

Matter of New York City Asbestos Litig. v Durez Corp.

2013 NY Slip Op 31064(U)

May 13, 2013

Supreme Court, New York County

Docket Number: 190421/11

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Scarpulla
Justice

PART 19

FRANK KESTENBAUM, ET AL.

INDEX NO. 190421/11

- v -

MOTION DATE _____

MOTION SEQ. NO. 1

Durez Corp., ET AL.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED
MAY 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/13/13

Salvatore Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
In Re: NEW YORK CITY ASBESTOS LITIGATION
-----X

- FRANK KESTENBAUM AND ALICE KESTENBAUM (Index No.: 190421/11)
- ALBERTO FERNANDEZ (Index No.: 190399/11)
- ROBERT SPINA (Index No.: 190321/11)
- CARMEN WILSON (Index No.: 190143/11)

Plaintiffs,

Index No.: 190421/11, *et al.*
Submission Date: 3/13/13

FILED

- against-

DUREZ CORPORATION, ET AL., MAY 15 2013

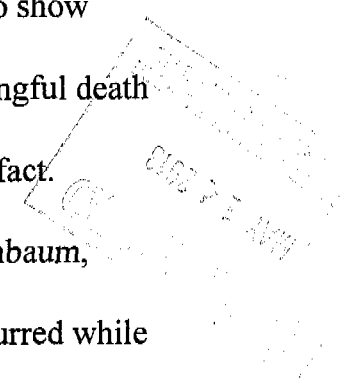
DECISION AND ORDER

NEW YORK
COUNTY CLERK'S OFFICE
Defendants

-----X
HON. SALIANN SCARPULLA, J.:

The four captioned matters involving the following plaintiffs: Frank Kestenbaum ("Kestenbaum"), Alberto Fernandez ("Fernandez"), Robert Spina ("Spina") and Carmen Wilson ("Wilson") (collectively "Plaintiffs") have been referred to this Court for trial. Three of the four plaintiffs are deceased. Plaintiffs' counsel moves by order to show cause pursuant to CPLR §602(a) to consolidate these four personal injury/wrongful death actions for joint trial, claiming the existence of common questions of law and fact.

All four plaintiffs suffer/suffered from mesothelioma. Plaintiffs Kestenbaum, Wilson and Fernandez are deceased. Wilson's claimed asbestos exposure occurred while



he was working as an electrician at residential and commercial construction worksites. Fernandez's alleged exposure occurred while he was working as a mechanic and electrician at Con Edison powerhouses and with steam system equipment. Spina's claimed exposure took place while he was serving in the United States Navy as a carpenter and engineer, working on pumps and steam system equipment, as well as additional exposure while managing real estate properties in Florida. Kestenbaum's claimed exposure to asbestos occurred while he was working as a fabricator at a plastic manufacturing facility, which included making the parts that were ultimately placed into electrical products.

In his affirmation, plaintiffs' counsel sets forth certain commonalities, which he argues warrant consolidation, including: (1) all of the plaintiffs suffer/suffered from mesothelioma, (2) all of the plaintiffs were largely exposed to asbestos through their work on or around electrical component equipment and/or steam system equipment, (3) each plaintiff was exposed to asbestos starting in the 1950s and 1960s, with the range of exposure from the 1950s through the 1980s; (4) the four cases share certain common defendants; (5) all plaintiffs are represented by the same counsel; and (6) all plaintiffs share similar expert witnesses.

Defendants oppose the motion, contending that the cases' dissimilarities outweigh their commonalities. Specific dissimilarities highlighted by some of the defendants are:

(1) not all of the plaintiffs are deceased; (2) none of the four plaintiffs had similar occupations or similar types of exposure to asbestos; (3) Fernandez is the only plaintiff who alleges exposure from a powerhouse; (4) Spina is the only plaintiff who alleges exposure while serving in the U.S. Navy; (5) there are 58 defendants, with no defendants common to all four cases¹; and (6) the alleged exposures took place over varying periods and lengths of time.

Discussion

CPLR §602(a) gives a trial court discretion to consolidate two or more actions for joint trial if they involve common questions of law or fact. Although great deference is to be accorded to the court's discretion, there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. *Progressive Ins. Co. v. Vasquez*, 10 A.D.3d 518, 519 (1st Dept. 2004); *Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824 (1st Dept. 1984).

In determining whether consolidation would be appropriate, the Court should consider certain suggested factors: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented

¹ At oral argument on this motion on February 21, 2013, the amount of defendants was reduced to 41.

by the same counsel; and (8) type of cancer alleged. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2nd Cir., 1993); *see also Aikman v. Atex, Inc.*, 224 A.D.2d 180 (1st Dept. 1996). The *Malcolm* factors must be considered in their totality; no single factor is dispositive. *In re New York City Asbestos Litig.*, 2012 NY Slip Op 32097(U) (Sup. Ct. N.Y. Co., August 8, 2012).

Notwithstanding defendants' contentions to the contrary, this Court finds that certain commonalities exist, and certain issues that defendants collectively claim predominate over the commonalities will not defeat plaintiffs' application for a joint trial. First, plaintiffs are all represented by the same law firm. Second, although three of the plaintiffs have died from mesothelioma, their deaths will not prejudice the jury against the remaining living plaintiff because he is suffering from the same terminal illness. *See Matter of New York City Asbestos Litig.*, 11 Misc. 3d 1063(A) (Sup. Ct. N.Y. Co., 2006). Third, there is not such extensive discovery remaining to warrant denying the order to show cause. Any outstanding discovery can be resolved within a short time frame and the court will make reasonable efforts to resolve any outstanding discovery concerns.

Fourth, the *Malcolm* factors do not require that plaintiffs share identical occupations or time periods of exposure, rather, just that there be similarities among the occupations and time periods of exposure. Here, the court finds that there are sufficient similarities in the manner in which the plaintiffs performed their respective tasks at various work sites during overlapping periods of time, all starting in the 1950s and 1960s.

The court notes that, "the use of suggested jury innovations such as juror note-taking and notebooks, extensive preliminary instructions, attorneys' interim commentary (short summations at different stages during the trial), juror questions, written copies of the special verdict sheets for jury use during summations and a written copy of the court's charge to the deliberating jury should avoid any confusion for the jury in sorting out the respective liabilities and damages attributable to each of the [four] plaintiffs." *Matter of New York City Asbestos Litig.*, 11 Misc. 3d 1063(A) *4 (Sup. Ct. N.Y. Co., 2006).

Accordingly, it is hereby

ORDERED that the motion to consolidate the *Kestenbaum, Fernandez, Spina* and *Wilson* cases for joint trials is granted.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 13, 2013

ENTER:

FILED
MAY 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Saliann Scarpulla
Saliann Scarpulla, J.S.C.