

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

**DEBORAH HAMPTON MILLER, Individually and
as Administratrix of the Estate of MYRON
WILLIAM MILLER, Deceased,
Plaintiff,
- against -
A.O. SMITH WATER PRODUCTS CO., et al,
Defendants.**

INDEX NO. 190257/2016
MOTION DATE 09/26/2018
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on W.W. Grainger, Inc.'s motion to dismiss the Third Amended Complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant W.W. Grainger, Inc.'s (hereinafter "Grainger") motion to dismiss the plaintiff's Third Amended Complaint against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted.

Plaintiff's decedent Myron William Miller, was born and resided in New York when he was younger, but moved to and was a resident of Georgia, from approximately 1973, during the alleged relevant period of his exposure to asbestos. The decedent was diagnosed with malignant mesothelioma on August 2, 2016. He died on September 8, 2016 (Mot. Ex. C). Plaintiff alleges that the decedent was exposed to asbestos from 1980 -1987 through purchasing, refurbishing and reselling equipment he obtained through liquidation sales as part of his business. Plaintiff testified that the decedent traveled to facility closings in other states, including New York, to purchase equipment for his business, and was exposed to asbestos through Grainger's products when he cleaned the equipment by removing and replacing asbestos containing packing material and gaskets (Mot. Ex. D, pgs. 65-68 and 85-89, Mot. Ex. E pg. 210-211 and 227-228).

Michael P. Ferrer, Grainger's Senior Manager states in his affidavit that it is an Illinois company since 1928, with its principal place of business in the State of Illinois (Mot. Ex. F).

Grainger moves to dismiss the Plaintiffs' Third Amended Complaint against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8). Grainger contends that this court does not have personal jurisdiction over it because the decedent did not reside in the State of New York, the decedent's exposures did not occur within the State of New York, Grainger is not incorporated in New York and does not maintain its principal places of business here, and therefore, there is no general jurisdiction. Furthermore, Grainger contends that plaintiff's testimony is too vague to establish claims arising from any of Grainger's New York transactions, and that Grainger 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]).

Plaintiff partially opposes the motion asserting that Grainger should not be permitted to use personal jurisdiction to obtain dismissal on the merits. To the extent t there is a finding of lack of jurisdiction, plaintiff seeks conditional dismissal of this New York action on Grainger's waiver of the statute of limitations defense in Illinois.

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

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).

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]). 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]).

This court cannot exercise general personal jurisdiction over Grainger because it is not incorporated, nor does it have its principal place of business in the State of New York. Grainger is an Illinois corporation with its principal place of business in the State of Illinois since 1928. Furthermore, the Plaintiffs are unable to demonstrate "exceptional circumstances" for this court to exercise general personal jurisdiction over Grainger.

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, ...; 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]).

Plaintiff commenced this action, and it was pending, before the decision in Bristol-Myers Squibb Co. v Superior Court of California, San Francisco, 136 S.Ct. 1773 [2017], which resulted in a change in the law. As a result of the change in the law, this Court cannot exercise specific personal jurisdiction under CPLR §302(a)(1) because there is no articulable nexus or substantial relationship between Grainger'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. The record before this court establishes that the injuries asserted by the plaintiff did not arise from any of Grainger's activities within the State of New York.

This court cannot exercise personal specific jurisdiction under CPLR §302(a)(2) because Grainger has not committed a tortious act within the state of New York. All of the alleged exposures to Grainger's asbestos-laden products occurred outside the State of

New York. 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. Plaintiff’s vague references to New York purchases in her deposition testimony does not show the decedent was exposed to Grainger’s products in New York, meaning that either Illinois or Georgia are the potential situs of the injury. Since the exposure and the injury -the original event- took place outside of the State of New York, the New York Courts cannot exercise jurisdiction (Bristol-Myers Squibb, *supra*; Lebron, *supra*).

Grainger has established that this action should be dismissed pursuant to CPLR 3211(a)(8), there is no jurisdiction over plaintiff’s claims in New York. Plaintiff has not shown that this Court should compel Grainger to enter into a stipulation waiving the statute of limitations in Illinois. The tolling provision of CPLR §205(a) does not apply when a case is dismissed for lack of personal jurisdiction (See CPLR §205(a)); however the Illinois Court may equitably toll the statute, in this case which was timely filed by plaintiff in New York but in the wrong forum due to a change in the law (See Ciens v. O.L. Schmidt Barge Lives, Inc., 285 Ill App. 3d 1046), 675 N.E. 2d 210, 221 Ill Dec. 303). Plaintiff’s allegation that the two year statute of limitations in Illinois has expired is unavailing. Plaintiff’s application for an extension of the statute of limitations should be made to the Court in Illinois.

Accordingly, it is ORDERED, that defendant, W.W. Grainger, Inc.’s motion to dismiss the plaintiff’s Third Amended Complaint asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8), is granted, and it is further,

ORDERED, that plaintiff’s claims asserted in the Third Amended Complaint against W.W. Grainger, Inc., are severed and dismissed, and it is further,

ORDERED, that the defendant, W.W. Grainger, Inc., serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk’s Office and on the County Clerk, by e-filing protocol, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

Dated: October 9, 2018


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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE