

**Matter of Johnson v A.O. Smith Water Prods.**

2018 NY Slip Op 32698(U)

October 19, 2018

Supreme Court, New York County

Docket Number: 190454/2012

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:

ROSEMARY JOHNSON, Individually and as Executrix of the Estate of ERIC ALLEN JOHNSON Plaintiffs

INDEX NO. 190454/2012

MOTION DATE 10-10 -2018

-Against-

A.O. SMITH WATER PRODUCTS, et al., Defendants.

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion by defendant AURORA PUMP COMPANY, to dismiss for lack of personal jurisdiction.

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 AURORA PUMP COMPANY'S, motion to dismiss Plaintiff's claims and all cross claims asserted against it, for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is granted.

The decedent Eric Johnson died of Mesothelioma, due to exposure to asbestos, from inter alia, his service in the U.S. Navy on the U.S.S. Vancouver. Eric Johnson died before being deposed but his coworker, Dave Thomas, testified on his behalf. It is undisputed that decedent Eric Johnson worked on and was potentially exposed to asbestos in the engine rooms of the U.S.S. Vancouver.

The moving Defendant, Aurora, now moves to dismiss the complaint and all cross-claims for lack of personal jurisdiction under CPLR § 3211(a)(8). Defendant asserts that Plaintiff cannot establish personal jurisdiction under CPLR § 302(a)(1) because the Brooklyn Navy Yard at issue was a federal enclave. Defendant states that both the real property and jurisdiction over the Brooklyn Navy Yard were transferred to the U.S. Federal Government. This, thereby, took away the City and State of New York's jurisdiction over the Brooklyn Navy Yard. The Defendant presents evidence showing that said territory was ceded to the Federal Government. Defendant also points out that Plaintiff has presented no non-speculative (inferential) evidence that Defendant transacted business within the territorial bounds of New York State or contracted to supply goods or services within said territorial bounds (as opposed to the bounds of the

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

Navy Yard enclave). Lastly, Defendant contends that Plaintiff's pure inference that a possible visit of Aurora employees to the Brooklyn Navy Yard constitutes grounds for personal jurisdiction is without merit. Accordingly, Defendant argues that the complaint should be dismissed because the Plaintiff has not established personal jurisdiction under CPLR § 302(a)(1).

Defendant also argues that this court does not have personal jurisdiction over it under CPLR § 302(a)(2) because Plaintiff's alleged exposures leading to injury only occurred outside of New York State. In other words, Defendant contends there was no exposure to Asbestos from Aurora products within the territorial bounds of New York State. This is because Mr. Thomas only claims there was exposure to Aurora products while he and Plaintiff were aboard the U.S.S. Vancouver.

Defendant also discusses a number of other ways in which Plaintiff has failed to show that CPLR § 302(a)(2) provides personal jurisdiction over Aurora. For instance, Defendant avers that Plaintiff has offered no evidence that Aurora manufactured its pumps in New York State or shipped them thereto. Rather, Defendant notes that Plaintiff has only shown that the pumps were sent to the Brooklyn Navy Yard which is, according to accompanying documentation, a federal enclave located within the boundaries of New York State. Therefore, Defendant claims that Plaintiff has failed to present evidence that Aurora committed a tortious act within New York State. Accordingly, Defendant argues this case should be dismissed for lack of specific personal jurisdiction because there is no nexus between New York State and the Plaintiff's supposed exposure to asbestos from Aurora products.

Finally, Defendant argues that Plaintiff's request for additional jurisdictional discovery should not result in a denial of its motion to dismiss for lack of personal jurisdiction. This is because such jurisdictional discovery would be a fishing expedition. Moreover, all business transacted between the U.S. Navy and Aurora with respect to the U.S.S. Vancouver occurred at the Brooklyn Navy Yard which is a federal enclave; thus, Defendant argues it is unlikely that additional testimonial evidence about the transactions at issue would allow for personal jurisdiction under CPLR § 302.

Although Plaintiff alleges exposure to asbestos from Aurora Pump Company's valves occurred at sea (i.e., in Vietnam and the West Pacific region), he contests Aurora's account of how the pumps were sold and distributed for installation in the U.S.S. Vancouver. Specifically, Plaintiff alleges that Defendant fails to admit that the U.S.S. Vancouver was built at the Brooklyn Navy Yard and that for this reason, the Aurora pumps installed on the ship were sold to the Navy at, and distributed to New York State. Plaintiff further alleges that because of Defendant's sales practices, its dealings to sell the pumps to the New York ship builder occurred at the Brooklyn Navy Yard; and, consequently, Plaintiff claims there is a nexus between Mr. Johnson's exposure to the pumps and the transactions to sell these pumps. That being said, Plaintiff does not claim that there is general jurisdiction over the Defendant.

Plaintiff says that CPLR § 302(a)(1) is satisfied based on Defendant's dealings and transactions which allegedly occurred physically in New York State at the Brooklyn Navy Yard. Plaintiff alleges that it may be clearly inferred that the Aurora employee in charge of Naval sales at the time the U.S.S. Vancouver was constructed (in the early 1960s) would have visited the Brooklyn Navy Yard to market and sell its pumps that were installed on the ship. Based on this inference, plaintiff reasons that visiting the

Brooklyn Shipyard to initiate or finalize the sale of Aurora pumps was the Defendant's standard business practice from the years 1952-1990. Furthermore, Aurora's physical act of projecting itself into New York to sell its pumps to the Navy allegedly constitutes a transaction in New York which is substantially related to Mr. Johnson's personal injury claims at issue.

