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

RUSSELL LEAVITT and JOYCE LEAVITT,

Plaintiffs,

- against -

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

Defendants.

INDEX NO. 190240/2017
MOTION DATE 02/13/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by Rogers Corporation and plaintiffs cross-motion for discovery:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Rogers Company's motion for summary judgment pursuant to CPLR §3212 for plaintiffs' failure to establish exposure to its asbestos products and pursuant to CPLR §3211 (a)(8) and (c) for lack of jurisdiction, dismissing plaintiffs' claims and all cross-claims asserted against it, is denied. Plaintiff's cross-motion pursuant to CPLR §302 compelling the Roger's Company to respond to jurisdiction discovery, is denied.

Plaintiff, Russell Leavitt, alleges that as result of asbestos exposure he was diagnosed with mesothelioma on January 23, 2017. He was about 71 years old at the time of his diagnosis. Mr. Leavitt was deposed over a course of two days on April 17 and 19, 2018 (Mot. Cullinane Aff., Exhs. D and E, Cross-Mot. Weinstein Aff. Exh. 1). It is alleged that Mr. Leavitt was exposed to asbestos while working as a security analyst for Argus Research and at Smith Barney, and that each of these jobs required periodic on-site visits outside of his Manhattan office for purposes of writing research reports for investors (Mot. Cullinane Aff., Exh. D, pgs. 65, 69 and 84-85). Plaintiffs allege that Mr. Leavitt's second hand exposure to the asbestos in Rogers Company's (hereinafter referred to as "defendant") product, Bakelite (a generic name for phenolic molding compound), occurred when he visited a Square-D Plant in Cedar Rapids, Iowa between 1969 and 1975 (Mot. Cullinane Aff., Exh. D, pgs. 69, 71-73, 75-77). It is also alleged that Mr. Leavitt was exposed to defendant's Bakelite product when he visited the General Electric Facility in Schenectady, New York between 1969 and the mid-1980's (Mot. Cullinane Aff., Exh. D, pgs. 97 and Exh. E, pg. 368). During the entire time of Mr. Leavitt's alleged exposure to asbestos from defendant's product, from 1969 through the mid-1980's, he was a resident of the State of New York (Mot. Cullinane Aff., Exh. C).

Mr. Leavitt testified that while employed by Argus Research he visited the Square D plant in Cedar Rapids, Iowa between two and three times during the period of 1969 through 1975 to prepare reports (Mot. Cullinane Aff., Exh. D, pg. 76). He stated that he observed the manufacture of the Square D plant's Bakelite line of products, for a period of between 15 to 30 minutes during each visit to Cedar Rapids, Iowa (Mot. Cullinane Aff., Exh. D, pg. 73). Mr. Leavitt testified that the Square D plant was forming Bakelite by a process of dumping black pellets into a hopper to create a disc, which generated dust. Mr. Leavitt further testified that the disc was then moved to a molding machine to be shaped into the size needed for the product, a circuit breaker, and when it came out of the mold there were flashings that were removed and this created more dust. He claims that the workers

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

performed additional sanding while moving the circuit breaker into position in the breaker and that this also created dust. Mr. Leavitt testified that there was lots of dust from the work on Bakelite at the Square D plant in Cedar Rapids and that there were fans at the factory that blew the dust around (Mot. Cullinane Aff., Exh. D, pgs. 71-73). Mr. Leavit testified that he spent about half a day at the plant (Mot. Cullinane Aff., Exh. D, pg. 69).

Mr. Leavitt testified that he visited the General Electric facility in Schenectady New York while working at Smith Barney, at least two or three times, for a few hours each visit from about 1969 through the mid-1980's. He stated that while at the General Electric facility he visited a Bakelite line and saw them pouring pellets into a hopper, which gave off a huge amount of dust. Mr. Leavitt observed the Bakelite disc that came out of the hopper being sanded, creating more dust. The disc was molded and then shaped by more sanding to remove flashings, resulting in dust that he breathed in. The workers at the General Electric facility next placed the molded and shaped disc into a press and injected it into the end product. The process required sanding which created lots of dust (Mot. Cullinane Aff., Exh. D, pgs. 96-98, Exh. E , pgs. 369-372, 376-377). Mr. Leavitt testified that the General Electric facility in Schenectedy, New York was huge, that there were fans blowing around the dust, and that he breathed the dust in (Mot. Cullinane Aff., Exh. D, pg. 100).

