

Difranco v. Amchem Prods., Inc.

Supreme Court of New York, Suffolk County

October 28, 2021, Decided

INDEX No. 600149/2018

Reporter

2021 N.Y. Misc. LEXIS 5384 *; 2021 NY Slip Op 32088(U) **

[1]** KATHLEEN DIFRANCO, as Administratrix for the Estate of ANTHONY J. DIFRANCO and KATHLEEN DIFRANCO, Individually, Plaintiffs, -against- AMCHEM PRODUCTS, INC., et. al., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

asbestos, personal jurisdiction, lack of personal jurisdiction, supporting papers, Products, renew a motion

Counsel: **[*1]** For Plaintiffs: WEITZ & LUXENBURG, P.C. New York, New York.

For American Biltrite Inc., Defendant: MANNING GROSS + MASSENBURG, LLP, New York, New York.

For Defendant: BARRY MCTIERNAN & MOORE, P.C., Cleaver-Brooks, Inc., New York New York.

Judges: PRESENT: Hon. JERRY GARGUILO, Justice of the Supreme Court.

Opinion by: JERRY GARGUILO

Opinion

Upon the following papers read on these renewed motions to dismiss and for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant American Biltrite Inc., dated September 30, 2020; Notice of Motion and supporting papers by defendant Cleaver-Brooks Company, Inc., dated October 2, 2020; Notice of Motion and supporting papers by defendant Domco Products Texas Inc., dated

October 2, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 6, 2020 and October 7, 2020; Replying Affidavits and supporting papers by defendant Cleaver-Brooks Company, Inc., dated October 20, 2020; Replying Affidavits and supporting papers by defendant Domco Products Texas Inc., dated October 20, 2020; Other Memoranda of Law; (and after hearing counsel in support and opposed to the motion) it is

ORDERED that the motion (010) by defendant American Biltrite **[*2]** Inc., the motion (011) by defendant Cleaver-Brooks Company, Inc., and the motion (012) by defendant Domco Products Texas Inc. are consolidated for the purposes of this determination; and it is further

[*2] ORDERED that the renewed motion by defendant American Biltrite Inc., for an order dismissing the complaint against it for lack of personal jurisdiction, or alternatively for summary judgment dismissing the complaint against it, is granted to the extent set forth herein and is otherwise denied; and it is

ORDERED that the renewed motion by defendant Cleaver-Brooks Company, Inc., for an order dismissing the complaint against it for lack of personal jurisdiction, shall be marked withdrawn in accordance with correspondence filed by defendant's counsel, dated March 2, 2021; and it is

ORDERED that the renewed motion by defendant Domco Products Texas Inc., for an order dismissing the complaint against it for lack of personal jurisdiction, shall be marked withdrawn in accordance with correspondence filed by defendant's counsel, dated December 9, 2020.

Plaintiff Kathleen DeFranco, as administratrix of the estate of Anthony J. DiFranco ("DiFranco"), brings this action to recover damages for personal **[*3]** injury allegedly incurred by DiFranco as the result of exposure to products containing asbestos throughout his work

history as a carpenter in the construction industry. With regard to defendant American Biltrite Inc., plaintiff alleges that DiFranco was exposed to asbestos while working with floor tiles containing asbestos, which were manufactured by American Biltrite and sold under the name "Amtico."

Defendant American Biltrite renews its prior motions to dismiss plaintiff's claims against it based on lack of personal jurisdiction, and for summary judgment. Those motions were previously denied without prejudice by order dated May 19, 2020 (Garguilo, J.), due to the fact that DiFranco passed away on October 9, 2019 and no administrator had been substituted at the time the motions were submitted. As plaintiff has now been substituted, the renewed motions are decided as follows.

American Biltrite moves to dismiss plaintiff's complaint based on lack of personal jurisdiction, or alternatively for summary judgment. It argues that there is no basis for general jurisdiction pursuant to [CPLR 301](#), and no basis for a finding that it is subject to specific jurisdiction pursuant to [CPLR 302 \(a\)](#). In support of its motion, [*4] American Biltrite submits, inter alia, copies of the pleadings, plaintiff's responses to interrogatories, the transcript of DiFranco's deposition testimony, and an affidavit by Howard N. Feist III, the Vice President of Finance and Chief Financial Officer for American Biltrite.

According to plaintiff's response to interrogatories, DiFranco was exposed to various products containing asbestos during his work history as a carpenter beginning in 1954, and he was diagnosed with asbestosis and lung cancer in 2017. With regard to American Biltrite, plaintiff alleges that DiFranco was exposed to asbestos while working with Amtico floor tiles at job sites in Ohio, Nebraska, Iowa and Pennsylvania. According to the affidavit of Howard N. Feist III, defendant's Vice President of Finance and Chief Financial Officer, American Biltrite has been incorporated in Delaware since 1954, and maintains its principal place of business in Massachusetts. In 2016 and 2017, American Biltrite's sales generated in New York were 2.5% of its total revenue. Feist's affidavit further states that American Biltrite has 712 employees, including 47 employees located in New York, and that it has two jewelry showroom/office [*5] facilities in New York.

