

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS LEWIS, ET AL., :
 : CONSOLIDATED UNDER
 : MDL 875

Plaintiffs, **FILED**

AUG - 2 2011:

: Transferred from the District
: of New Jersey
: (Case No. 10-CV-650)

v. :
 : MICHAEL RUNZ, Clerk
By _____ Dep. Clerk

ASBESTOS CORP., LTD., ET AL., :
 :
 : E.D. PA CIVIL ACTION NO.
 : 2:10-64625
 :
Defendants. :

O R D E R

AND NOW, this **29th** day of **July, 2011**, it is hereby **ORDERED**
that the Motion to Dismiss of Defendant Asbestos Corp, Ltd. (doc.
no. 25) is **DENIED**.¹

¹ Plaintiff filed this action on February 13, 2008 in the New Jersey Superior Court. This case was removed to the United States District Court for the District of New Jersey on or about February 4, 2010. This case was transferred to the United States District Court for the Eastern District of Pennsylvania on or about April 9, 2010 as part of MDL-875. Plaintiff alleges that Mr. Lewis was exposed to asbestos when he worked at Johns-Manville in Manville, New Jersey starting in 1965 until approximately 1967, at Chicago Bridge & Iron in Birmingham, Alabama from 1967 until 1977, and as a boilermaker at various job sites from 1977 until 2000. Plaintiff alleges that Mr. Lewis was exposed to ACL asbestos fibers when working at the Manville plant. Mr. Lewis was diagnosed with mesothelioma on May 18, 2006 and passed away on June 28, 2008.

I. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5)

Federal Rule of Civil Procedure 4(m) states that, "[i]f a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against the

defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision(m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)."

B. Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)

The Due Process Clause protects defendants from binding judgments of foreign states with which the defendants have no significant "contacts, ties, or relations." Burger King v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (quoting Int'l Shoe v. Wash., 326 U.S. 310, 319 (1945)). Due process requires that a defendant be provided a "fair warning" and a "degree of predictability" regarding how his conduct may subject him to legal process and liability in a particular forum. Id. at 472.

To exercise personal jurisdiction over a defendant, a federal court sitting in diversity must undertake a two-step inquiry. IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 258-59 (3d Cir. 1998). First, a court must determine whether the applicable state jurisdictional statute allows it to exercise jurisdiction under the circumstances of the particular case. Id. at 259. Second, a court must determine whether the reach of the state statute comports with the Due Process Clause of the Federal Constitution. Id. In Pennsylvania, where the relevant long-arm statute provides for jurisdiction "based on the most minimum contact with th[e] Commonwealth allowed under the Constitution of the United States," 42 Pa. Cons. Stat. § 5322(b), this inquiry is collapsed into a single step, i.e., whether the Federal Constitution allows the state to exercise personal jurisdiction over the defendant. See IMO Indus., 155 F.3d at 259. The constitutional test used to answer this question depends upon whether the jurisdiction sought is "general" or "specific." See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

General jurisdiction exists "when a defendant has maintained systematic and continuous contacts with the forum state." Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007). Specific jurisdiction exists "when the claim arises from or relates to conduct purposely directed at the forum state." Id.

II. MOTION TO DISMISS OF ASBESTOS CORP., LTD.

Defendant makes two arguments in its Motion to Dismiss: (1) Plaintiff failed to serve Defendant with the complaint within 120 days after the complaint was filed; (2) Defendant is not subject to personal jurisdiction in New Jersey.

As to Defendant's first argument that it was not served with the complaint within 120 days after the complaint was filed as required by Federal Rule of Civil Procedure 4(m), Defendant acknowledges that the 120 day time limit generally does not apply to foreign corporations, like ACL. See Pennsylvania Orthopedic Ass's v. Mercedes-Benz A.G., 160 F.R.D. 58 (E.D. Pa. 1995) (finding that despite the fact that service had not yet been effectuated on the defendant, plaintiff's complaint could not be dismissed since Federal Rule of Civil Procedure 4(m) does not apply to foreign corporations, but "encourag[ing] Plaintiffs to make a good faith attempt to effect service"). Defendant argues that Plaintiff did not make good faith attempts to serve ACL.

Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) is denied since Federal Rule of Civil Procedure 4(m) does not apply to foreign corporations. Plaintiff has served ACL, so Defendant has no remedy against Plaintiff.

Second, Defendant argues that New Jersey does not have personal jurisdiction over ACL because ACL is incorporated in Canada and lacks contacts with New Jersey. Plaintiff cites to a recent unpublished decision by the Superior Court of New Jersey. Buttitta v. Allied Signal, Inc., 2010 WL 1437273 (N.J. Super. A.D. April 5, 2010). The court noted that, "[i]n what it characterizes as a 'streamlined motion procedure,' ACL moved to dismiss plaintiff's complaint for lack of personal jurisdiction based on the same facts and legal arguments asserted in three federal cases in the 1970's." 2010 WL 1437273 at *20. The Buttitta court cites to Austin v. Johns-Manville Products Corp., where the United States District Court for the District of New Jersey denied ACL's Motion to Dismiss for lack of personal jurisdiction noting that because of ACL's billing and shipping methods, it knew or should have known that its products would reach New Jersey. 2010 WL 1437273 at *20 (citing No. 75-754 (D.N.J. Dec. 1, 1976)). The Austin court cited to several cases where the identical motion by ACL had been denied.

In accordance with Buttitta and Austin, as the same evidence has been presented by ACL in this case, ACL's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) is denied.

E.D. PA NO. 2:10-64625

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno, J.", with a long horizontal flourish extending to the right. The signature is positioned above a solid horizontal line.

EDUARDO C. ROBRENO, J.