Plaintiffs commenced this action on August 17, 2017 and subsequently amended the complaint four times (See Mot. Cullinane Aff., Exh. A). Defendant has appeared in this action and joined issue (Mot. Cullinane Aff., Exhs. A and B).

Defendant's motion seeks an Order granting summary judgment pursuant to CPLR §3212 for plaintiffs' failure to establish exposure to its asbestos products and pursuant to CPLR §3211 (a)(8) and (c) for lack of personal jurisdiction, dismissing plaintiffs' claims and all cross-claims asserted against it.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

In support of its motion for summary judgment defendant relies on the affidavits of David Sherman, Business Manager of Consumer Products (Mot. Cullinane Aff., Exh. G and Reply Aff. Exh. B). Mr. Sherman states that he has been employed by the defendant from 1985. Mr. Sherman relies solely on a review of defendant's records of sales to Square D, General Electric and three other companies (Mot. Collinane Reply Aff., Exh. B). Mr. Sherman states that the defendant sold asbestos containing thermosetting material but that it was the smallest in terms of quantity supplied, totaling between 5% and 25%, and it was never the exclusive supplier of the materials to any of the entities Mr. Leavitt alleges that he visited (Mot. Collinane Reply Aff., Exh. B). He claims that thermosetting molding materials were sold to General Electric at various locations for various applications, but there were no sales to General Electric's facility in New York (Mot. Collinane Reply Aff., Exh. B).

Mr. Sherman's affidavit relies solely on review of defendant's records for the period Mr. Leavitt alleges he was exposed. Mr. Sherman does not provide any other documentation in support of his conclusions that a smaller supply means Mr. Leavitt was not exposed to the defendant's product. Mr. Sherman's affidavit is "conclusory and without specific factual basis, and does not establish the prima

facie burden of a proponent of a motion for summary judgment" (Matter of N.Y.C. Asbestos Litig., 123 AD3d 498, 1 NYS3d 20 [1st Dept. 2014]).

Defendant argues that Mr. Leavitt's deposition testimony, the affidavit of David Sherman, and its responses to plaintiffs' interrogatories establish that: (i) Mr. Leavitt is unable to specifically identify any of defendant's products or related materials; (ii) plaintiff is unable to specifically state the relevant time period and at which locations he was exposed to defendant's products (iii) that the company never supplied materials to General Electric's facility in New York during the alleged relevant period.

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need "only show facts and conditions from which defendant's liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A Plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (Oken v A.C. & S. (*In re* N.Y.C. Asbestos Litig.), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiffs provide the deposition testimony of Square D's corporate representative Michelle Redfield, and defendant's representative David Sherman (Cross-Mot. Weinstein Aff., Exhs. 2 and 3). Ms. Redfield testified that from 1971 through 1978 defendant sold over 500 tons of RX462 asbestos molding compound to the Square D, Cedar Rapids, plant (Cross-Mot. Weinstein Aff., Exh. 2, pgs. 75-76). Ms. Redfield also testified that the Square D plant in Cedar Rapids did not go asbestos free until 1980 after the period of Mr. Leavitt's alleged exposure (Cross-Mot. Weinstein Aff., Exh. 2, pg. 79). Mr. Sherman confirmed in his deposition testimony that defendant manufactured a crocidolite asbestos reinforced molding material with a series number of 462 that was in the shape of black pellets. He further testified that small amounts of the 462 series with the crocidolite asbestos was sold starting in 1971(Cross-Mot. Weinstein Aff. Exh. 3, pgs. 72-74). Mr. Sherman also identified a product sold to Square D with series number 468, a chrysotile asbestos containing thermoset molding material that came in black pellets. Mr. Sherman testified that series number 468 was sold from the 1950's through the early 1970's (Cross-Mot. Weinstein Aff. Exh. 3, pgs. 78-90).