[**3] When a motion is made to dismiss an action for lack of personal jurisdiction, it is the plaintiff who bears the burden of proving a basis for such jurisdiction (see

[Qudsi v Larios](#), 173 AD3d 920, 103 NYS3d 492 [2d Dept 2019]; [Aybar v Aybar](#), 169 AD3d 137, 93 NYS3d 159 [2d Dept 2019]). To withstand such a motion, the plaintiff must make a prima facie showing that the defendant is subject to the personal jurisdiction of the court (see [Leuthner v Homewood Suites by Hilton](#), 151 AD3d 1042, 58 NYS3d 437 [2d Dept 2017]). In deciding whether the plaintiff's burden has been met, the court must accept as true the facts alleged in the complaint and affidavits in opposition to the motion, and must accord the plaintiff the benefit of every favorable inference ([Weitz v Weitz](#), 85 AD3d 1153, 926 NYS2d 305 [2d Dept 2011]). The plaintiff may also oppose the motion on the ground that discovery on the issue of personal jurisdiction is necessary (see [CPLR 3211 \(d\)](#)), in which case the plaintiff "must come forward with some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" ([Mandel v Busch Entertainment Corp.](#), 215 AD2d 455, 455, 626 NYS2d 270, 271 [2d Dept 1995]; see [Aybar v Aybar](#), *supra*; [Leuthner v Homewood Suites by Hilton](#), *supra*). Upon such a showing, a court may, in the exercise of its discretion, grant jurisdictional discovery [*6] and postpone resolution of the issue (see [Goel v Ramachandran](#), 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]).

There are two types of personal jurisdiction which a New York court may exercise: general ([CPLR 301](#)) and specific ([CPLR 302](#)). General, all purpose jurisdiction permits a court to hear "any and all claims" against a foreign or out-of-state corporation "only when the corporation's affiliations with [New York] are so constant and pervasive 'as to render [it] essentially at home'" in the state ([Daimler AG v Bauman](#), 571 U.S. 117, 122, 134 S Ct 746, 751, 187 L. Ed. 2d 624 [2014], citing [Goodyear Dunlop Tires Operations, S.A. v Brown](#), 564 U.S. 915, 919, 131 S Ct 2846, 2851, 180 L. Ed. 2d 796 [2011]). As instructed by the Court in [Daimler](#), other than in an exceptional case, a foreign or out-of-state corporation is "essentially at home" where it is incorporated or where it has its principal place of business ([Daimler AG v Bauman](#), 571 U.S. 117, 137, 134 S Ct 746, 760, 187 L. Ed. 2d 624; see [Aybar v Aybar](#), *supra*). In situations where a defendant is not sufficiently "at home" in New York such that the court's exercise of general jurisdiction would be appropriate, the court may be able to exercise specific jurisdiction. Under [CPLR 302](#), the court may exercise specific, or long-arm jurisdiction, over a defendant only if the plaintiff's claim arises from one of the listed forms of

activity, namely transacting business within the state or contracting anywhere to supply goods or services in the state, committing a tortious act within the state, [*7] committing a tortious act outside the state that causes injury within the state, and owning, using, or possessing real property in the state ([CPLR 302 \(a\)](#)). Even if the plaintiff can establish the requisite elements for the exercise of personal jurisdiction under [CPLR 302](#), it must also appear that a finding of personal jurisdiction comports with federal due process (see [Williams v Beemiller, Inc.](#), 33 NY3d 523, 106 NYS3d 237, 130 N.E.3d 833 [2019]). "Due process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'" ([Williams v Beemiller, Inc.](#), *supra*, citing [International Shoe Co. v Washington](#), 326 U.S. 310, 316, 66 S Ct 154, 90 L. Ed. 95 [1945]).

Plaintiff does not dispute that the Court lacks general jurisdiction over American Biltrite, as it is not incorporated in New York, nor does it maintain its principal place of business in the state. However, plaintiff argues that American Biltrite is subject to specific jurisdiction pursuant to [CPLR 302 \(a\) \(1\)](#) because it transacted with the New York sales offices of Union Carbide Corporation, a New York corporation, for the purchase of **asbestos** fiber during the years when DiFranco was allegedly exposed to [*4] **asbestos** through his work with Amtico floor tiles. "In order for a court to exercise specific jurisdiction [*8] over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State'" ([Bristol-Myers Squibb Co. v Superior Court of California](#), US , 137 S Ct 1773, 1781, 198 L. Ed. 2d 395 [2017], citing [Goodyear Dunlop Tires Operations, S.A. v Brown](#), 564 U.S. 915, 919, 131 S Ct 2846, 2851, 180 L. Ed. 2d 796). "In order to determine whether personal jurisdiction exists under [CPLR 302 \(a\) \(1\)](#), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction" ([Pichardo v Zayas](#), 122 AD3d 699, 701, 996 NYS2d 176 [2d Dept 2014]). With regard to the first prong, there must be a finding that the non-domiciliary's activities were "purposeful," in that it "avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" ([Paterno v Laser Spine Inst.](#), 24 NY3d 370, 376, 998 NYS2d 720, 23 N.E.3d 988 [2014], citing [Fischbarg v Doucet](#), 9 NY3d 375, 380, 880 N.E.2d 22, 849 NYS2d 501 [2007]). In order to

