

## PRODUCT LIABILITY

# ALERT

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## NY Appellate Division: Civil Defendant's Use of Standard Affirmative Defense Based on Lack of Personal Jurisdiction Was Not Effective

By Cary Stewart Sklaren

Defendants in New York civil cases may now consider revising their standard answers to complaints when asserting an affirmative defense of lack of personal jurisdiction. An equivocal statement regarding personal jurisdiction may not preserve the defense. See the succinct opinion by the Appellate Division First Department in *In the Matter of New York City Asbestos Litigation (Barber)*, 2021 N.Y. App. Div. LEXIS 13 (App. Div. 1st Dep't Jan. 5, 2021).

In this New York County asbestos case brought by James Montell, then a living plaintiff, defendant Kohler Co. did not file a CPLR 3211(a)(8) motion to dismiss based upon lack of personal jurisdiction. Instead, as permitted by CPLR 3211(e), the defendant asserted the following affirmative defense: "Where applicable, Kohler preserves its right to object to personal jurisdiction of Plaintiff over Kohler." See *In the Matter of New York City Asbestos Litigation (Barber)*, 2019 N.Y. Misc. LEXIS 4235. N.Y. Slip Op 32318(U) (Sup. Ct. N.Y. Cty. Aug. 1, 2019).

Thereafter, Montell responded to discovery and was deposed. Subsequently, Montell died, and Karen E. Barber, individually and as executrix of decedent's estate served a third amended complaint. Kohler then moved to dismiss based upon lack of personal jurisdiction, asserting that the personal jurisdiction defense, quoted above, had been preserved as its Seventeenth Affirmative Defense. Plaintiffs opposed by asserting waiver.

At the trial court level, Justice Manual J. Mendez explained that CPLR 3211(e) required the defendant to move to dismiss pursuant to CPLR 3211(a)(8) based upon lack of personal jurisdiction or assert an affirma-

tive defense to such effect. CPLR 3018(b), Justice Mendez concluded, "provides that a party shall plead all matters which if not pleaded would be likely to take an adverse party by surprise." He then explained "courts have found that defendants have waived objection to jurisdiction when the affirmative defense actually pleaded in defendant's answer did not fairly apprise a plaintiff of the objection made."

In this case, Justice Mendez held that the affirmative defense asserted by Kohler "lacked specificity and did not fairly apprise the plaintiffs of the objection to jurisdiction now being raised." (citing *Walden v Genevieve*, 67 A.D.2d 973 (2d Dep't 1979). First Department affirmed citing *Interlink Metals & Chems. v Kazdan*, 222 A.D.2d 55, 58 (1<sup>st</sup> Dep't 1996).

In appropriate situations, defendants in New York civil cases may reconsider their affirmative defenses in accordance with the recent opinion. It should be noted that three other similar motions to dismiss pursuant to CPLR 3211(a)(7) by three other defendants in *Barber* were granted by the trial court. See *In the Matter of New York City Asbestos Litigation (Barber)*, 2020 N.Y. Misc. LEXIS 1505, 2020 N.Y. Slip Op 30962 (U) (Sup. Ct. N.Y. Cty. Apr. 14, 2020); *In the Matter of New York City Asbestos Litigation (Barber)*, 2020 N.Y. Misc. LEXIS 1341, 2020 N.Y. Slip Op 30884 (U) (Sup. Ct. N.Y. Cty. Mar. 25, 2020); *In the Matter of New York City Asbestos Litigation (Barber)*, 2020 N.Y. Misc. LEXIS 281, 2020 N.Y. Slip Op 30177 (U) (Sup. Ct. N.Y. Cty. Jan. 23, 2020).

Although other courts in different cases may or may not reach these same conclusions when faced with somewhat different sets of facts or different wording,

in general defendants may consider the overall benefits of asserting an unequivocal affirmative defense of lack of personal jurisdiction. In that way, the possibility of waiver can be avoided. ◆

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