Mr. Sherman testified that defendant sold a product with series number RX660 that was asbestos containing thermoset molding material to General Electric through 1991 (Cross-Mot. Weinstein Aff. Exh. 3, pgs. 82-83). Mr. Sherman testified that the material was used to make an "iron skirt", the part of a clothes iron that was between the hot metal plate and the plastic parts held by a person's hand (Cross-Mot. Weinstein Aff. Exh. 3, pgs. 41-42). Mr. Sherman further testified that RX660 had about eight percent chrysotile asbestos in it from about 1965 through 1978 or 1979, and that two versions of the series, with and without asbestos, were manufactured from 1978 or 1979 through 1991. He testified the asbestos version of the series was sold to General Electric after 1978 or 1979, in black pellets in the shape of a grain of rice (Cross-Mot. Weinstein Aff. Exh. 5, pgs. 99-100).

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], Almonte v. 638 West 160 LLC, 139

A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018] citing to S.J. Capelin Assoc. v. Globe Mfg. Corp., 34 N.Y. 2d 338, 313 N.E. 2d 776, 357 N.Y.S. 2d 478 [1974]).

The deposition testimony of Square D and defendant's corporate representatives, provided by plaintiffs in opposition, together with Mr. Leavitt's testimony, raise credibility issues and issues of fact on causation. The alleged sales of defendant's asbestos containing product to Square D are within Mr. Leavitt's alleged exposure period of 1969 through 1975 and match his physical description. The defendant's alleged sales of RX660 to General Electric are within plaintiff's alleged exposure period of between 1969 and the mid-1980's and also match his description of the product. Mr. Leavitt was unable to provide definitive information because of the time that had elapsed since his alleged exposure. Mr. Leavitt's failure to provide specific information, does not mean defendant's products were not present or that he had no exposure to defendant's products. Plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of Mr. Leavitt's ability to provide a detailed description of defendant's product, warranting denial of summary judgment on causation.

Alternatively, defendant seeks to dismiss this action pursuant to CPLR §3211 (a)(8) and convert the relief to summary judgment pursuant to CPLR §3211 (c) for lack of jurisdiction. Defendant argues that this Court does not have general jurisdiction over it because Mr. Leavitt's exposures occurred outside of the State of New York, the defendant is not incorporated in New York, nor does it maintain a principal place of business in New York. Defendant also argues that plaintiffs' claims do not arise from any of the defendant's New York transactions, and 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, therefore there is no specific jurisdiction. (See CPLR § 302(a)(1), (2) and (3)).

Plaintiff opposes the defendants motion arguing that there has been sufficient evidence to challenge the defendant as to the existence of specific jurisdiction, pursuant to CPLR § 302(a)(1) and (2). Alternatively plaintiffs cross-move for additional jurisdictional discovery, specifically to determine the extent of defendant's sale of asbestos containing phenolic molding materials to General Electric's Schenectady, New York facility and the materials used by General Electric in the relevant manufacturing operations at the time of Mr. Leavitt's visits.

"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]).

<u>General Jurisdiction</u>:

"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.Supp. 3d 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 A.D. 3d 600, 999 N.Y.S. 2d 44 [1st Dept. 2014]). Absent "exceptional circumstances" a corporation is at home where it is incorporated or where it has its principal

place of business. 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 [1st Dept. 1992]).

Defendant is incorporated in the State of Massachusetts and although defendant provided conflicting testimony as to whether it has a principal place of business in Arizona or Connecticut, it did not identify the State of New York as a principal place of business (Mot. Collinane Aff., Exh. G and Exh. H response to Interrogatory No. 4). This court cannot exercise general personal jurisdiction over the defendant because it does not have sufficient affiliations with the State of New York. Plaintiffs have not demonstrated "exceptional circumstances" for this court to exercise general personal jurisdiction over the defendant.

