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
BEVERLY CROZIER and DONALD CROZIER,
Plaintiffs,

- against -

AVON PRODUCTS, INC., *et al*,

Defendants.

INDEX NO. 190385/2016
MOTION DATE 06/20/2018
MOTION SEQ. NO. 008
MOTION CAL. NO. ____

The following papers, numbered 1 to 8 were read on Imerys Talc America, Inc. and Cyprus Amax Minerals, Co.'s motion to dismiss the 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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Imerys Talc America, Inc. ("Imerys") and Cyprus Amax Minerals, Co.'s ("CAMC," together hereinafter the "Moving Defendants") motion to dismiss Plaintiffs' Complaints and all Cross-Claims against them for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), or on the ground of *forum non conveniens* pursuant to CPLR §327(a), is denied.

Plaintiff Beverly Crozier, a citizen of Texas, was diagnosed with mesothelioma on April 6, 2016 (Opposition Papers Ex. 4). Plaintiffs allege Mrs. Crozier was exposed to asbestos in a variety of ways. Plaintiffs allege exposure to asbestos through Mrs. Crozier's use of cosmetic talcum powder, including Colgate's Cashmere Bouquet, Johnson & Johnson's Baby Powder and Shower to Shower, Avon's body powder, Coty's face and body powders, Lanvin's body powder, and Nina Ricci's body powders (*Id* at Exs. 3-5). Plaintiffs testified that Mrs. Crozier used these products beginning from when she was an infant in the 1940s through her diagnosis in 2016 (*Id*).

Plaintiffs allege that the Moving Defendants supplied asbestos-contaminated raw talc to Avon, in New York, for the manufacture of Avon's powder from at least the 1960s through 2015, prior to and during the time of Mrs. Crozier's exposure (*Id* at Ex. 8). Plaintiffs further allege that the Moving Defendants from at least 1978, also supplied, in New York, asbestos-contaminated raw talc to Kolmar laboratories, Inc., who also used it for the manufacture of Avon's Powder (*Id* at Exs. 17-18). The Plaintiffs commenced this action on December 23, 2016 to recover for injuries resulting from Mrs. Crozier's exposure to asbestos.

The moving defendants now move to dismiss the action pursuant to CPLR §3211 (a)(8) and §327(a) for lack of personal jurisdiction and for *forum non conveniens*.

Imerys alleges that it is a Delaware Corporation with its principal place of business in California. CAMC alleges that it is a Delaware Corporation with its principal place of business in Arizona. The Moving Defendants allege that they are not New York residents, they have no offices in New York, nor do they own or lease property in New York, they are not registered to do business in New York, have no New York address or bank account, do not mine, manufacture, research, develop, design or test talc or talcum powder in New York, and has never sued anyone in New York.

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

The Moving Defendants contend that this court does not have personal jurisdiction over them because Mrs. Crozier's exposures occurred outside of the State of New York, Mrs. Crozier did not reside in the State of New York, the Moving Defendants are not incorporated in New York and do not maintain their principal places of business here, and therefore, there is no general jurisdiction. Furthermore, the Moving Defendants contend that Plaintiffs' claims do not arise from any of the Moving Defendants' New York transactions, and that the Moving Defendants 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, and therefore, there is no specific jurisdiction (CPLR §302[a][1], [2] and [3]). Finally, the Moving Defendants contend that if this court finds that it can exert personal jurisdiction over them, this action should be dismissed on the ground of *forum non conveniens*.

Plaintiffs oppose the motion contending that this court does have personal general jurisdiction and long-arm jurisdiction over the Moving Defendants and that this court should deny the Moving Defendants' attempt to dismiss this action on the ground of *forum non conveniens*. The Plaintiffs further contend that if personal jurisdiction over the Moving Defendants cannot be established at this time, the motion should be denied to allow for jurisdictional discovery as they have made a "sufficient start."

"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 plaintiffs 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 the Moving Defendants because they are not incorporated, nor do they have their principal place of business in the State of New York. Defendant Imerys is a Delaware corporation, with its principal place of business in the State of California. Defendant CAMC is a Delaware Corporation, with its principal place of business in the State of Arizona. Furthermore, the Plaintiffs are unable to demonstrate "exceptional circumstances" for this court to exercise general personal jurisdiction over the Moving Defendants.

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]).

"Jurisdiction is proper under the transacting of business provision of New York's long-arm statute even though the defendant never enters New York, so long as the defendant's activities in the state were purposeful and there is a substantial relationship between the transaction and the claim asserted (McKinney's CPLR §302(a)(1), Al Rushaid v Pictet & Cie, 28 NY3d 316, 68 NE3d 1, 45 NYS3d 276 [2016]).

