

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

PRESENT: HON. ADAM SILVERA **PART** **IAS MOTION 13**

Justice

-----X

DARRELL NELSON and BARBARA NELSON,
his wife,

Plaintiffs,

- V -

3M COMPANY, Individually and as Successor to
MINNESOTA MINING & MANUFACTURING
COMPANY, et al.,

Defendants.

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INDEX NO. 190095/2019

MOTION DATE 8/20/2020

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 279, 282, 287, 288, 289, 290, 298, 299, 300, 301, 302, 303, 304, 305

were read on this motion to/for DISMISS.

Before the Court is defendant Cleaver-Brooks, Inc. s/h/a Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division's ("Cleaver-Brooks") motion to dismiss plaintiffs'

Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant. Plaintiffs oppose the motion.

This matter stems from plaintiff Darrell Nelson's diagnosis of malignant pleural mesothelioma, which plaintiffs allege resulted from Mr. Nelson's exposure to asbestos from his work as a maintenance worker and boiler operator for the Red Wing School District in Red Wing, Minnesota from 1977 to 1997. Plaintiffs allege that Mr. Nelson was exposed to asbestos from dust created from performing repair and maintenance on Cleaver-Brooks boilers at the Red Wing School District.

Here, Cleaver-Brooks moves to dismiss the action for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Cleaver-Brooks contends that this court does not have general

jurisdiction over it because Cleaver-Brooks is not domiciled in New York, is not incorporated in New York, and does not maintain a place of business in New York. Cleaver-Brooks argues that plaintiffs also cannot establish specific jurisdiction pursuant to CPLR 302(a)(2) because plaintiff cannot establish that Cleaver-Brooks committed a tortious act within New York, and there is no evidence Mr. Nelson suffered an injury in New York as a result of a Cleaver-Brooks product.

“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, a plaintiff sufficiently demonstrates that its position is not frivolous when it demonstrates that defendant engages in business in New York ([*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974] [finding that evidence that appellant applied for several permits and received permission to sell and store some of its products in New York was sufficient to show plaintiff’s position not to be frivolous and give plaintiff “further opportunity to prove other contacts and activities of defendant in New York as might confer jurisdiction under the long-arm statute”]). 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 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 Cleaver-Brooks 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.”

Here, defendant contends that this court does not have general jurisdiction over Cleaver-Brooks. Cleaver-Brooks notes that it is a Delaware corporation with its corporate headquarters and principal place of business in Georgia (Mot, Exh E&D). Further, defendant points to the fact that plaintiffs’ claims against Cleaver-Brooks arise from Mr. Nelson’s exposure to asbestos occurring within the jurisdiction of Minnesota and not in New York. Defendant argues that specific personal jurisdiction cannot stand, as there is no nexus between the alleged Cleaver-Brooks goods, Mr. Nelson’s injury and the State of New York.

In opposition, plaintiffs argue that defendant is subject to jurisdiction under CPLR 302 based upon Cleaver-Brooks presence in the State of New York, operating several sales offices within the state from which it sold its packaged boilers. In support of their claim, plaintiffs attach a Cleaver-Brooks Packaged Boiler Advertisement, which lists Cleaver-Brooks Sales Representatives within the State of New York (Aff in Op, Exh 2). Plaintiffs admit that they have little knowledge regarding Cleaver-Brooks and its operations, particularly at the time Mr. Nelson worked with Cleaver-Brooks products. Plaintiffs concede that they are not aware of Cleaver-Brooks employees, offices, distribution centers, and warehouses within New York during the time at issue in this matter. As such, plaintiffs aver that it is necessary to deny defendant's motion and allow plaintiffs the opportunity to gather discovery. Plaintiffs note that to defeat a motion to dismiss for lack of jurisdiction under CPLR 3211(a)(8), a plaintiff need only show that jurisdiction "may exist" (*Hessel v. Goldman, Sachs & Co.*, 281 A.D.2d 247, 248 [1st Dept. 2001]). At issue here is whether the undated Cleaver-Brooks advertisement submitted by plaintiffs is sufficient to demonstrate that Cleaver-Brooks had a presence in New York during the time that plaintiff was allegedly exposed to asbestos in order to establish jurisdiction under CPLR 302(a)(2).

This Court can exercise jurisdiction over a foreign entity such as Cleaver-Brooks under CPLR 302(a)(3) only if there is a clear connection between New York and the specific claims at issue. In Reply, defendant argues that plaintiffs' arguments have no merit, as plaintiffs' counsel has not sought to argue that Cleaver-Brooks boilers were manufactured or sold from New York. The Court notes that the Court of Appeals has long held that the location where the allegedly defective product was manufactured is the state where the tort occurred with respect to CPLR § 302(a)(2) (*Longines-Wittnauer Watch Co. v. Barnes & Reinecke*), 15 N.Y.2d 443, 465

[1965][finding that the tortious act was committed in Kansas when a defective tank was manufactured in Kansas and exploded in New York]). Cleaver-Brooks notes that while plaintiffs request the Court dismiss defendant's motion to allow plaintiffs to take jurisdictional discovery from Cleaver-Brooks, plaintiffs failed to meet the necessary precondition of articulating how, even if true that Cleaver-Brooks conducted business activity in New York, that plaintiff's injuries arose from the purported in-state business activity.

The Court notes that defendant has demonstrated that the Court does not have general jurisdiction over Cleaver-Brooks. Further, with regards to specific jurisdiction, New York's long-arm statute is "a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1998][internal citations omitted]). Here, plaintiffs have not submitted any evidence, which demonstrates a substantial relationship between Cleaver-Brooks alleged transactions in New York and plaintiffs' injuries. As such, defendant's motion to dismiss is granted.

Accordingly, it is

ORDERED that defendant Cleaver-Brooks motion to dismiss plaintiffs' Complaint, pursuant to CPLR 3211(a)(8) on the basis that this Court lacks personal jurisdiction over said defendant is granted; and it is further

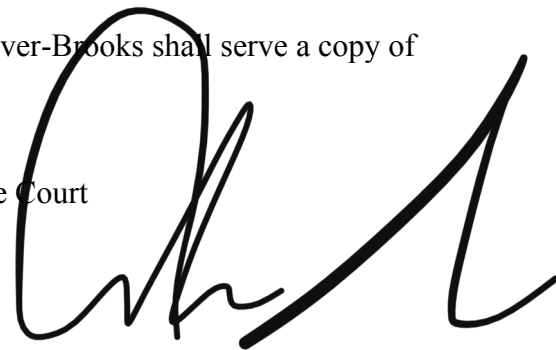
ORDERED that the Complaint is dismissed in its entirety as against defendant Cleaver-Brooks with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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; and it is further

ORDERED that within 30 days of entry, defendant Cleaver-Brooks shall serve a copy of
this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court



3/25/2021

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

X

GRANTED

☐

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE