

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION:

KRISTIAN NICHOLE GIBSON, as Executrix for the
Estate of WAYNE GIBSON,
Plaintiffs

- against-

AIR & LIQUID SYSTEMS CORPORATION, as
successor by merger to BUFFALO PUMPS, INC.,
et al.,
Defendants.

INDEX NO. 190187 / 15

MOTION DATE 09-05 -2018

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion by defendant MACK TRUCKS, INC., pursuant to CPLR §2221[d] to reargue and plaintiff's cross-motion pursuant to CPLR §2221[d] to reargue:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers it is Ordered that that defendant Mack Trucks, Inc.'s motion pursuant to CPLR §2221 (d) to reargue the June 25, 2018 Decision and Order of this Court and upon reargument pursuant to CPLR §3211(a)(8) to dismiss Plaintiffs' claims and all cross-claims asserted against it, is denied. Plaintiffs' cross-motion pursuant to CPLR §2221 (d) to reargue such portions of the opposition to defendant Mack Truck, Inc.'s motion to dismiss as demonstrated specific jurisdiction pursuant to CPLR 302(a)(1) and upon reargument to deny Mack Truck Inc.'s motion, is denied as moot.

Plaintiff's Decedent, Wayne Gibson, was diagnosed with and died from Mesothelioma, which is alleged to have resulted from his exposure to asbestos. It is alleged that the decedent was exposed to asbestos when he came in contact with defendant Mack Trucks, Inc. (hereinafter "Mack"), and Kenworth Trucks, Inc.'s (hereinafter "Kenworth") asbestos containing brake pads, clutches and gaskets, when he worked as a driver for a trucking company called "Russell Transfer" in the State of Virginia from 1968 to 1985. Plaintiff alleges that the injuries were caused when, on a few occasions, decedent helped the company's mechanics and in his presence they removed and replaced brake pads, clutches and gaskets on Mack and Kenworth Trucks.

Mr. Gibson at all relevant times resided outside the state of New York and was exposed to asbestos outside the state of New York, except for a brief six month period when he was serving in the United States Navy between 1963 and 1968. Mack Trucks, Inc., is a Pennsylvania Corporation with its principal place of business in Greensboro North Carolina. Mack's Vehicle assembly plant is located in Macungie Pennsylvania and its engine assembly plant is located in Hagerstown Maryland. The only alleged exposure Mr. Gibson had with a product made or sold by Mack occurred in the course of his duties as a driver with Russell Transfer, a company that operated in the State of

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

Virginia. Mr. Gibson did not know, and could not tell where Russell Transfer's Mack Trucks, or the replacement parts they used were purchased.

Mack under Motion Sequence 005, pursuant to CPLR § 3211(a)(8) sought to dismiss Plaintiffs' claims and all cross-claims asserted against it, for lack of personal jurisdiction. On June 25, 2018 this Court denied Mack's motion for failure to state an affirmative defense of personal jurisdiction in the Answer resulting in waiver.

Mack's motion pursuant to CPLR §2221(d) seeks to reargue the portion of the June 25, 2018 Decision and Order of this Court and upon reargument to dismiss Plaintiff's claims and all cross-claims asserted against it for lack of personal jurisdiction pursuant to CPLR §3211(a)(8).

Mack refers to the June 25, 2018 Decision and Order of this Court filed under Motion Sequence 005 as addressing a motion for summary judgment, but this relief was not sought pursuant to either CPLR §3212 or CPLR § §3211(c). In fact, Motion Sequence 005 was solely a motion to dismiss pursuant to CPLR 3211(a)(8)(See Notice of Motion, Mot. Exh. B).

Mack argues that this Court misinterpreted facts and misapplied the law limited to the portion of the June 25, 2018 Decision and Order that determined Mack waived the defense of personal jurisdiction. It is further argued that the general denial in paragraph 2 of Mack's NYCAL Answer (Mot. Exh. D, Reply Exh. B), eliminated the need to assert an affirmative defense of lack of personal jurisdiction to the jurisdictional claims asserted in plaintiff's complaint. In support of its arguments Mack relies on cases permitting the defendant to deny allegations made in the complaint instead of pleading lack of jurisdiction as an affirmative defense (Green Bus Lines v. Consolidated Mut. Ins. Co., 74 A.D. 2d 136, 426 N.Y.S. 2d 981 [2nd Dept., 1980] and Williams v. Stimlinger, 229 A.D. 2d 1022, 645 N.Y.S. 2d 179 [4th Dept., 1996]).