"A non-domiciliary defendant transacts business in New York when on their own initiative the non-domiciliary projects itself into this state to engage in a sustained and substantial transaction of business. However, it is not enough that the non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an "articulable nexus" or "substantial relationship with the defendant's transaction of business here. At the very least there must be a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim. This inquiry is relatively permissive and an articulable nexus or substantial relationship exists where at least one element arises from the New York contacts"(D& R. Global Selections, S.L., v Bodega Olegario Falcon Pineiro, 29 NY3d 292, 78 NE3d 1172, 56 NYS3d 488 [2017] *quoting* Licci v Lebanese Can. Bank, SAL, 20 NY3d 327, 984 NE2d 893, 960 NYS2d 695 [2012]).

This court can exercise specific personal jurisdiction over the Moving Defendants under CPLR §302(a)(1) because there is an articulable nexus or substantial relationship between their 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 Moving Defendants from the 1960s through 2015 (a period of approximately 50 years) sold to Avon and Kolmar Laboratories, and shipped into New York on a continuous basis, asbestos-contaminated talc for the manufacture of Avon talc powder, which was subsequently shipped throughout the nation. It is alleged that Plaintiff Mrs. Crozier's injury arose from the use of Avon talc powder containing the asbestos-contaminated talc shipped into New York by the Moving Defendants.

Plaintiff has established that long-arm jurisdiction should be exercised over the moving defendants under CPLR §302(a)(1). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

Forum non conveniens:

CPLR § 327(a) applies the doctrine of *forum non conveniens* flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case (Matter of New York City Asbestos Litig., 239 AD2d 303, 658 NYS2d 858 [1st Dept. 1997]; Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 797 NYS2d 89 [1st Dept. 2005]). In determining a motion seeking to dismiss on *forum non conveniens* grounds, "no one factor is controlling" and the Court should take into consideration any or all of the following factors: (1) residency of the parties; (2) the jurisdiction in which the underlying claims occurred; (3) the location of relevant evidence and potential witnesses; (4) availability of bringing the action in an alternative forum; and (5) the interest of the foreign forum in deciding the issues (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 467 NE2d 245, 478 NYS2d 597 [1984]). "The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by [the] court" (*Id*).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors in favor of dismissing the action based on *forum non conveniens*. It is not enough that some factors weigh in the defendants' favor. The motion should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs (Elmaliach v Bank of China Ltd., 110 AD3d 192, 971 NYS2d 504 [1st Dept. 2013]).

When the only nexus with the State of New York is that the corporate defendant is either registered or has its principal place of business in New York, the action is properly dismissed on the ground of *forum non conveniences* (Avery v Pfizer, Inc., 68 AD3d 633, 891 NYS2d 369 [1st Dept. 2009] *dismissing action on ground of forum non conveniens where plaintiff was resident of Georgia, his physician who recommended and prescribed drug lived in the state of Georgia, plaintiff ingested drug in Georgia, suffered his injuries in Georgia and all of his treating physicians and witnesses were in Georgia*; *see also* Farahmand, v Dalhousie University, 96 AD3d 618, 947 NYS2d 459 [1st Dept. 2012]; Becker v Federal Home Loan Mortgage Corp., 114 AD3d 519, 981 NYS2d 379 [1st Dept. 2014]).

However, when there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted (Travelers Cas. & Sur. Co. v Honeywell Int'l Inc., 48 AD3d 225, 851 NYS2d 426 [1st Dept. 2008] *denying dismissal on forum non conveniens where there was a substantial nexus between the action and New York, as most of the insurance policies at issue were negotiated, issued and brokered in New York*; *see also* Am. BankNote Corp. v Daniele, 45 AD3d 338, 845 NYS2d 266 [1st Dept. 2007] *denying dismissal on forum non conveniens where New York is the place where parties met on a regular basis and where during such meetings false representations and assurances were made and where defendant's bank accounts, a central part of the claimed fraudulent scheme, was located*).

Weighing all relevant factors, this court is of the opinion that the Moving Defendants failed to meet their heavy burden to dismiss this action based on *forum non conveniens*. In balancing the interests and convenience of the parties and the court's, this action should be adjudicated in New York: a) There are other Defendants that are New York Corporations and have their principal place of business in New York; b) documents related to the shipment of asbestos-contaminated talc from the Moving Defendants to Avon and Kolmar are located in New York; c) there are relevant facts giving rise to this action that occurred in New York, and d) there is a substantial nexus between this action and New York as the asbestos-containing talc was shipped into New York for the manufacture by Avon of the talc powder that allegedly caused Mrs. Crozier's injury. Under these facts, the action should not be dismissed as the "balance is not strong enough to disturb the choice of forum made by the Plaintiff" (Elmaliach, *supra*).

Accordingly, it is ORDERED, that Defendants Imerys Talc America, Inc. and Cyprus Amax Minerals, Co.'s motion to dismiss Plaintiffs' Complaints and all Cross-Claims against them for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), or on the ground of *forum non conveniens* pursuant to CPLR §327(a), is denied.

ENTER:

MANUEL J. MENDE

Dated: August 2, 2018 **J.S.C.**

MANUEL J. MENDEZ
J.S.C.

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