STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

THOMAS EDWARD MCCUNE,

DECISION & ORDER

Plaintiff,

Index No.: 2024-997
RJI No.:

-against-

FIVES GIDDINGS & LEWIS, LLC, et al.,

Defendants.

APPEARANCES:

Robert P. Cahalan, Esq.
Smith, Sovik, Kendrick & Sugent, P.C.
Attorney for FG&L
Syracuse, New York

Michael A. Macrides, Esq.
Belluck Law, LLP
Attorney for Plaintiffs
New York, New York

Paul E. Davenport, J.S.C.:

On May 13, 2024, Thomas Edward McCune (hereinafter "plaintiff") commenced an action by filing a summons and complaint in the Schenectady County Clerk's Office. Plaintiff seeks to recover damages for personal injuries resulting from his exposure to various asbestos containing products. Issue was subsequently joined, and discovery has been conducted pursuant to an expedited schedule. This matter is currently scheduled for trial commencing on July 31, 2025.

Fives Giddings & Lewis, LLC (hereinafter "defendant") has now made a motion for summary judgment dismissing the plaintiff's complaint and all crossclaims asserted pursuant to

CPLR §3212. The defendant seeks summary judgment on the theory that the plaintiff lacks personal jurisdiction. The defendant asserts that this Court has neither general nor specific jurisdiction over it because it is not incorporated in New York and has no principal place of business in New York. Plaintiff has opposed the motion, arguing that personal jurisdiction exists over the defendant.

The plaintiff was diagnosed with lung cancer in July of 2023. Plaintiff alleges that he was exposed to asbestos containing materials because of his work on the defendant's machines, lathes and milling machines. Plaintiff asserts that this equipment was used in commercial and industrial applications and the plaintiff worked on these items while working as a machine repairman at Aracom at its shop in Lunenburg Massachusetts.

Defendant, a non-domiciliary, maintains that it is incorporated in Wisconsin, and has a principal place of business in Wisconsin. It claims plaintiff's exposure occurred in Massachusetts. Therefore, the defendant argues that this Court cannot exercise jurisdiction over it, because it is not incorporated in, nor is its principal place of business in New York State *see Daimler AG v Bauman* (134 S Ct 746 [2014], and the alleged tortious conduct and the plaintiff's alleged exposure all exist, occurred or arose outside of New York State *see Bristol-Myers Squibb Co. v Superior Court*, 137 S Ct 1773 [2017].

In response to the defendant's summary judgment motion, the plaintiff does not contest defendant's general jurisdiction argument. However, plaintiff argues that the Court maintains specific jurisdiction over the defendant under CPLR 302(a)(1)). CPLR 302(a)(1) subjects a non-domiciliary to personal jurisdiction when it "transacts any business within the state" and there is substantial relationship between the transaction and the legal claim asserted. "Essential to the maintenance of a suit against a non-domiciliary under CPLR §302(a)(1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon" *McGowan v Smith*, 52 NY2d 268, 272[1981]. In order to determine whether jurisdiction exists under CPLR

§302(a)(1), the Court must decide whether the defendant transacts any business in the state of New York and, if so, whether the plaintiff's cause of action arises out of such business transactions. *Johnson v Ward*, 4 NY3d 516, 519{2005]. It is well settled that the party asserting jurisdiction bears the ultimate burden of proof to establish the same *see Urfirer v SB Bldrs., LLC,* 95 AD3d 1616 [3d Dept 2012]; *Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC*, 90 AD3d 977, 978 [2d Dept 2011]. However, "on a motion to dismiss, a plaintiff may defeat the motion by showing that facts 'may exist' to support the exercise of personal jurisdiction over the defendant" *Rajpurohit v Rajpurohit*, 122 AD3d 706, 708 [2d Dept 2014]; *see Yin Jun Chen v Lei Shi*, 19 AD3d 407 [2d Dept 2005]. As stated at the outset, the defendant has chosen to move for summary judgment rather than a motion to dismiss pursuant to CPLR 3211. "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Stonehill Capital Management, LLC v Bank of the West,* 28 NY3d 439, 448 (2016) *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); CPLR 3212(b). "Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Id.* quoting *Alvarez*, 68 NY2d at 324. "When considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations." *Sovocool v Cortland Regional Med. Ctr.*, 218 AD3d 947, 949 (3d Dept 2023); *see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011). If the movant fails to meet its burden to establish a *prima facie* case, tendering sufficient evidence to eliminate material issues of fact, the motion must be denied regardless of the sufficiency of the opposing papers. *Vega v Restani Const. Corp.*, 18 NY3d 499 (2012); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985).

In support of the motion, the defendant included an affidavit from Jeff Ritz, its Chief Financial Officer. Mr. Ritz discusses the corporate history of the defendant and he further claims that the defendant is not qualified to do business in New York, has never collected New York taxes, has never appointed an agent for service of process in New York, has never had any offices or manufacturing facilities in New York, has never owned or leased real property in New York, has never had officers or employees in New York and has never had a bank account in New York. Noticeably absent from the affidavit is any discussion of whether the defendant or any of its prior brands ever shipped machinery to customers in New York State. The plaintiff testified at his deposition that he worked on the defendant's machinery at the shop in Lunenberg Massachusetts and he also described how the various customers were located in Massachusetts, Connecticut, Rhode Island, New York, New Jersey, and Pennsylvania.[1] The plaintiff was also asked of the various manufacturers of machines that he worked on, including defendant's machine and the ones that came come from New York to be repaired and the plaintiff replied, "[a]ll of them".[2] In addition to claiming that he worked on the defendant's machinery which was transported to Massachusetts from New York the plaintiff also alleges that the defendant's prior brands (Prior to 2002) had significant physical presence in the State of New York which would make the defendant amenable to service under CPLR 302. The defendant has failed to meet its burden of proof on the motion for summary judgment. On the current state of the record, it is readily apparent that jurisdiction exists under CPLR 302(a)(1).

The defendant's motion for summary judgment is denied, without costs.

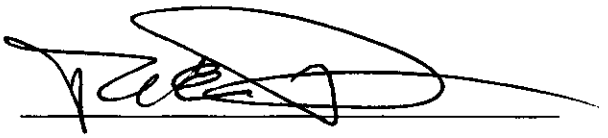
This writing shall constitute the Decision and Order of this Court.

SO, ORDERED.

[1] Plaintiff's Dep. Page 613
[2] Plaintiff's Dep. Page 614.

ENTER.

Dated: June 11, 2025
Schenectady, New York



Paul E. Davenport
Supreme Court Justice

Papers Considered: Documents Nos. 510-519, 589-601, 605-607, filed electronically in the NYSCEF docket.

The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Schenectady County Clerk. Plaintiff is not relieved from the applicable provisions of CPLR 2220 and §202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.