

<b>Holleman v Avon Prods., Inc.</b>
2019 NY Slip Op 33492(U)
November 26, 2019
Supreme Court, New York County
Docket Number: 190077/2018
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK

COUNTY PRESENT: MANUEL J. MENDEZ PART 13

Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

KARLENE HOLLEMAN,

Plaintiffs,

- against -

AVON PRODUCTS, INC., et al,

Defendants.

INDEX NO. 190077/2018

MOTION DATE 11/20/2019

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on Johnson & Johnson, Inc. and Johnson & Johnson Consumer Inc.'s motion to dismiss the Complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s ("JJCI") motion to dismiss Plaintiff's Complaint and all Cross-Claims against them for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), and pursuant to CPLR§327 for forum non conveniens is held in abeyance pending jurisdictional discovery.

Plaintiff Karlene Holleman, a life-long citizen and resident of the states of Michigan and Illinois, sustained injuries as a result of her alleged use of Johnson's Baby Powder (opposition papers Exhibit 1). Ms. Holleman alleges she was exposed to asbestos in Johnson & Johnson's Baby Powder when using it from 1947 through 1978 (opposition Exhibit 1). Ms. Holleman testified that her mother would use Johnson & Johnson's Baby Powder on her, that she purchased at the store, when she was approximately seven or eight years old, and then when she turned 11 or 14 years old, she started applying the Johnson & Johnson baby powder on herself, all over her body (Id at Ex. 1). Although Ms. Holleman visited New York on three occasions in 1960, 1964 and 1966 she never purchased or used Johnson & Johnson baby powder in New York (moving papers Exhibit C). Ms. Holleman purchased, used, and was exposed to Johnson & Johnson baby powder only in either the States of Michigan or Illinois (Moving Papers Ex. C). Ms. Holleman commenced this action on March 16, 2018 to recover for injuries resulting from her exposure to asbestos.

Johnson & Johnson is a New Jersey holding company with its principal place of business in New Jersey (Affidavit of Tina French Exhibit E). Johnson & Johnson does not sell or manufacture any products (Id). JJCI is a subsidiary of Johnson & Johnson and is a New Jersey Corporation with its principal place of business in New Jersey (Affidavit of Laura A. Donnelly Exhibit D). JJCI manufactured and distributed Johnson & Johnson's Baby Powder during the subject time period. JJCI does not own any property in New York (Id). JJCI does

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

not manufacture, research, develop, design, or test Johnson & Johnson's Baby Powder in New York (*Id.*).

Johnson & Johnson and JJCI (hereinafter the "J&J Entities") move to dismiss Ms. Holleman's Complaint and all Cross-Claims against them pursuant to CPLR §3211(a)(8) and CPLR §327(a). The J&J Entities contend that this court does not have personal jurisdiction over them because Ms. Holleman's exposures occurred outside of the State of New York, Ms. Holleman did not reside in the State of New York, Johnson & Johnson and JJCI 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 J&J Entities contend that Ms. Holleman's claims do not arise from any of the J&J Entities New York transactions, and that the J&J Entities 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 J&J Entities 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*.

Plaintiff opposes the motion contending that this court does have personal general jurisdiction and long-arm jurisdiction over the J&J Entities and that this court should deny the J&J Entities attempt to dismiss this action on the grounds of *forum non conveniens*. The Plaintiff further contends that if personal jurisdiction over the J&J Entities cannot be established at this time, the motion should be denied allowing for jurisdictional discovery as they have made a "sufficient start." Plaintiff claims that the J & J Entities shipped talc to Kolmar laboratories in New York for sampling, testing, manufacturing and distribution of Johnson & Johnson baby powder. It is alleged that Kolmar manufactured and distributed the Johnson & Johnson baby powder throughout the nation on behalf of the J&J Entities and that Ms. Holleman got injured as a result. It is alleged that this contact by the J&J Entities with New York subjects them to the Jurisdiction of the New York Courts.

"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 longarm 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*).

This court cannot exercise general personal jurisdiction over Johnson & Johnson because it is not incorporated, nor does it have its principal place of business in the State of New York. Johnson & Johnson is a New Jersey corporation with its principal place of business in the State of New Jersey. Plaintiff’s contention that Johnson & Johnson subjected itself to general jurisdiction because of several isolated events that Johnson & Johnson was involved in (including industry meetings that Johnson & Johnson employees attended in the 1970s, four (4) letters sent from Johnson & Johnson representatives to New York-based scientists, and two statements made to the *New York Times*) [Opposition Memorandum of Law; Exhibits 9-35] is unavailing since only “continuous and systematic” contacts can establish general personal jurisdiction (Daimler AG, *supra*). Furthermore, the Plaintiff is unable to demonstrate “exceptional circumstances” for this Court to exercise general personal jurisdiction over Johnson & Johnson.

