

**McFarland v ABB, Inc.**

2024 NY Slip Op 31257(U)

April 12, 2024

Supreme Court, Erie County

Docket Number: Index No. 800616/2023

Judge: Raymond W. Walter

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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RILEY S. McFARLAND, as Executor of the  
Estate of KAREN McFARLAND, deceased,  
Plaintiff,

v.

ABB, INC., et al.,  
Defendants.

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**Decision & Order**

Index No. 800616/2023  
(Motion Seq. #2)

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**Walter, J.:**

In addition to Oral arguments held on March 18, 2024, the following papers were read on this motion by Defendant pursuant to CPLR § 3211(a)(8):

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion, Affirmation, Exhibits. Memo of Law In Support...	173-177
Affirmation in Opposition, Exhibits.....	181-197
Memorandum of Law in Reply, Exhibits.....	203-205, 232-233

This matter comes before the Court on motion for an Order pursuant to CPLR § 3211(a)(8), dismissing all claims and cross claims against Defendant, IMI Fabi, LLC for lack of personal jurisdiction over IMI Fabi, LLC in the state of New York. Oral arguments were heard on the motion on March 18, 2024, via Microsoft Teams.

Plaintiff alleges that she contracted mesothelioma from her exposure to asbestos through her use of cosmetic talc products, including Estee Lauder (“EL”) products. Plaintiff further alleges that IMI Fabi, LLC’s (“Fabi LLC” or “Defendant”) transactions and sales of cosmetic talc in New York and to New York domiciliaries,

including EL, is enough to establish long-arm jurisdiction over Fabi LLC pursuant to CPLR § 302(a)(1), (2), and (3).

Zemex Fabi Benwood, LLC (“ZFB”) was a North Carolina limited liability company established in 1997 (Defense Exh 2 ¶ 3). ZFB was a joint venture between Zemex Corp., and IMI Fabi (USA) (Plaintiff Exh C p 1187). Zemex owned Suzorite which owned and operated a talc plant in Natural Bridge, New York (*id.* at 1188). It is unclear in the record whether ZFB had an interest in the New York plant between 1997 and 2001. ZFB changed its name to IMI Fabi, LLC in 2001 (Defense Exh 2 at ¶ 4). IMI Fabi (Diana), Inc., (“Fabi Diana”), is a subsidiary of Fabi LLC, which purchased the talc plant in New York from Suzorite in 2001 (Plaintiff Exh C p 1188). Fabi Diana sold cosmetic talc from 2001 until 2004 (Defense Exh 2 at ¶ 14; Plaintiff Exh C p 1185). It is undisputed that IMI Fabi, LLC has sold cosmetic grade talc since, at least, 2005 (Defense Exh 2 at ¶ 7). Plaintiff sued Fabi LLC, but did not name its predecessors, Fabi Diana or ZFB as defendants.

The Defendant argues that Plaintiff failed to plead jurisdiction through and between Fabi Diana, ZFB, and its successor Fabi LLC. Defendant cites *BRG Corp., v Chevron U.S.A., Inc.*, (163 AD3d 1495, 1496 [4<sup>th</sup> Dept. 2018] quoting *Sementz v Sherling & Walden, Inc.*, 21 AD3d 1138, 1139-1140 [3<sup>rd</sup> Dept. 2005]), for the proposition that corporate successor liability rules “deal with the concept of tort liability, not jurisdiction.... [Successor Liability rules] do not and cannot confer such jurisdiction over the successor in the first instance.”

The Fourth Department decision in *BRG Corp., v Chevron U.S.A., Inc.*, is on point as it applies to Fabi Diana and thereby binding on this Court. The Plaintiff, therefore, cannot establish jurisdiction over Fabi LLC through the acts of Fabi Diana, which owned and operated the New York facility from 2001 through 2004. ZFB, however, is not a separate entity from Fabi LLC. It is the same entity that simply changed its name (Defense Exh 2 ¶ 4). The Court, therefore, must determine whether the allegations in the complaint against Fabi LLC, (including ZFB), are enough to confer long-arm jurisdiction over it, or at a minimum, enough to permit further discovery.

