

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ELLEN KLEINER et al.

v.

RITE AID CORPORATION et al.

:
:
:
:
:
:
:
:
:
:

JANUARY TERM, 2017

NO. 2505

CONTROL NO. 17121375

FILED
OCT 15 2018
CLERK OF COURT

ORDER

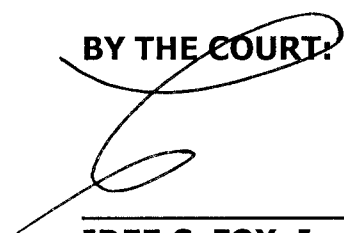
AND NOW, this

15th

day of October, 2018, upon consideration of the

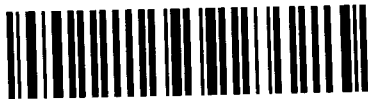
Preliminary Objections filed by Defendant Imerys Talc America, Inc., Plaintiffs' response thereto, and after oral argument, for reasons set forth in the attached Opinion, said Objections are **OVERRULED**. Defendant is granted leave of twenty (20) days from the docketing of this Order to file responsive pleading to the Complaint.

BY THE COURT:



IDEE C. FOX, J.

Kleiner Etal Vs Rite Ai-ORDOP



17010250500134

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ELLEN KLEINER et al.

v.

RITE AID CORPORATION et al.

:
:
:
:
:
:
:
:
:

JANUARY TERM, 2017

NO. 2505

CONTROL NO. 17121375

OPINION

Defendant Imerys Talc America, Inc. ("Imerys") filed Preliminary Objections to Plaintiffs Ellen and Yuri Kleiner's Complaint. For the following reasons, the Preliminary Objections are overruled.

FACTS AND PROCEDURAL HISTORY

Plaintiffs commenced this action by Writ of Summons in the Philadelphia Court of Common Pleas. The named Defendants are Rite Aid Corporation; Rite Aid of Pennsylvania, Inc.; Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.; Imerys Talc America, Inc. f/k/a Luzenac America, Inc.; and Personal Care Products Council f/k/a Cosmetic, Toiletry, and Fragrance Association.

This action arises from a claim that the talc in Johnson & Johnson's Baby Powder and Shower to Shower products ("Products") caused Ellen Kleiner to develop ovarian cancer. The Complaint alleges that movant Imerys "mined and sold talc to Johnson & Johnson with full knowledge that Johnson & Johnson was then packaging the talc and selling to consumers as the Products." The Complaint also alleges that "by mining talc and supplying that talc to Johnson & Johnson for use in the Products, [Imerys] was

knowingly an integral part of the overall manufacture, design, and production of the Products and their introduction into the stream of interstate commerce, including in Pennsylvania.”

Imerys filed the instant Preliminary Objections¹ on the grounds that this Court lacks personal jurisdiction.² Imerys attached as evidence an Affidavit from Patrick Joseph Downey, Imerys’ New Product Development Engineering Director. The Affidavit avers, *inter alia*, that Imerys is a Delaware Corporation with its principal place of business in California; Imerys does not own, possess, or lease property in Pennsylvania; Imerys does not maintain an office or operations in Pennsylvania; Imerys does not have an address, telephone number, or bank account in Pennsylvania; the talc that is used in the Products is not mined in Pennsylvania; Imerys neither sells talc in Pennsylvania for use in the Products, nor ships or distributes talc in Pennsylvania for use in the Products; and Imerys’ commercial transactions with Johnson & Johnson Consumer Companies, Inc. related to the Products took place outside Pennsylvania.

Plaintiff filed a response to the Preliminary Objections, arguing that the averments of the Affidavit “are irrelevant to whether this Court has specific or general personal jurisdiction over Imerys (a foreign corporation registered to do business in Pennsylvania) in this case (involving a Pennsylvania Plaintiff harmed and injured in Pennsylvania).” Attached to Plaintiff’s response is a printout from the Pennsylvania

¹ Johnson & Johnson and Johnson & Johnson Consumer Company Inc. initially removed this action to the United States District Court for the Eastern District of Pennsylvania. The District Court subsequently remanded the action to this Court.

² Imerys’ other Preliminary Objections were resolved by Stipulation.

Department of State website showing that Imerys is actively registered as a foreign corporation, with an effective date of January 11, 2007.

The Court scheduled oral argument and the parties submitted reply briefs. During oral argument, the parties made reference to documents that were not included or addressed in the briefs. As a result, the Court granted the parties leave to conduct written jurisdictional discovery.

