

<b>Kolodziej v Borg-Warner, Inc.</b>
2019 NY Slip Op 33495(U)
November 22, 2019
Supreme Court, New York County
Docket Number: 190333/2018
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**

**ELLA KOLODZIEJ, Individually and as the Executrix of the Estate of JOHN KOLODZIEJ,**

Index number 190333/2018  
MOTION DATE 11-13-2019

**Plaintiffs,**

MOTION SEQ. NO. 001

- against -

**BORG- WARNER, INC.( as successor in interest to**

MOTION CAL. NO.

**BORG-WARNER MORSE TEC INC.), et al,**

**Defendants.**

The following papers, numbered 1 to 5 were read on A.O. Smith Water products Company's motion pursuant to CPLR §3211(a)(8) to dismiss the Complaint or alternatively for summary judgment:

	<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 defendant A.O. Smith Water Products Company's (hereinafter "A.O. Smith") motion to dismiss the plaintiffs' Complaint and all cross-claims asserted against it for lack of Personal jurisdiction pursuant to CPLR §3211(a)(8), is granted. The complaint and all cross-claims are dismissed for lack of personal jurisdiction.

Plaintiffs' action arises out of Mr. Kolodziej's alleged exposure to asbestos from 1963 through 2010 while he performed home renovations, did automotive work and worked at International Flavors and Fragrances. It is alleged that Mr. Kolodziej, at all times a New Jersey resident, was exposed to asbestos from an A.O. Smith's product when he replaced an old water heater while performing renovations in his New Jersey home in 1965. Mr. Kolodziej stated in his deposition that the casing of the hot water heater split open when he pushed it down the porch steps, exposing the inner lining. He did not know if this liner, which he described as white matting that looked like fiberglass, contained asbestos. He did not recall ever seeing the name A.O. Smith on the water heater, but the plumber told him the old water heater was an A.O. Smith unit and recommended that it be replaced with a new unit from the same company (see Exhibit C).

It is alleged that as a result of his exposure to asbestos in that A.O. Smith water heater Mr. Kolodziej developed and subsequently died from mesothelioma. Plaintiffs commenced this action to recover from A.O. Smith and other defendants for Mr. Kolodziej's injuries and death. Defendant A.O. Smith now

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

moves to dismiss this case alleging that this court lacks general and specific personal jurisdiction over it. In the alternative A.O. Smith moves for summary judgment alleging that Mr. Kolodziej could not identify exposure to its product because the only evidence linking its product to Mr. Kolodziej's exposure is the plumber's hearsay statement.

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

A.O. Smith argues that this court does not have personal jurisdiction over it because Mr. Kolodziej's exposures occurred outside of the State of New York, A.O. Smith is not incorporated in New York and does not maintain its principal place of business in New York. A.O. Smith alleges that it is a Delaware Corporation with its principal place of business in Milwaukee, Wisconsin, therefore there is no general jurisdiction. Furthermore, A.O. Smith contends that plaintiffs' claims do not arise from any New York transactions, and that A.O. Smith 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 and argue that at one time A.O. Smith was a New York Corporation and that currently A.O. Smith sells water heaters in over 100 locations in the State of New York, therefore there should be specific jurisdiction over A.O. Smith. In the alternative, plaintiffs request that this court grant it the opportunity to conduct jurisdictional discovery.

"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 [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]). The defendant's course of conduct must be voluntary, continuous and self-benefitting (Hardware v. Ardowork Corp., 117 AD 3d 561, 986 NYS 2d 445 [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*). 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 [1<sup>st</sup> Dept. 1992]).

This court cannot exercise general personal jurisdiction over A.O. Smith because at the time this action was commenced A.O. Smith was incorporated in Delaware with its principal place of business in Milwaukee, Wisconsin.

**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” (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, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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 or possesses any real property situated within the state. (CPLR §302(a)(1),(2),(3) and (4)).

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 A.O. Smith’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.

Although A.O. Smith, as claimed by plaintiffs, transacts business in the state of New York, there is nothing in this record to connect the old water heater Mr. Kolodziej was removing from his New Jersey home in 1965 to the State of New York. Mr. Kolodziej was allegedly exposed to asbestos from A.O. Smith’s

product and was injured in the State of New Jersey. Therefore, this court has no specific jurisdiction over A.O. Smith.

Plaintiff has not made a sufficient start to obtain jurisdictional discovery. Since the court is granting the motion to dismiss for lack of personal jurisdiction there is no need to address defendant's motion for summary judgment.

Accordingly, it is ORDERED, that defendant A.O. Smith Water Products Company's motion to dismiss the plaintiffs' complaint and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR 3211 (a)(8), is granted, and it is further

ORDERED that the complaint and all cross-claims asserted against defendant A.O. Smith Water Products Company are severed and dismissed, and it is further

ORDERED that the movant serve a copy of this order with notice of entry on plaintiffs' attorney, on all remaining parties, on the General Clerk's Office (Room 119) and on the County Clerk (Room 141B) in accordance with e-filing protocol, and it is further

ORDERED, that the clerk of the court enter judgment accordingly.

ENTER:

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

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

Dated: November 22, 2019

Check one:  FINAL DISPOSITION     NON-FINAL  
DISPOSITION

Check if appropriate:  DO NOT POST     REFERENCE