Rejecting the Plaintiff’s attempts to establish jurisdiction through the acts of Fabi Diana the Court is left to examine any acts that may be attributed to Fabi LLC, (including ZFB), for the purposes of establishing jurisdiction. “In opposing a motion to dismiss the complaint pursuant to CPLR § 3211 (a)(8) on the ground of lack of jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists. The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff” (*Lowy v*

*Chalkable, LLC*, 186 AD3d 590, 591 [2<sup>nd</sup> Dept. 2020] [internal quotation marks omitted]).

Plaintiff first argues that she has demonstrated a prima facie case pursuant to CPLR § 302(a)(2). Plaintiff alleges that Defendant processed and sold cosmetic talc contaminated with asbestos from its Natural Bridge plant in New York and therefore the tortious conduct occurred within the state. Plaintiff argues that the tortious conduct, at least in part, was committed within this state between late 1996 and 2001.

Plaintiff also argues she has demonstrated a prima facie showing of jurisdiction over Fabi LLC pursuant to CPLR § 302(a)(3) in that she was exposed to asbestos and injured in New York State from using EL products that contained asbestos-contaminated talc supplied by Fabi LLC. Plaintiff claims the Defendant manufactured and distributed its products outside of New York. Plaintiff claims the Defendant derives substantial revenues in New York and was aware or could reasonably foresee that its conduct would have consequences in New York, and it derives substantial revenues from interstate or international commerce.

Under the first prong of CPLR § 302(a)(3), it is undisputed that Fabi LLC processed and sold its talc from West Virginia (Defense Exh 2). Second, the Plaintiff's pleadings allege that her injuries occurred in New York through the inhalation of asbestos contaminated talc contained in, among other products, EL cosmetics. On a motion to dismiss pleadings are to be afforded a liberal construction and the facts alleged therein are to be accepted as true (*Rushaid v Picket & Cie*, 28 NY3d 316, 327[2016]).

Third, "the decisive issue here is whether plaintiffs met their burden of establishing that defendant should have reasonably foreseen that a defect in the manufacture of its [product] would have consequences in New York (*Darrow v Deutschland*, 119 AD3d 1142 [3<sup>rd</sup> Dept. 2014]). The exhibits provided in this motion establish that since 2004, Fabi LLC has contracted with Cosmetic Specialties, Inc. ("CSI"), as sole distributor of its cosmetic talc (Plaintiff's Exh D at 41-42). It is undisputed that Fabi LLC's talc is sold for use in the cosmetic, pharmaceutical, and food industries (Defense Exh 2 ¶ 7). In addition, there is some indication that Fabi LLC was aware of CSI's end customers, including EL, a New York company (Plaintiff's Exh C at 1192, 1194, 1210, Exh M). In view of the fact that cosmetics are a ubiquitous consumer product, and that a reasonable inference can be drawn that the Defendant was aware that CSI was distributing to manufacturers in New York, the Defendant should have reasonably expected a manufacturing defect to have consequences in New York (*Darrow* at 1144-1145).

Finally, Fabi LLC has revenues of approximately \$16 Million (Plaintiff's Exh D at 104). Its entire business is based on distributing talc through interstate

commerce and it admittedly “sells its products to customers in a number of states and Canada” (Plaintiff Exh E ¶2).

Plaintiff also argues that she has demonstrated a prima facie case pursuant to CPLR § 302(a)(1) which subjects an entity to specific jurisdiction for either “transacting any business within the state or contracting anywhere to supply goods or services in the state,” as long as the cause of action arose from that transaction or supply of goods. Plaintiff argues the same facts that give her jurisdiction under CPLR § 302(a) (2) and (3) establish jurisdiction under (a)(1).

