). In *Gucci America*, the Second Circuit Court of Appeals stated that "in *Daimler* the Supreme Court addressed for the first time the question whether, consistent with due process, a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary.... Aside from an exceptional case, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's place of incorporation or its principal place of business" (Gucci America Inc. v Weixing Li, 768 F3d 122 [2nd Circuit 2014]). The court expressly cast doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business in the forum through a local branch. "The Second Circuit cautioned against adopting an expansive view of general jurisdiction after *Daimler*" (Chatwal Hotels & Resorts LLC., v Dollywood Co., 90 F. Supp3d 97 [SDNY 2015]).

Federal District Courts in looking at this question post-*Daimler* have come to the conclusion that *Daimler* rendered this method of acquiring personal jurisdiction outmoded and inapplicable. The mere fact that a corporation is registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business. The Solicitation of business in New York without more substantial activities within the forum is insufficient to find a corporation's presence in the forum (Chatwal Hotels & Resorts, LLC. v Dollywood Co., 90 F. Supp3d 97 [SDNY 2015]; Wilderness USA, Inc., v DeAngelo Brothers, LLC., 265 F.Supp3d 301 [WDNY 2017];Minholz v Lockheed Martin Corporation, 227 F.Supp3d 249 [NDNY 2016]).

The mere fact Scotts registered to do business in New York, after *Daimler*, is insufficient to confer general jurisdiction in New York over the corporation.

Specific Jurisdiction:

"For the court to exercise specific jurisdiction over a defendant the suit must arise out of or relate to the defendant's contacts with the forum. Specific Jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction. When no such connection exists specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. What is needed is a connection between the forum and the specific claims at issue" (Bristol-Myers Squibb Co. v Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017]). "It is the defendant's conduct that must form the necessary connection

with the forum state that is the basis for its jurisdiction over it. The mere fact that this conduct affects a plaintiff with connections with a foreign state does not suffice to authorize jurisdiction" (*Id*; Walden v Fiore, 134 S. Ct. 1115 [2014]).

With CPLR §302(a)'s long-arm statute, courts may exercise specific personal jurisdiction over a non-resident when it: "(1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state, ...; or (3) commits a tortious act without the state causing injury to person or property within the state, ..., if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the state" (CPLR §302[a]).

This court cannot exercise Specific Personal jurisdiction under CPLR §302(a)(1) because there is no articulable nexus or substantial relationship between Miracle-Gro's in state conduct and the claims asserted. This section of the Statute is triggered when a defendant transacts business in New York and the cause of action asserted arises from that activity. The record before this Court establishes that the injuries asserted by the Plaintiff did not arise from any activity Miracle-Gro undertook within the state of New York. Mr. Grabowski admitted that the products at issue were purchased in New Jersey. Plaintiff's attempt to introduce evidence including Miracle-Gro's subsidiary Scotts' having a soil-testing facility and call centers located in New York is unavailing as it does not relate to this action.

This Court cannot exercise personal specific jurisdiction under CPLR §302(a)(2) because Miracle-Gro has not committed a tortious act within the state of New York. All of the alleged exposures to defendant's product occurred in the State of New Jersey. Exercise of specific jurisdiction under this section requires a defendant to be physically present in New York.

"CPLR §302(a)(3) which allows for jurisdiction over an out of state defendant who causes personal injury in New York by committing a tortious act elsewhere if it reasonably expects its act to have consequences in this state and derives substantial revenue from interstate or international commerce, was adopted for the purpose of broadening New York's long-arm jurisdiction so as to include non-residents who cause tortious injury in the state by an act or omission outside the state... .The amendment was not intended to burden unfairly non-residents whose connection with the State is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York" (Lebron, *supra*).

More is required than just an injury in New York. The plaintiff must establish that the defendant either "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce"(CPLR § 302[a][3]).

This court cannot exercise personal specific jurisdiction under CPLR §302(a)(3) because the injury did not occur in the State of New York. Mr. Grabowski was exposed to Miracle-Gro's subsidiary Scotts' products in New Jersey, meaning that New Jersey is the situs of the injury. Since the exposure and the injury- the original event- took place outside of the State of New York, Mr. Grabowski is not and has never been a resident of the State of New York, the New York courts cannot exercise jurisdiction (Bristol-Myers Squibb, *supra*; Lebron, *supra*).

Accordingly, it is ORDERED, that Defendant The Scotts Miracle-Gro Company's motion to dismiss Plaintiff's Third Amended Complaint and all Cross-Claims against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is

granted, and it is further,

ORDERED, that Plaintiff's Third Amended Complaint and all Cross-Claims against The Scotts Miracle-Gro Company are severed and dismissed, and it is further,

ORDERED, that the Defendant The Scotts Miracle-Gro Company serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 25, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE