

Fitzwater v Air & Liquid Sys. Corp.

2021 NY Slip Op 30086(U)

January 11, 2021

Supreme Court, New York County

Docket Number: 190052/2017

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

IAS MOTION 13

Justice

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BARBARA FITZWATER,

Plaintiff,

- v -

AIR & LIQUID SYSTEMS CORPORATION, AMCHEM PRODUCTS, INC., BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., CERTAINTEED CORPORATION, CROSBY VALVE LLC, DAP, INC., FMC CORPORATION, FOSTER WHEELER, L.L.C, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INC, HONEYWELL INTERNATIONAL, INC., IMO INDUSTRIES, INC, ITT INDUSTRIES, INC., OWENS-ILLINOIS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A.O. SMITH WATER PRODUCTS CO., ABB, INC. AS SUCCESSOR IN INTEREST TO ITE CIRCUIT BREAKERS, INC., AERCO INTERNATIONAL, INC., ARMSTRONG INTERNATIONAL, INC., ARMSTRONG PUMPS, INC., BAKERS PERKINS AS SUCCESSOR BY MERGER TO PETERSON OVEN COMPANY, USA, BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BRYANT HEATING & COOLING SYSTEMS, COLUMBIA BOILER COMPANY OF POTTSTOWN, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC., EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC., GEORGIA PACIFIC LLC, GOULD ELECTRONICS INC., HEXION INC., F/K/A MOMENTIVE SPECIALTY CHEMICALS INC., F/K/A HEXION SPECIALTY CHEMICALS, INC., F/K/A BORDEN CHEMICAL, INC., F/K/A BORDEN, INC., INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, KOHLER CO., SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, SUPERIOR BOILER WORKS, INC., WEYERHAEUSER COMPANY,

Defendant.

| | |
|-----------------|--------------------|
| INDEX NO. | <u>190052/2017</u> |
| MOTION DATE | <u>07/27/2020</u> |
| MOTION SEQ. NO. | <u>002</u> |

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 181, 182, 183, 184, 185, 190, 191, 192, 193, 194 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendant APV North America, Inc.'s motion, as successor to Baker Perkins, Inc., and Peterson Oven Company (improperly sued as "Bakers Perkins as Successor by Merger to Peterson Oven Company, USA) (hereinafter "Baker Perkins"), for an Order pursuant to CPLR 3212 to dismiss plaintiffs' Complaint on the basis that there is a lack of evidence that plaintiff Harvey Fitzwater's ("Decedent") was exposed to asbestos from a Baker Perkins product and in the alternative, on the basis that this Court lacks personal jurisdiction over said defendant is granted.

This matter stems from Decedent's October 10, 2016 diagnosis of Mesothelioma, which led to his death on August 30, 2017. Decedent's diagnosis is alleged to have resulted from his exposure to asbestos from a number of defendant entities. Specific to this motion is Decedent's alleged exposure to asbestos from his work as a baker using ovens manufactured by Baker Perkins. Plaintiff alleges that Decedent was exposed to asbestos contaminated Baker Perkins ovens while working in 1965 at the North Star hotel in Nome, Alaska and at an Albertsons supermarket in Bremerton, Washington, in 1966 at a Tradewell grocery store in Burien, Washington and in 1967 at Town & Country Bakery store, in Bainbridge Island, Washington.

In regards to general and personal jurisdiction in New York, defendant contends that this court does not have general jurisdiction over them as defendant APV North America, Inc. is a Delaware corporation with its principal place of business in North Carolina (Mot, Exh F, ¶7; Mot, Footnote 1). Defendant also notes that the current Baker Perkins is a Delaware company

with its principal place of business in Grand Rapids, Michigan (Mot, Footnote 2). Defendant argues that the company only manufactures large commercial ovens used in commercial bakeries and that the Baker Perkins entity did not come into existence until approximately 2006.

Defendant argues that specific personal jurisdiction cannot stand, as there is no nexus between the alleged Baker Perkins ovens, Decedent's injury and the State of New York. Defendant notes that plaintiff has not alleged that Decedent was exposed to asbestos from a Baker Perkins product during his time working in New York (Mot, Exh D at 174, ¶¶8-14). Further defendant submits evidence of plaintiff being a resident of Washington where he was diagnosed and treated (Mot, Exh B & D at 23, ¶¶16-20; at 58, ¶22; at 60, ¶8; at 61, ¶14; at 63, ¶20). Further defendant affirms that Baker Perkins ovens have never been manufactured in New York (Mot, Exh E, ¶6).

