

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

In Re: Eighth Judicial District Asbestos Litigation

RONALD McINNIS,

Plaintiff,

Decision & Order

v.

Index No. 800792/2024

Motion Seq. #22

A.O. SMITH WATER PRODUCTS, et al.,
Defendant.

Susan Van Gelder, Esq
Goldberg Segalla LLP
Attorney for Defendant / Movant

Michael Macrides, Esq.
Belluck & Fox, LLP
Attorney for Plaintiff / Respondent

Walter, J.:

The following papers were read on this motion by Defendant, The William Powell Company ("Powell" or "Defendant") to dismiss the complaint: NYSCEF Document Numbers 323 – 337, 352 – 368, and 377.

Defendant moves this Court for an Order pursuant to CPLR §§ 3211(a)(8) and 3212 dismissing Plaintiff's, Ronald McInnis' ("Plaintiff" or "Mr. McInnis"), complaint and all cross claims against Powell on the grounds that the Court lacks personal jurisdiction over Powell. Plaintiff argues he has made a prima facie showing of long-arm jurisdiction over Powell under CPLR § 302(a)(3).

Generally, a motion to dismiss is made prior to the service of the responsive pleadings, however, the Court may treat a motion to dismiss as a motion for summary for summary judgement (CPLR § 3211[c]). "Even if a post answer motion is denominated as a motion to dismiss under CPLR 3211, the court can treat it as one for summary judgment under CPLR 3212 if the papers submitted demonstrate that the parties are laying bare their proof and deliberately charting a summary

judgment course (Siegel, New York Practice, § 272; citing *Nowacki v. Becker*, 71 AD3d 1496, 1497 [4th Dept. 2010]). “As commonly employed, the motion for summary judgment is based upon the overall merits of the case rather than on an individual defense. It is, however, acceptable practice to move for summary judgment on grounds listed in CPLR § 3211(a) when these are asserted as defenses in the answer rather than as basis for dismissal” (*Houston v Trans Union Credit Information Co.*, 154 AD2d 312, 313 [1st Dept. 1989]; see also Siegel, New York Practice, § 283). In the instant case the Defendant, in addition to “laying bare its proof,” asserted its defenses in the Answer, and specifically moved under both CPLR §§ 3211 and 3212. The Plaintiff, therefore, was on notice and is not prejudiced by the Court treating this motion as one for summary judgment.

Plaintiff argues it has made a prima facie showing as to long-arm jurisdiction under CPLR § 302(a)(3). To establish a prima facie case of long-arm jurisdiction under CPLR § 302(a)(3) Plaintiff must demonstrate that the defendant (1) committed a tortious act without the state; (2) causing injury within the state; and (3) defendant regularly does business in the state and derives substantial revenues within the state or should reasonably expect the act to have consequences in the state and derives substantial revenues from interstate or international commerce. For the purposes of the instant motion the Court’s determination centers on whether there is a prima facie case that the Plaintiff was injured in New York.

Defendant argues that neither the Plaintiff nor any witness testified that Mr. McInnis was exposed to any Powell products in New York. Defendant points out that Plaintiff testified to being a union pipefitter from 1969 – 2014 and he worked at various industrial facilities throughout Canada and occasionally in New York. Plaintiff could not recall where he worked in New York, when he was there, or the type of facilities he worked in. Defendant also argues that Plaintiff has not made any claim that he worked on or around Powell valves in New York.

Plaintiff asserts that the work he did in New York was at an “oil refinery and some chemical plants” but he can’t recall the names of the facilities (NYSCEF Doc No 353 at p 95). Plaintiff testified he was doing “exactly the same thing” he was doing in Canada (Id. at 97). Plaintiff argues this is enough to establish that he repaired the same valve brands in New York and was subjected to the same exposure to asbestos from Powell valves as he was in Canada.

In deciding a motion for summary judgment, “the court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Assaf v Ropog Cab Corp.*, AD2d 520, 521-522 [1st Dept 1989] [internal citations omitted]). At issue here is whether Plaintiff’s vague testimony regarding

his work in New York is enough to draw a reasonable inference that he was exposed to asbestos through Powell valves in New York.

There is no evidence presented as to where Mr. McInnis worked in New York. He testified the pumps, valves, and traps he worked on in New York were the same as the ones he worked on in Canada, but they could have been any of the brands he identified (NYSCEF Doc No. 93 at pp 97-98). There is no way to reasonably infer that the valves he worked on were Powell valves and, therefore, the Plaintiff has failed to establish a prima facie case that he was injured by the Defendant in New York. As such the Defendant's motion to dismiss is Granted.

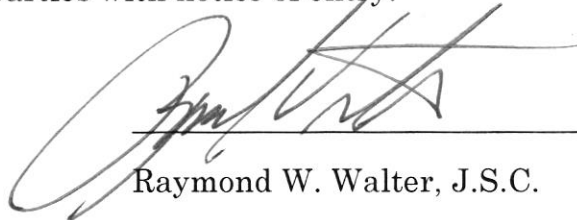
Accordingly, it is

ORDERED that the Defendant's motion pursuant to CPLR §§ 3211(a)(8) and 3212 dismissing Plaintiff's, complaint and all cross claims against Powell is **GRANTED**; and it is further

ORDERED that the action is severed and continued against the remaining Defendant s; and it is further

ORDERED that within 30 days of entry defendant Powell shall serve a copy of this Decision and Order upon all parties with notice of entry.

Dated: 11/15/2024



Raymond W. Walter, J.S.C.