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 (See Bristol Myers Squibb Co., Supra; Walden v. Fiore, 134 S. Ct. 1115 [2014])." "To justify specific personal jurisdiction over a non-resident defendant, a plaintiff must show that the claim arises from or relates to the defendant's contacts in the forum state" (In re MTBE Products Liability Litigation, 399 F.Supp2d 325 [S.D.N.Y. 2005]).

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]).

The decision in 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, this Court can exercise specific personal jurisdiction under CPLR §302(a)(1) when there is an articulable nexus or substantial relationship between the defendant's 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.

CPLR §302(a)(1) requires that (1) defendant has purposefully availed itself of the privilege of conducting activities within the state by either transacting business in New York or contracting anywhere to supply goods or services in New York, and (2) the claim arises from that business transaction or from the contract to provide goods or services"(Mckinney's CPLR §302(a)(1)). "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"(see D& R. Global Selections,

S.L., v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 78 N.E.3d 1172, 56 N.Y.S.3d 488 [2017] quoting Licci v. Lebanese Can. Bank, SAL, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 [2012]).

According plaintiffs the benefit of every possible inference in construing the evidence presented, they have shown through the deposition testimony of Mr. Leavitt and defendant's corporate representative Mr. David Sherman, that the asbestos molding compound was regularly sold to General Electric. Pursuant to CPLR § 302(a)(1) there is an articulable nexus or substantial relationship between defendant's in state conduct and the claims asserted. Mr. Leavitt's injury arose from exposure to defendant's product that was purchased by General Electric and shipped into New York by the moving defendant. Mr. Leavitt was a New York resident at the time of his alleged exposure within the State of New York to defendant's asbestos-laden products at the General Electric facility in Schenectady New York.

Specific jurisdiction pursuant to CPLR §302(a)(2) requires that the defendant commit a tortious act within the state of New York (see Mckinney's CPLR §302(a)(2), Siegel, N.Y. Pratice,§ 87 (6th edition) and Nick v. Schneider, 150 A.D. 3d 1250, 56 N.Y.S. 3d 210 [2nd Dept., 2017]).

Defendant's argument that the printout annexed to defendant's reply papers establishes there was no sales to General Electric in New York during plaintiff's alleged period of exposure, is unavailing (Mot. Reply Exh. A). The printout is: (1) redacted with no explanation; (2) only provides the name of the city to which the sale was made to, not the state; (3) provides the name of some General Electric facilities without locations (i.e. "GE Pilot Driver" and "GEN ELECTRIC"); and (4) shows sales to "GE, New York" under customer number 05982 in the month ending December 31, 1981 (Mot. Reply Exh. A). Customer number 05982 is listed only as "GEN ELECTRIC" with sales also occurring during the month ending December 31, 1983 (Mot. Reply Exh. A). Both 1981 and 1983 are within Mr. Leavitt's alleged period of exposure at the General Electric facility in Schenectady, New York, which he alleges occurred from about 1969 through the mid-1980's, and further supports the plaintiffs' claims that defendant regularly conducted business in the State of New York.

Plaintiffs have established that long-arm jurisdiction should be exercised over the defendants under CPLR 302(a)(1) and (2). Accordingly, the motion to dismiss for lack of jurisdiction pursuant to CPLR §3211 (a)(8) and to convert the relief to summary judgment pursuant to CPLR §3211(c), is denied.

There is no need to address the merits of the relief sought in the cross-motion. The defendant's motion is denied rendering the cross-motion, moot.

Accordingly, it is ORDERED that defendant Rogers Company's motion for summary judgment pursuant to CPLR §3212 for plaintiffs' failure to establish exposure to its asbestos products, and pursuant to CPLR §3211 (a)(8) and (c) for lack of jurisdiction, dismissing plaintiffs' claims and all cross-claims asserted against it, is denied, and it is further,

ORDERED that plaintiff's cross-motion pursuant to CPLR §302 compelling the Roger's Company to respond to jurisdiction discovery, is denied.

ENTER:

Dated: February 21, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
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