This court is also not able to exercise general personal jurisdiction over JJCI because it is not incorporated, nor does it have its principal place of business in the State of New York. JJCI is a New Jersey corporation with its principal place of business in the State of New Jersey. The Plaintiffs do not allege or present evidence of any New York contacts on behalf of JJCI to demonstrate “exceptional circumstances” for this court to exercise general personal jurisdiction over JJCI.

#### 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]).

It is possible that this court cannot exercise specific personal jurisdiction under CPLR §302(a)(1) because there is no articulable nexus or substantial relationship between the J&J Entities’ 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. On the record before this Court it is possible that the injuries asserted by the Plaintiff arose from Johnson & Johnson’s activity within the State of New York. Plaintiff claims that the J&J Entities shipped talc to Kolmar laboratories in Port Jervis, New York and that Kolmar sampled, tested, mixed, blended, manufactured and distributed Johnson & Johnson baby powder, on behalf of the J&J Entities, from New York.

Plaintiff points to the deposition testimony of Pamela Lokatell, a quality control supervisor for Kolmar, who worked at their Port Jervis facility from 1980 to 1986 (see Lokatell deposition excerpts, exhibit 12). Ms. Lokatell stated at her deposition that she worked for Kolmar laboratories at their Port Jervis, New York facility, as a quality control supervisor from 1980 to 1986. She stated that while she was there Kolmar’s business was to produce color cosmetics and personal care products. They manufactured certain talcum powder products such as Johnson & Johnson baby powder, the small mini size...and several others for many companies. She believed that the product was to be part of a packet to be [gifted] to mothers when they exited the hospital. Kolmar mixed the talc with a fragrance and then filled it. The Johnson baby powder small size was blended and filled during the time period she worked at Kolmar in Port Jervis New York. She knows this because she had to review the batch, had responsibility for performing that review and participating in the release of the product.

What is not certain is when did Kolmar begin to sample, test, mix, blend, manufacture and distribute the product? to whom was this product released? Where was the product released? Where was the product distributed? who distributed the product and from where was the product distributed? When did Kolmar begin to manufacture the product and when did it cease manufacturing it? Was the product manufactured at Kolmar for sale to consumers? These questions and more prevent this court from deciding if there is jurisdiction under 302(a)(1) over the J&J Entities.

This court cannot exercise personal specific jurisdiction under CPLR §302(a)(2) because the J&J Entities have not committed a tortious act within the state of New York. All of the alleged exposures to JJCI’s Baby Powder occurred in the States of Michigan and Illinois. 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. Ms. Holleman was never exposed to JJCI’s products in New York, but rather exposed in the states of Michigan and Illinois, meaning those states are potentially the situs of the injury. Since the exposure and the injury -the original event- took place outside of the State of New York, Ms. Holleman is not and has never been a resident of the State of New York, the New York courts cannot exercise jurisdiction under CPLR§302(a)(3)(Bristol-Myers Squibb, *supra*; Lebron, *supra*).

However, Plaintiff has made 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*). Plaintiff has demonstrated that discovery is needed to determine if the contacts between the J&J Entities and Kolmar Laboratories in New York are substantially related to Ms. Holleman’s claims. Discovery is needed concerning whether the J&J Entities had sufficient jurisdictional contacts to support exercise of jurisdiction under the statute providing for personal jurisdiction over non-domiciliary that transact any business within the state, CPLR 302(a)(1) (Venegas v. Capric Clinic, 147 A.D.3d 457, 47 N.Y.S.3d 13 [1<sup>st</sup>. Dept. 2017]). The requested discovery could uncover facts establishing personal jurisdiction in New York ( FIMBank P.L.C. v. Woori Finance Holdings Co., Ltd., 104 A.D.3d 602, 962 N.Y.S.2d 114 [1<sup>st</sup>. Dept. 2013]).


Accordingly, it is ORDERED, that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.’s motion to dismiss Plaintiff’s Complaint and all Cross-Claims against them for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), or in the alternative to dismiss for forum non conveniens pursuant to CPLR§327, is held in abeyance until the parties conduct jurisdictional discovery specific to whether the J& J Entities had sufficient jurisdictional contacts with Kolmar Laboratories in New York to support the exercise of jurisdiction over them under the statute providing for personal jurisdiction over non-domiciliary that transact any business within the state (CPLR§ 302(a)(1)), and it is further

ORDERED, that the parties complete the jurisdictional discovery within 60 days from the date of this order, and it is further,

ORDERED, that the parties notify the court and supplement the motion papers within 30 days from the completion of the jurisdictional discovery.

ENTER:

Dated: November 26, 2019

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

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