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

JOSEPH WILLIAM CZULADA SR. and ROSEMARY CZULADA,

Plaintiffs,

- against -

AERCO INTERNATIONAL, *et al*,

Defendants.

INDEX NO.	190181/2017
MOTION DATE	01/30/2019
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to 7 were read on Aurora Pump Company's motion pursuant to CPLR §3211(a)(8) to dismiss the Complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6 - 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Aurora Pump Company's (hereinafter "Aurora") motion to dismiss the plaintiff's Complaint and all cross-claims asserted against it for lack of jurisdiction pursuant to CPLR §3211(a)(8), is denied.

Plaintiff, William Czulada, Sr., is a life-long resident of the State of New York. He was diagnosed with Mesothelioma on June 6, 2017. At his deposition plaintiff testified that he enlisted in the United States Navy in December of 1960 and left the service in January of 1964 with an Honorable Discharge (Mot. Exh. H, pgs. 36-37). He testified that after eight weeks at boot camp and twelve weeks in electrician's mate school at Great Lakes, Illinois, he was assigned to the U.S.S. Valley Forge stationed in Norfolk, Virginia (Mot. Exh. H, pg. 37). Plaintiff testified that he was not re-assigned and remained on the U.S.S. Valley Forge from 1961 until his discharge in 1964 at Long Beach, California (Mot. Exh. H, pg. 40-41).

He claims that initially the U.S.S. Valley Forge did maneuvers in the Norfolk Shipyard in Virginia, but eventually it traveled to three other ports, which he identified as Long Beach California, Pearl Harbor in Hawaii and Subic Bay in the Philippines (Mot. Exh. H, pg. 41). He testified that his only exposure to asbestos from Aurora's products was taking apart and replacing packing and gaskets on the pumps while repairing boilers during his service on the U.S.S. Valley Forge (Mot. Exh. H, pgs. 49- 50). He identified Aurora as one of nine manufacturers of asbestos pumps he worked on while serving on the U.S.S. Valley Forge and stated there was no difference between the products. He would measure and cut asbestos packing that was shaped like a rope while working with a machinist mate which resulted in his breathing the dust it created (Mot. Exh. H. pgs. 553-559).

Aurora was initially founded in Aurora, Illinois in 1919 and reorganized in 1927. In 1952 Aurora was acquired by New York Air Brake Company. In 1967 New York Air Brake Company and Aurora were acquired by General Signal. In 1968 Aurora moved its manufacturing facility to North Aurora, Illinois and it is still located there. In August of 1997 Aurora was acquired by Pentair, Inc. and

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

became part of the Pentair Pump Group. Pentair Inc. is incorporated under the laws of the State of Minnesota, with a principal place of business in Minneapolis (Mot. Exhs. E, F and G).

Aurora moves to dismiss the plaintiffs' complaint and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8).

Aurora argues that this court does not have personal jurisdiction over it because Mr. Czulada's exposures occurred outside of the State of New York, Aurora is not incorporated in New York and is part of Pentair Inc., a Minnesota Corporation that does not maintain its principal places of business in New York, so that there is no general jurisdiction. Furthermore, Aurora contends that plaintiffs' claims do not arise from any New York transactions, and that Aurora 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, specific jurisdiction does not exist (See CPLR §302 (a)(1),(2), (3) and (4)).

Plaintiffs oppose the motion contending that this Court does have jurisdiction over Aurora. Plaintiffs have conceded that there is no specific jurisdiction at issue pursuant to CPLR §302(a) (2), (3) and (4) (See Opp., pg. 1 of 7, para. 3, footnote 1). Plaintiffs argue that specific jurisdiction is at issue solely under CPLR §302 (a)(1) and that they are disputing general jurisdiction. It is argued by plaintiffs that during the period relative to Mr. Czulada's exposure, December of 1960 through January of 1964, Aurora was owned by, and was a division of New York Air Brake Company (hereinafter referred to as "NYAB"), a Delaware corporation that manufactured brakes and maintained offices for business in the State of New York (Opp. Exh. C, pgs. 74-75). Plaintiffs further argue that Aurora has admitted that it destroys documents after ten years and it has no records for the relevant time period of December of 1960 through January of 1964. It is plaintiffs' contention that a brochure from 1963 shows that NYAB had a "Factory Branch Sales Office" located in Long Island City, New York (Opp. Exhs. B and D). Plaintiffs claim that it would be reasonable to conclude that, during the relevant period, sales to the United States Navy of the pumps plaintiff was exposed to could have been made in New York.

"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 CPLR §301, and long-arm statute CPLR §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]). The defendant's course of conduct has to be voluntary, continuous and self - benefitting (Hardware v. Ardowork Corp., 117 AD 3d 561, 986 NYS 2d 445 [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*). The relevant 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 [1st Dept. 1992]).

This court can exercise general personal jurisdiction over Aurora because at the time of plaintiff's alleged exposure, December of 1960 through January of 1964, Aurora was a division of, and was owned by NYAB, a Delaware corporation which conducted business in the State of New York (Opp. Exh. D). The fact that NYAB had other "Factory Branch Sales Offices" in five other locations: Chicago, Illinios; Decatur, Georgia; Cleveland, Illinois; and Milwaukee, Wisconsin (Opp. Exh. D), does not mean that sales made to the United States Navy were conducted elsewhere. Defendant has not provided any proof and - given its destruction of documents every ten years - will be unable to support its contention that NYAB made sales to the United States Navy only from offices located outside of New York during the relevant time period.

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. Specif,ic 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" (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 (CPLR §302(a)(1)).

Bristol-Myers Squibb Co. v Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017], resulted in a change in the law. As a result of the change in the law, specific personal jurisdiction under CPLR §302(a)(1) requires that plaintiffs establish that there is an articulable nexus or substantial relationship between Aurora's alleged New York conduct and the claims asserted against it. 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.

Plaintiffs in opposition to dismissal pursuant to CPLR §3211(a)(8), provided a 1963 brochure - from the period relative to plaintiff's alleged exposure - showing that NYAB transacted business and conducted sales in New York (Opp. Exh. D). Aurora has stated it destroys records every ten years, and did not provide proof that NYAB's sales to the United States Navy were conducted in a sales office outside of New York (Opp. Exh. B). Plaintiffs have provided sufficient proof to meet their burden of establishing jurisdiction, warranting denial of defendant's motion.

Accordingly, it is ORDERED, that defendant Aurora Pump Company's motion to dismiss the plaintiff's complaint and all cross-claims asserted against it for lack of jurisdiction pursuant to CPLR 3211 (a)(8), is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 15, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**