Defendant counters that Plaintiff’s evidence does not confer jurisdiction over Fabi LLC. Defendant points to the deposition testimony of Plaintiff’s daughter, Siblea Pangallo (Defense Exh A). Ms. Pangallo testified that her mother used EL face powder, eyeshadow, and blush products and that she only used those products from 1996 to 2000. This timeframe, Defendant alleges, is prior to the period that Fabi LLC began selling cosmetic talc. Defendant also argues that Plaintiff cannot rely on EL “Youth Dew” body powder as a basis for jurisdiction because Ms. Pangallo’s testimony does not state that the Plaintiff used that product.

Defendant goes on to argue that specific jurisdiction requires a link not just between the Defendant and the forum, but between the defendant, the forum and the Plaintiff’s claims (*see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339-340 [2012]). The question for the Court at this stage, however, is not whether the Plaintiff has provided enough evidence to prove her claim at trial, but whether “the pleadings establish the articulable nexus or substantial relationship necessary for the purpose of personal jurisdiction” (*id.* at 340[internal quotation marks omitted]). Defendant insists, based on Ms. Pangallo’s testimony, that Plaintiffs have failed to offer any proof of Fabi LLC’s suit-related contacts and Plaintiff’s claims are completely “unmoored” from Defendant’s contacts with New York.

In the event that the Court determines that the Plaintiff has failed to establish a prima facie showing of personal jurisdiction, the Plaintiff need only demonstrate that it made a “sufficient start” as to jurisdiction to permit further discovery on the issue (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). “The opposing party need only demonstrate that facts “may exist” whereby to defeat the motion. It need not be demonstrated that they do exist” (*id.* at 466). Whether Plaintiff has made a sufficient start to warrant discovery pursuant to CPLR § 3211(d) is a matter within the Court’s discretion (*Bunkoff Gen. Contrs., v State Auto Mut. Ins. Co.*, 296 AD2d 699, 700 (3<sup>rd</sup> Dept. 2002)).

Plaintiff admits that during the daughter’s testimony she was only able to identify her mother’s use of EL face powder, blush, and eyeshadow from 1996 to 2000. Plaintiff alleges it is very likely she used it longer than that (Oral argument transcript p 12 line 18-25). Plaintiff also alleges that ZFB was processing and

selling cosmetic talc from its New York plant prior to 2001 and its talc was used in EL products (see Plaintiff Exh G pp 82-87). The testimony provided by Ms. Pangallo, however, raises enough questions regarding the link between the defendant, the forum, and the Plaintiff's claims that a prima facie case of jurisdiction cannot be established at this point. The facts needed to firmly establish that link may be "within the exclusive control" of the Defendant which is the purpose of CPLR § 3211(d) (see *Peterson* at 466).

Given the record before the Court at this time and the arguments of Counsel, the Court finds that the Plaintiff has demonstrated a sufficient start to justify jurisdictional discovery.

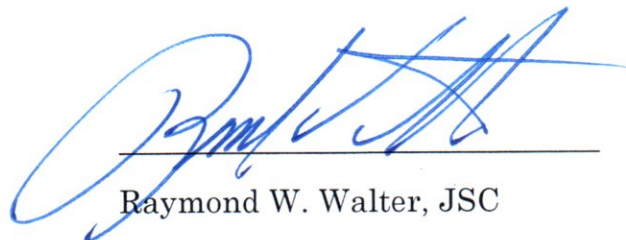
WHEREFORE, upon the foregoing, it is hereby

ORDERED, that the Defendant's motion to dismiss for lack of personal jurisdiction is DENIED without prejudice to renew following the completion of jurisdictional discovery; and it is further

ORDERED, that the parties are directed to submit a proposed discovery schedule that will enable them to complete jurisdictional discovery by May 20, 2024; and it is further

ORDERED, that in the event the parties are unable to agree on a discovery schedule, a scheduling conference will be held with the Court on April 25, 2024, at 12:30 PM via Microsoft Teams.

Dated: April 12, 2024



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Raymond W. Walter, JSC

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