After discovery, Plaintiff filed a sur-reply with the following attached: 1). A spreadsheet of Imerys' annual sales data showing that from 2007 to 2017 Imerys earned approximately two to three million dollars per year in revenue from talc sales in Pennsylvania and approximately sixty to seventy million dollars per year in revenue from talc sales in the United States; 2). Responses to interrogatories stating that Imerys sent samples of its talc to Pennsylvania-based R.J. Lee Group in Monroeville, Pennsylvania for testing approximately eleven times since 2010; 3). An article written by Pennsylvania State University epidemiologist Joshua Muscat on the subject of talc use and ovarian cancer (which states "funding for this work was provided by a grant from Luzenac American Inc., and Johnson and Johnson Consumer and Personal Products Worldwide."); 4). Emails between an Imerys employee and a Johnson & Johnson employee, in which the Johnson & Johnson employee's address is listed as "400 West Lincoln Avenue, Lititz, PA 17543"; and 5). A photograph of a Johnson & Johnson's Baby Powder bottle, allegedly taken in a Philadelphia Rite-Aid location, which displays a telephone number with a "215" area code. Imerys also filed a sur-reply, which included a response to interrogatories stating that "Imerys does not manufacture,

package, label, or otherwise have any input on the information contained on the Products.”

The Court heard additional oral argument and held this matter under advisement. For the following reasons, Imerys’ Preliminary Objections are overruled.

DISCUSSION

A party may assert a lack of personal jurisdiction by preliminary objection. Pa.R.C.P. 1028(a)(1). When a defendant challenges the court’s assertion of personal jurisdiction, that defendant bears the burden of supporting such objections to jurisdiction by presenting evidence. *Trexler v. McDonald’s Corp.*, 118 A.3d 408, 412 (Pa.Super. 2015). Once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it. *Mendel v. Williams*, 53 A.3d 810, 816 (Pa.Super. 2012). When deciding a motion to dismiss for lack of personal jurisdiction, the trial court must consider the evidence in the light most favorable to the non-moving party. *Id.*

Here, the parties agree that Imerys is registered as a foreign corporation in Pennsylvania. The authority of a state to exercise *in personam* jurisdiction over non-resident defendants is limited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mendel at 817*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The extent to which jurisdiction is proscribed by the Due Process Clause is dependent upon the nature and quality of the defendant’s contacts with the forum state. *Id.*

Specific Jurisdiction

A state may exercise *in personam* jurisdiction over a non-resident defendant based either upon the specific acts of the defendant which gave rise to the cause of action or upon the defendant's general activity within the state. *Kubik v. Letteri*, 532 Pa. 10, 16, 614 A.2d 1110, 1113 (Pa. 1992). Specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Mendel* at 817, quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011). For Pennsylvania courts to exercise specific jurisdiction over a non-resident defendant, "the exercise of jurisdiction must comport with constitutional principles of due process." *Schiavone v. Aveta*, 41 A.3d 861, 866 (2012), *aff'd*, 625 Pa. 349, 91 A.3d 1235 (2014).

The United States Supreme Court examined the limitations of due process on specific personal jurisdiction recently, in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). *Bristol-Myers Squibb Co.* involved an action by California residents and California non-residents against a pharmaceutical company that developed the drug at issue in another state. The lower courts found that specific jurisdiction existed, due to the courts' use of a "sliding scale" approach, which held that "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." *Id.* at 1781. The Supreme Court explicitly rejected this "relaxed" approach, and made clear that "[i]n order for the court to exercise specific jurisdiction 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.'" *Id.*, quoting *Goodyear* at 919, 2851. Furthermore, the Supreme Court noted, "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.*

Here, Plaintiffs have demonstrated that Imerys engages in some business activities in Pennsylvania. Specifically, Plaintiffs presented evidence that Imerys has earned revenue from sales of its talc in Pennsylvania, has sent samples of its talc for testing in Pennsylvania, and has communicated with employees of Johnson & Johnson who are located in Pennsylvania. However, Plaintiffs have failed to demonstrate that any of this activity is related to the underlying controversy in this matter, as described by the Complaint.

The Complaint states that Imerys "mined and sold talc to Johnson & Johnson with full knowledge that Johnson & Johnson was then packaging the talc and selling to consumers as the Products." Imerys, in their Preliminary Objections, presented evidence that the talc in the Products was mined and sold in other jurisdictions. Plaintiffs did not rebut this evidence. Instead, Plaintiffs presented evidence of Imerys' unconnected activities in the Commonwealth.