satisfy the second prong of the jurisdictional inquiry, "there must be an 'articulable nexus' or a 'substantial relationship' between a defendant's in-state activity and the cause of action asserted" ([Leuthner v Homewood Suites by Hilton](#), 151 AD3d at 1043-1044, 58 NYS3d at 439).

Plaintiff has failed to establish a prima facie basis for specific jurisdiction over American Biltrite pursuant to [CPLR 302 \(a\) \(1\)](#) for the claims arising from DiFranco's exposure to **asbestos** outside of New York, based on its purchase of **asbestos** fibers from a New York corporation. Contrary to plaintiff's [*9] contention, the holding in [Licci v Lebanese Canadian Bank](#), 20 NY3d 327, 984 N.E.2d 893, 960 NYS2d 695 (2012), does not support a finding that American Biltrite is subject to long-arm jurisdiction pursuant to [CPLR 302 \(a\) \(1\)](#). In [Licci](#), the Court held that the defendant foreign bank's repeated use of a correspondent bank account in New York to effect dozens of international wire transfers was "purposeful," and that there was a substantial relationship between those business transactions and the claims asserted. Here, plaintiff's causes of action do not pertain to an alleged breach of any agreement between American Biltrite and Union Carbide for the purchase of the **asbestos** fibers (see [Pichardo v Zayas](#), *supra*). In addition, there is no evidence connecting American Biltrite's business transactions in New York to plaintiff's alleged exposure to **asbestos** while working with Amtico tiles outside of New York. "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State" ([Bristol-Myers Squibb Co. v Superior Court of California](#), *supra*). Accordingly, plaintiff failed to demonstrate a substantial relationship between American Biltrite's in-state activity and the claims asserted herein (see [Bristol-Myers Squibb Co. v Superior Court of California](#), *supra*; [Paterno v Laser Spine Inst.](#), *supra*; [McGowan \[*10\] v Smith](#), 52 NY2d 268, 419 N.E.2d 321, 437 NYS2d 643 [1981]).

Plaintiff has also failed to establish that jurisdiction over American Biltrite is proper under [CPLR 302 \(a\) \(3\)](#). Under that provision, New York courts may exercise specific personal jurisdiction over a nonresident corporation when it commits a tortious act outside the state causing injury to a person or property within the state, but only if the nonresident corporation (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. Plaintiff alleges that DiFranco's **asbestos**-related injury was sustained when he developed asbestosis and lung cancer, years after his exposure to **asbestos**, while he was a resident of New York. Plaintiff further **[**5]** alleges that a prima facie basis for jurisdiction exists because American Biltrite committed tortious acts outside New York which caused the injury to DiFranco within the state, and because American Biltrite regularly does business in New York and derives substantial revenue **[*11]** from "goods used or consumed or services rendered in the state."

Even assuming that plaintiff's injury occurred in New York, where his **asbestos**-related illness manifested itself (see [*Finerty v Abex Corp.*, 125 AD3d 564, 5 NYS3d 40 \[1st Dept 2015\]](#), *revd on other grounds* [*27 NY3d 236, 32 NYS3d 44, 51 N.E.3d 555 \[2016\]*](#)), plaintiff has failed to establish, prima facie, that American Biltrite's business activities in New York are sufficient to subject it to personal jurisdiction pursuant to [*CPLR 302 \(a\) \(3\)*](#), or that those activities are connected to the claims herein. In addition, plaintiff has failed to come forward with evidence establishing that the exercise of such jurisdiction would comport with federal due process, as there is no evidence that plaintiff's claims arise out of, or relate to, American Biltrite's contacts with New York ([*Bristol-Myers Squibb Co. v Superior Court of California*, *supra*](#); [*Goodyear Dunlop Tires Operations, S.A. v Brown*, *supra*](#)). As plaintiff has also failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exists here, American Biltrite's motion to dismiss the complaint based on lack of personal jurisdiction is granted (see [*Aybar v Aybar*, *supra*](#); [*Leuthner v Homewood Suites by Hilton*, *supra*](#)).

/s/ Jerry Garguilo

J.S.C.

Dated: March 3, 2021