

**Aston v Algoma Hardwoods, Inc.**

2018 NY Slip Op 31968(U)

August 13, 2018

Supreme Court, New York County

Docket Number: 160588/2015

Judge: Manuel J. Mendez

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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 KATHERINE ASTON and JOHN ASTON,

Plaintiffs,

INDEX NO. 160588/2015

- against -

MOTION DATE 08/01/2018

ALGOMA HARDWOODS, INC., et al,

MOTION SEQ. NO. 003

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on Dykes Lumber Company, Inc.'s motion to dismiss the Complaint:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Dykes Lumber Company, Inc.'s ("Dykes") motion to dismiss the Plaintiffs' Complaint and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted.

Plaintiff Katherine Aston, a life-long citizen of New Jersey, was diagnosed with mesothelioma on September 23, 2015 (Moving Papers Ex. 3). Plaintiffs allege Mrs. Aston was exposed to asbestos through her husband Mr. Aston's asbestos-laden clothes. Mr. Aston, a career carpenter, worked for the Jersey City Board of Education for twenty-seven (27) years beginning in 1971 or 1972 (Opposition Papers Ex. D). Mr. Aston alleges he was exposed to asbestos dust while working on construction projects, including while using Dykes' products.

Dykes is a New Jersey company with its principal place of business in Weehawken, New Jersey (Id at Ex. 6). Prior to 1973, Dykes had its principal place of business in New York (Opposition Papers Ex. F). Dykes maintains five (5) lumber yards in New York (Id at Ex. G). Dykes is registered to do business in New York.

Dykes moves to dismiss Plaintiffs' Complaint against it pursuant to CPLR §3211(a)(8). Dykes contends that this court does not have personal jurisdiction over it because Mrs. Aston's exposures occurred outside of the State of New York, Mrs. Aston did not reside in the State of New York, Dykes is not incorporated in New York and does not maintain its principal places of business here, and therefore, there is no general jurisdiction. Furthermore, Dykes contends that Plaintiffs' claims do not arise from any of Dykes' New York transactions, and that Dykes 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]).

Plaintiffs oppose the motion contending that this court does have personal jurisdiction and long-arm jurisdiction over Dykes. The Plaintiffs further contend that if personal jurisdiction over Dykes cannot be established at this time, the

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

**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 [1<sup>st</sup> 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 [1<sup>st</sup> 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*). The relevant temporal inquiry regarding a corporate defendant's place of incorporation and principal place of business is at the time the action is commenced (Lancaster v Colonial Motor Freight Line, Inc., 177 AD2d 152, 581 NYS2d 283 [1<sup>st</sup> Dept. 1992]).**

**This court cannot exercise general personal jurisdiction over Dykes because it is not incorporated, nor does it have its principal place of business in the State of New York. Dykes is a New Jersey corporation with its principal place of business in the State of New Jersey since 1973. The fact that Dykes had its principal place of business in New York prior to 1973 provides no guidance since the inquiry of general jurisdiction begins at the commencement of this action (Lancaster, *supra*). Furthermore, the Plaintiffs are unable to demonstrate "exceptional circumstances" for this court to exercise general personal jurisdiction over Dykes.**

#### **Foreign Corporation registered to do business in New York:**

**Plaintiffs argue that Dykes has consented to general jurisdiction in the State of New York because it is registered to do business in the state of New York.**

**However, *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 [2<sup>nd</sup> 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 through a local branch in the forum. “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 Dykes is 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 Dykes’ New York 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 Plaintiffs did not arise from any of Dykes’ activity within the State of New York. Plaintiffs assertion that Dykes maintained operations in New York prior to 1973 including where it maintained its clerical work and billing work is unavailing as this conduct does not have an articulable nexus or substantial relationship to Plaintiffs’ claims. Furthermore, the Plaintiffs admitted that the products used by Plaintiffs came from Dykes’ Weehawken lumber yard.

This court cannot exercise personal specific jurisdiction under CPLR §302(a)(2) because Dykes has not committed a tortious act within the state of New York. All of the alleged exposures to Dykes’ asbestos-laden products 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. Mrs. Aston was never exposed to Dykes’ products in New York, but rather exposed in New Jersey meaning that state is potentially the situs of the injury. Since the exposure and the injury -the original event-took place outside of the State of New York, Mrs. Aston 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*).

Plaintiffs fail to make a “sufficient start” for this court to grant jurisdictional discovery. Regarding specific jurisdiction, the relevant question is whether there is any “connection between the forum and the specific claims at issue” (Bristol-Myers Squibb, *supra*). Plaintiffs failed to demonstrate “that discovery would uncover facts establishing” jurisdiction (Hardwick v Auriemma, 116 AD3d 465, 983 NYS2d 509 [1<sup>st</sup> Dept. 2014]). Dykes is not “at home” in New York, and Mrs. Aston did not come into contact with any product manufactured by Dykes in New York.

Accordingly, it is ORDERED, that Defendant Dykes Lumber Company, Inc.’s motion to dismiss the Plaintiffs’ Complaint and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted, and it is further,

ORDERED, that Plaintiffs’ claims in the Complaint and all cross-claims asserted against Defendant Dykes Lumber Company, Inc. are severed and dismissed, and it is further,

ORDERED, that the Defendant Dykes Lumber Company, Inc. 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.

  
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MANUEL J. MENDEZ  
J.S.C.

Dated: August 13, 2018

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
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