The Complaint also states that "by mining talc and supplying that talc to Johnson & Johnson for use in the Products, [Imerys] was knowingly an integral part of the overall manufacture, design, and production of the Products and their introduction into the stream of interstate commerce, including in Pennsylvania." The Supreme Court

explicitly rejected the stream of commerce theory as a basis for personal jurisdiction in *J. McIntyre, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011). Specifically, the Supreme Court held that a “defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” *Id.* at 880. Here, Plaintiffs have presented no evidence that Imerys targeted Pennsylvania as a forum. As such, Imerys introduction of talc “into the stream of interstate commerce” is not enough to establish specific jurisdiction.

Likewise, the fact that Plaintiffs reside in Pennsylvania, and allegedly purchased and used the Products here, is insufficient to subject Imerys to specific jurisdiction. The “primary focus of [a] personal jurisdiction inquiry is the *defendant’s* relationship to the forum State.” *Bristol-Myers Squibb Co.* at 1779, quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). In *Walden*, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. The Supreme Court held that “the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and ‘suffered foreseeable harm in Nevada’...because the ‘relevant conduct occurred entirely in Georgi[a] ... the mere fact that [this] conduct affected plaintiffs with connections to the forum State d [id] not suffice to authorize jurisdiction’.” *Bristol Myers Squibb Co.* at 1781-82, quoting *Walden* at 1124, 1126.

Plaintiffs, like the plaintiffs in *Walden*, may have suffered foreseeable harm in Pennsylvania. However, the relevant conduct of Imerys (i.e. the mining and shipping of

the talc) took place in other jurisdictions. As such, this Court cannot exercise specific personal jurisdiction over Imerys consistent with due process.

General Jurisdiction

General jurisdiction involves “circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from[,], and thus an intention to submit to[,], the laws of the forum State [.]” *Mendel* at 817. In Pennsylvania, general personal jurisdiction over corporations is governed by 42 Pa.C.S.A §5301:

(a) General rule.--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

...

(2) Corporations.--

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S.A. §5301(a).

The United States Supreme Court examined the limitations of due process on general personal jurisdiction in *Daimler AG v. Bauman*, 571 U.S. 117, 134 S.Ct. 746 (2014). In *Daimler*, the Supreme Court upheld the general rule that “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Id.* at 127, 754, quoting *Goodyear* at 919, 2851. However, the Supreme Court

emphasized the restrictive nature of this standard - that "continuous and systematic" affiliations with a state are not enough, and the affiliations must be so "continuous and systematic" as to render them essentially "at home." *Id.* at 139, 761.

Imerys argues that this Court cannot exercise general personal jurisdiction because Imerys is not "at home" in Pennsylvania. However, the Pennsylvania Superior Court has held specifically, in *Webb-Benjamin, LLC v. International Rug Group, LLC*, 1514 WDA 2017, 2018 WL 3153602 (Pa.Super. 2018),³ that registration as a foreign association constitutes consent to personal jurisdiction notwithstanding the United States Supreme Court's ruling in *Daimler*.⁴

As in the instant case, the defendant in *Webb-Benjamin, LLC* was registered to do business in Pennsylvania as a foreign association. On appeal, the defendant alleged that "registration as a foreign association in Pennsylvania does not satisfy the Due Process Clause of the Fourteenth Amendment, following the United States Supreme Court's ruling in *Daimler*." *Webb-Benjamin, LLC* at *3. In addressing the defendant's argument, the Superior Court discussed, at length, the impact of *Daimler* on Pennsylvania law:

"[the defendant] contends that its registration as a foreign association in Pennsylvania is not sufficient to 'render [it] essentially at home' in Pennsylvania, and therefore, Pennsylvania may not exercise personal jurisdiction. *Daimler*, however, makes a clear distinction between jurisdiction by consent, and the method of establishing personal jurisdiction that forms the basis of its analysis and holding. See *Daimler*, 571 U.S. at 129, 134 S.Ct. 746. While Pennsylvania courts have not discussed this distinction following the *Daimler* decision, federal courts in Pennsylvania have analyzed 42 Pa.C.S.A. § 5301, in light of *Daimler*,

³ The Superior Court's Opinion, dated June 28, 2018, was issued after the Preliminary Objections were filed but before oral argument had concluded.

