

Niemeyer v Brenntag N. Am., Inc.

2019 NY Slip Op 33493(U)

November 27, 2019

Supreme Court, New York County

Docket Number: 190156/2017

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

SHIRLEY NIEMEYER,
Plaintiffs,

- against -

BRENTAG NORTH AMERICA, INC., et al,
Defendants.

INDEX NO. 190156/2017

MOTION DATE 11/20/2019

MOTION SEQ. NO. 005

MOTION CAL. NO.

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

	<u>PAPERS NUMBERED</u>
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") (hereinafter "moving defendants") 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(a) for forum non conveniens, is denied.

Plaintiff, Shirley Niemeyer, brings this action to recover for personal injuries sustained from asbestos exposure through her lifetime use of the defendants' Johnson baby powder talc product. Plaintiff was deposed over the course of two days on July 26 and August 11, 2017. At her deposition she testified that she was exposed to asbestos in the Johnson & Johnson baby powder talc from 1944 through 1998 as she used Johnson's baby powder on herself, her siblings, and her daughters at different times throughout this period. As relevant to this motion plaintiff stated that she moved to New York in 1978 and remained in New York through 1998. Although she could not remember precise details, she stated that while residing in New York she purchased and used Johnson's baby powder on herself all the time after bathing (see moving papers Exhibit C and opposition papers Exhibit 2).

Plaintiff commenced this action on April 27, 2017 naming the defendants. The complaint was amended on March 6, 2018 to add defendant Kolmar Laboratories, Inc.

The moving defendants now move to dismiss the action pursuant to CPLR §3211 (a)(8) and §327(a) for lack of personal jurisdiction and for *forum non conveniens*.

The moving defendants allege that Johnson & Johnson is a New Jersey holding company with its principal place of business in New Jersey (Affidavit of Tina French Exhibit F). 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

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

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

Johnson & Johnson and JJCI move to dismiss Plaintiff's Complaint and all Cross-Claims against them pursuant to CPLR §3211(a)(8) and CPLR §327(a). They contend that this court does not have personal jurisdiction over them because Mrs. Niemeyer's exposures occurred outside of the State of New York and Mrs. Niemeyer does not remember if she ever used their product 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, they contend that Mrs. Niemeyer's claims do not arise from any of their New York transactions, and that they 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, they 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 moving defendants and that this court should deny their attempt to dismiss this action on the grounds of *forum non conveniens*. The Plaintiff further contends that if personal jurisdiction over the moving defendants 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 not only has it been established that plaintiff was exposed to the moving defendants' product in New York, but the moving defendants also 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 moving defendants and that Ms. Niemeyer got injured as a result. It is alleged that this contact by the moving defendants 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 [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]). “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]).

“Jurisdiction is proper under the transacting of business provision of New York’s long-arm statute even though the defendant never enters New York, so long as the defendant’s activities in the state were purposeful and there is a substantial relationship between the transaction and the claim asserted (McKinney’s CPLR §302(a)(1), *Al Rushaid v Pictet & Cie*, 28 NY3d 316, 68 NE3d 1, 45 NYS3d 276 [2016]).

“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”(D& R. Global Selections, S.L., v Bodega Olegario Falcon Pineiro, 29 NY3d 292, 78 NE3d 1172, 56 NYS3d 488 [2017] quoting *Licci v Lebanese Can. Bank*, SAL, 20 NY3d 327, 984 NE2d 893, 960 NYS2d 695 [2012]).

This court can exercise specific personal jurisdiction over the Moving Defendants under CPLR §302(a)(1) because there is an articulable nexus or substantial relationship between their 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. Mrs. Niemeyer stated at her deposition that she purchased and used Johnson’s baby powder during the 20 years she lived in New York. It is alleged that Mrs. Niemeyer’s injury arose from the use of Johnson’s baby powder talc purchased and used by her in New York.

Plaintiff has established that long-arm jurisdiction should be exercised over the moving defendants under CPLR §302(a)(1). Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.

Forum non conveniens:

CPLR § 327(a) applies the doctrine of *forum non conveniens* flexibly, authorizing the Court in its discretion to dismiss an action on conditions that may be just, based upon the facts and circumstances of each particular case (*Matter of New York City Asbestos Litig.*, 239 AD2d 303, 658 NYS2d 858 [1st Dept. 1997]; *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 797 NYS2d 89 [1st Dept. 2005]). In determining a motion seeking to dismiss on *forum non conveniens* grounds, “no one factor is controlling” and the Court should take into consideration any or all of the following factors: (1) residency of the parties; (2) the jurisdiction in which the underlying claims occurred; (3) the location of relevant evidence and potential witnesses; (4) availability of bringing the action in an alternative forum; and (5) the interest of the foreign forum in deciding the issues (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 467 NE2d 245, 478 NYS2d 597 [1984]). “The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by [the] court” (*Id*).

There is a heavy burden on the movant challenging the forum to show that there are relevant factors in favor of dismissing the action based on *forum non conveniens*. It is not enough that some factors weigh in the defendants’ favor. The motion should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 971 NYS2d 504 [1st Dept. 2013]).

When the only nexus with the State of New York is that the corporate defendant is either registered or has its principal place of business in New York, the action is properly dismissed on the ground of *forum non conveniens* (*Avery v Pfizer, Inc.*, 68 AD3d 633, 891 NYS2d 369 [1st Dept. 2009] *dismissing action on ground of forum non conveniens where plaintiff was resident of Georgia, his physician who recommended and prescribed drug lived in the state of Georgia, plaintiff ingested drug in Georgia, suffered his injuries in Georgia and all of his treating physicians and witnesses were in Georgia; see also Farahmand, v Dalhousie University*, 96 AD3d 618, 947 NYS2d 459 [1st Dept. 2012]; *Becker v Federal Home Loan Mortgage Corp.*, 114 AD3d 519, 981 NYS2d 379 [1st Dept. 2014]).

However, when there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted (*Travelers Cas. & Sur. Co. v Honeywell Int'l Inc.*, 48 AD3d 225, 851 NYS2d 426 [1st Dept. 2008] *denying dismissal on forum non conveniens where there was a substantial nexus between the action and New York, as most of the insurance policies at issue were negotiated, issued and brokered in New York; see also Am. BankNote Corp. v Daniele*, 45 AD3d 338, 845 NYS2d 266 [1st Dept. 2007] *denying dismissal on forum non conveniens where New York is the place where parties met on a regular basis and where during such meetings false representations and assurances were made and where defendant's bank accounts, a central part of the claimed fraudulent scheme, was located*).

Weighing all relevant factors, this court is of the opinion that the Moving Defendants failed to meet their heavy burden to dismiss this action based on *forum non conveniens*. In balancing the interests and convenience of the parties and the court's, this action should be adjudicated in New York: a) There are other Defendants that are New York Corporations and have their principal place of business in New York; b) Mrs. Niemeyer alleges that she purchased and used the moving defendants' Johnson baby powder, a relevant fact giving rise to this action, in New York, and c) there is a substantial nexus between this action and New York as it is alleged that Mrs. Niemeyer purchased and used defendants' product in New York over a period of 20 years, thereby sustaining injuries. Under these facts, the action should not be dismissed as the "balance is not strong enough to disturb the choice of forum made by the Plaintiff" (*Elmaliach, supra*).

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(a), is denied.

ENTER:
MANUEL J. MENDEZ
J.S.C.

Dated: November 27, 2019


MANUEL J. MENDEZ
J.S.C.

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