Plaintiff opposes Mack Truck Inc.'s motion and as alternative relief cross-moves pursuant to CPLR §2221 (d) to reargue such portions of their opposition to defendant Mack Truck, Inc.'s motion to dismiss as applies to specific jurisdiction pursuant to CPLR §302(a)(1).

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [1st Dept., 1979] and Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]). Pursuant to CPLR 2221[d][2], reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously decided, or to present arguments different from those originally asserted. The movant cannot use a motion to reargue as a successive opportunity to merely restate previously unsuccessful arguments (DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D. 3d 715, 800 N.Y.S. 2d 679 [1st Dept., 2005] and Mangine v. Keller, 182 A.D. 2d 476, 581 N.Y.S. 2d 793 [1st Dept., 1992]).

The June 25, 2018 Decision and Order of this Court determined that Mack waived the defense of personal jurisdiction. In deciding the motion this Court was aware of the arguments made by Mack of the denial of plaintiff's assertion of jurisdiction made in the complaint. The June 25, 2018 Decision and Order emphasized precedent applying to waiver for failure to raise the affirmative defense of personal jurisdiction, however there was an implied determination by this Court that the lack of specificity in the general denial, contained in paragraph 2 of Mack's NYCAL Answer, was not enough to state a defense of lack of personal jurisdiction (Mot. Exh. D, Reply Exh. B).

As a means of clarification, a defense based upon lack of jurisdiction is deemed waived if the defendant fails to assert it with specificity, such that it fails to fairly apprise

the plaintiff of the defendant's objections (Interlink Metals and Chemicals, Inc. v. Kazdan, 222 A.D. 2d 55, 644 N.Y.S. 2d 704 [1st Dept., 1996] citing to Weisner v. Avis Rent-A-Car, 182 A.D. 2d 372, 582 N.Y.S. 2d 122 [1st Dept., 1992] and Hatch v. Tran, 170 A.D. 2d 649, 567 N.Y.S. 2d 72 [2nd Dept., 1991]). A general denial of the allegations of the complaint does not raise the question of jurisdiction (Nass v. Nass, 64 A.D. 2d 852, 407 N.Y.S. 2d 344 [4th Dept. 1978]). To the extent that the grounds for the motion to dismiss based on lack of personal jurisdiction could not be gathered from Mack's pleading, it was deemed waived (Rodriquez v. Hidalgo, 294 A.D. 2d 114, 740 N.Y.S. 2d 871 [1st Dept. 2002]).

Plaintiff, in opposition to Mack's motion, correctly argues that the limited jurisdictional allegation raised in the complaint was such that Mack's general denial did not avoid a waiver of personal jurisdiction. The lack of specificity warranted the finding of waiver and denial of Mack's motion to dismiss pursuant to CPLR §3211(a)(8). Mack has not established entitlement to reargument.

Plaintiff as alternative relief cross-moves pursuant to CPLR §2221(d) to reargue such portions of the the June 25, 2018 Decision and Order that determined that without waiver there was no personal jurisdiction pursuant to CPLR §302(a)(1).

This Court, having denied Mack's motion to reargue because it waived the defense of lack of jurisdiction, has no need to address the arguments raised by plaintiffs in the cross-motion.

Accordingly, it is ORDERED that defendant Mack Trucks, Inc.'s motion pursuant to CPLR §2221 (d) to reargue the June 25, 2018 Decision and Order of this Court and upon reargument pursuant to CPLR §3211(a)(8) to dismiss Plaintiffs' claims and all cross-claims asserted against it, is denied, and it is further,

ORDERED that plaintiff's cross-motion pursuant to CPLR §2221 (d), is denied as moot.

ENTER:

Dated: October 2, 2018



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

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