Plaintiff argues that CPLR § 302(a)(2) also provides specific personal jurisdiction over the Defendant because the Aurora pumps were allegedly placed into the stream of commerce for installation on the U.S.S. Vancouver in New York State. In this case, Plaintiff claims Aurora shipped its pumps directly to the Brooklyn Navy Yard without a middleman or distributor and, therefore, it placed the pumps into the stream of commerce, expecting them to be installed on ships built at the shipyard (including the U.S.S. Vancouver). As such, the Plaintiff claims that it is just fortuitous that Mr. Johnson's actual exposure occurred elsewhere. In the same vein, Plaintiff claims that shipping the pumps directly to New York State for installation aboard the U.S.S. Vancouver without an accompanying warning about asbestos hazards constitutes tortious conduct in New York State under a stream of commerce theory. Therefore, Plaintiff argues that a prima facie case of specific jurisdiction is established under CPLR § 302(a)(2).

Plaintiff pleads in the alternative that Defendant's motion to dismiss for lack of personal jurisdiction should be granted without prejudice pending further jurisdictional discovery. Also, if Defendant's motion to dismiss is granted, it should be contingent on the Defendant waiving its statute of limitations defense in Illinois.

#### General and Specific Jurisdiction:

General personal jurisdiction is not at issue here because Defendant claims it is not present and Plaintiff acknowledges this fundamental point of law.

On the other hand, specific personal jurisdiction is at issue. "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 to a foreign state does not suffice to authorize jurisdiction (See *Bristol Myers Squibb Co., supra; Walden v. Fiore*, 134 S. Ct. 1115 [2014])."

This court cannot exercise specific personal jurisdiction over Aurora Pump Company under CPLR § 302(a)(1) because there is no articulable nexus or substantial relationship between its 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. Plaintiff only alleges a "clear inference" that the Aurora employee in charge of Naval sales at the time the U.S.S. Vancouver was

constructed would have visited the Brooklyn Navy Yard to market and sell its pumps that were installed on the ship. As such, plaintiff infers that visiting the Brooklyn Shipyard to initiate or finalize the sale of Aurora pumps must have been the Defendant's standard business practice from the years 1952-1990. It is not, however, this court's place to make a decision, post-discovery on the mere basis of an inference, especially as concerns a very important part of the specific personal jurisdiction analysis (See *Peterson v. Spartan Indus., Inc.*, 33 NY2d 463 [1974], discussing the pre-discovery, as opposed to post-discovery standard for evaluating personal jurisdiction). Plaintiff also claims that Aurora's physical act of projecting itself into New York to sell its pumps to the Navy allegedly constitutes a transaction in New York which is substantially related to Mr. Johnson's personal injury claims at issue. Nonetheless, Plaintiff fails to put forth adequate evidence that Defendant actually projected itself into New York.

This court also cannot exercise personal specific jurisdiction over Aurora Pump Company under CPLR § 302(a)(2) because Defendant Aurora, has not committed a tortious act within the State. All of the alleged exposures to Defendant's product occurred abroad when the U.S.S. Vancouver was stationed at sea beyond the reach of New York jurisdiction. Exercise of specific jurisdiction under this section requires a defendant to be physically present in New York.

In *McGowan v. Smith* (52 N.Y.2d 268, 419 N.E.2d 321, 437 N.Y.S.2d 643 [1981]) the New York Court of Appeals affirmed the dismissal of the claims brought by a New York resident plaintiff, who was injured in Canada by the explosion of a fondue pot plaintiff had purchased in New York State, against a Japanese trading company.

The court in *McGowan v. Smith, supra*, held that "(1) several visits which representatives of trading company made to New York for purposes of general marketing research and ascertaining what type of products might be salable in New York could not form the basis for the exercise of in personam jurisdiction over the trading company, and (2) the injury did not occur in New York so as to provide the New York courts jurisdiction on the theory that the company had committed a tortious act outside of New York which resulted in injury in New York."

The instant case is more tenuous than *McGowan, supra*, in that Plaintiff claims that Johnson's exposure to the asbestos while the U.S.S. Vancouver was at sea is simply fortuitous; and, as such, the court should overlook the fact that there is no actual evidence presented which shows that Johnson was exposed to the asbestos at issue anywhere other than in foreign seas. It is not, however, this court's business to assume the presence of facts which are not otherwise shown to exist other than through speculation. Fortuity alone does not allow the court to simply assume the absence or presence of an important fact.

Plaintiff has not sufficiently established a basis for this court to exercise specific personal jurisdiction over the Defendant under CPLR § 302(a)(1) or (2). Therefore, the motion to dismiss for lack of personal jurisdiction is granted.

Plaintiff also requests that if Defendant's motion to dismiss for lack of personal jurisdiction is granted, it should be contingent on the Defendant waiving its statute of limitations defense in Illinois. It is not this court's place to impose a waiver of a statute of limitations that exists under Illinois law. Rather, plaintiff may seek relief to this effect in an Illinois court of law. (See *Ciers v O.L. Schmidt Barge Lines*, 285 Ill App 3d 1046, 221 Ill Dec 303, 675 NE2d 210 [1996]).

Accordingly, it is ORDERED that Defendant Aurora Pump Company's motion, pursuant to CPLR § 3211(a)(8), to dismiss the complaint and all cross-claims asserted against it for lack of personal jurisdiction is granted, and it is further

ORDERED that all claims in the complaint and all cross-claims asserted against Defendant Aurora Pump Company are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

Enter:

**MANUEL J. MENDEZ**  
**J.S.C.**

Dated: October 19, 2018

  
Manuel J. Mendez  
J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST       REFERENCE