⁴ See *Murray v. Am.Lafrance*, 2018 Pa. Super.LEXIS 1064 (Pa.Super.2018)

and determined that it has no effect on jurisdiction by consent.

In *Bors v. Johnson & Johnson*, 208 F.Supp.3d 648 (E.D. Pa. 2016), Nancy Bors (“Bors”), a Pennsylvania resident, sued Imerys Talc America, Inc. (“Imerys”), and Johnson and Johnson in the United States District Court for the Eastern District of Pennsylvania. *Id.* at 650–51. Imerys filed preliminary objections alleging, in part, a lack of personal jurisdiction pursuant to *Daimler*. *Id.* at 651. Imerys argued that it had no contact with Pennsylvania outside of its registration to do business in Pennsylvania. *Id.* Bors argued that Imerys consented to Pennsylvania's exercise of personal jurisdiction, pursuant to 42 Pa.C.S.A. § 5301, by registering to do business in Pennsylvania. *Id.* at 651–52. The federal district court agreed with Bors, holding that

[c]onsent remains a valid form of establishing personal jurisdiction under [42 Pa.C.S.A. § 5301] after *Daimler*. The Supreme Court did not eliminate consent. Parties can agree to waive challenges to personal jurisdiction by ... registering to do business under a statute which specifically advises the registrant of its consent by registration. *Id.* at 655 (emphasis added).

In *Gorton v. Air & Liquid Sys. Corp.*, 303 F.Supp.3d 278, —, 2018 WL 1385531, at *12 (M.D. Pa. 2018), Thomas Gorton (“Gorton”) filed suit against numerous defendants, alleging that he contracted mesothelioma as a result of his exposure to asbestos while working for, or coming into contact with products manufactured, supplied, or distributed by, the defendants. *Gorton*, 303 F.Supp.3d at —, 2018 WL 1385531, at *2. The defendants filed a motion to dismiss alleging, in part, a lack of personal jurisdiction. *Id.* at —, 2018 WL 1385531, at *1. They argued that pursuant to *Daimler*, consent by registration was no longer a valid method of obtaining personal jurisdiction. *Id.* at —, 2018 WL 1385531, at *10. The Court, citing *Bors*, disagreed, holding that “under section 5301[,], a corporation that applies for and receives a certificate of authority to do business in Pennsylvania consents to the general jurisdiction of state and federal courts in Pennsylvania.” *Id.* at —, 2018 WL 1385531, at *11.

...

Guided by the reasoning in *Bors* and *Gorton*, we conclude that *Daimler* does not eliminate consent as a method of obtaining personal jurisdiction. Accordingly, pursuant to 42 Pa.C.S.A. § 5301, Pennsylvania may exercise general personal jurisdiction over [plaintiff's] claims against [defendant].

Webb-Benjamin, LLC at *4-5.

Here, the parties agree that Imerys has been actively registered as a foreign corporation with the Pennsylvania Department of State. As such, this Court finds that Imerys has demonstrated its consent to personal jurisdiction in Pennsylvania. In making this finding, the Court relies on both the holding of *Webb-Benjamin, LLC*, and the Superior Court's explicit reliance on *Bors*.

In *Bors*, Imerys presented the same argument to the District Court that it presents to this Court – that “constructed consent to personal jurisdiction in Pennsylvania after simply registering as a foreign corporation in the Commonwealth runs afoul of the due process guaranteed under the Fourteenth Amendment following the Supreme Court's 2014 decision in *Daimler*.” *Bors* at 652. The District Court rejected this argument, noting that “[i]n 2007, long after Pennsylvania enacted its specific notice statute and after our Court of Appeals confirmed personal jurisdiction based on registration, Imerys elected to register to do business in Pennsylvania as a foreign corporation. Imerys' compliance with Pennsylvania's registration statute amounted to consent to personal jurisdiction.” *Id.* at 654.

The District Court's reasoning is as applicable here as it was in *Bors*. Moreover, Plaintiffs in the instant case have provided factual evidence that Imerys' consent is not “constructed” or limited to “simple registration.” Specifically, Plaintiffs have shown that Imerys earns approximately two to three million dollars per year in revenue from talc sales in Pennsylvania. Although these earnings are not enough to find that Imerys is “at home” in Pennsylvania, they are evidence that Imerys' registration to do business in Pennsylvania is more than a mere formality.

For the reasons set forth above, Imerys' Preliminary Objections are overruled.

BY THE COURT:

IDEE C. FOX, J.