“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 [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 Klien*, 35 AD2d 248 [1st Dept 1970]). However, in opposing a motion to dismiss, the plaintiff needs only to make sufficient start by showing that its position is not frivolous [*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974]]. In determining whether the Court has jurisdiction over defendant, the Court must analyze general personal jurisdiction and specific personal 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 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. 2856 [2011]; see *Daimler AG v Baumann*, 134 S. Ct. 746, 187 L.Ed.2d 624 [2014]; see also *Magdalena v Lins*, 123 AD3d 600 [1st Dept 2014]). The defendant’s course of conduct must be voluntary, continuous and self-benefitting (*Ralph Cole Hardware v Ardowork Corp.*, 117 AD3d 561 [1st Dept 2014]).

To determine where a corporation is “at home” the Court must look at the place of incorporation and principal place of business (*Daimler AG*, 134 S.Ct. 746). 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 [1st Dept 1992]). Here, the Court finds that general personal jurisdiction cannot be exercised over defendant because at the time this action was commenced, defendant was neither incorporated nor maintained their principal place of business in New York. Thus, the Court shall examine 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, 137 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 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]).

Under CPLR 302(a)’s long arm statute, the Court 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.”

In the case at bar, the Court is not entitled to exercise specific personal jurisdiction under CPLR 302(a)(1) because there is no clear nexus and substantial relationship between defendant’s New York conduct and the claims asserted. Plaintiff has failed to demonstrate that defendant transacted business in New York or that plaintiff’s cause of action arises from defendant’s activity in New York. Thus, defendant has made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff who needs only to make sufficient start by showing that its position is not frivolous.

In opposition, plaintiff fails to make a sufficient showing that its position is not frivolous. Plaintiff's opposition makes no mention of the defendant and its conduct in the State of New York. Plaintiff argues that defendant has failed to offer proof that it has preserved the issue of personal jurisdiction by raising jurisdiction as an affirmative defense in its answer. However, the Court notes that defendant has submitted proof of its Amended Standard Answer, dated December 17, 2017, which included the affirmative defense of lack of personal jurisdiction (Aff in Reply, Exh A, at 18, 81st Affirmative Defense). Further, instead of making a substantive argument as to why defendant should be subject to personal jurisdiction, plaintiff's argument hinges on the flawed suggestion that defendant should not be entitled to any relief on jurisdictional grounds, as it has fully participated in this matter for over three years without raising the issue. This Court has found that a motion for personal jurisdiction can be made at any time (Aff in Reply, Exh C; *Gibson v. Air & Liquid Systems Corp., et al.*, Index No.: 190187/2015, Judge Mendez June 27, 2018).

While this Court can exercise jurisdiction over a foreign entity under CPLR 302(a)(3), there must be a clear connection between New York and the specific claims at issue. The products from which plaintiff alleges Decedent's exposure to asbestos were neither manufactured in New York nor used by Decedent in New York. As defendant is not subject to either General or Specific Personal Jurisdiction in New York, the Court will not address defendant's assertion that plaintiff has failed to demonstrate that Decedent was exposed to asbestos from work with Baker Perkins products. This is a question for a Court that has proper jurisdiction over defendant. Plaintiff's opposition has failed to raise an issue of fact and defendant's motion is granted as it has made a prima facie showing of lack of personal jurisdiction over defendant and is entitled to summary judgment to dismiss plaintiff's complaint.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of defendant APV North America, Inc. and to dismiss plaintiffs' Complaint and all cross-claims against said defendant is granted; and it is further

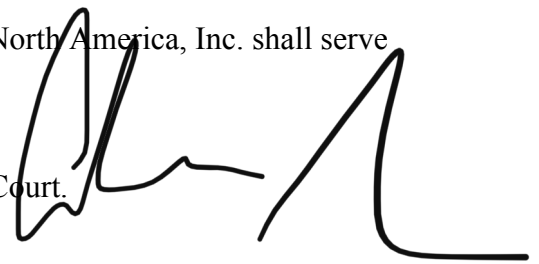
ORDERED that the Complaint is dismissed in its entirety as against defendant APV North America, Inc. with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption

ORDERED that within 30 days of entry, defendant APV North America, Inc. shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court.



1/11/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE