

Golden v Alliance Laundry Sys.
2014 NY Slip Op 33613(U)
February 5, 2014
Supreme Court, New York County
Docket Number: 190160/13
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190160/2013
GOLDEN, MARVIN
vs.
ALLIANCE LAUNDRY SYSTEMS LLC
SEQUENCE NUMBER : 001
VACATE
(HOFFMAN)

INDEX NO. 190160/13
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

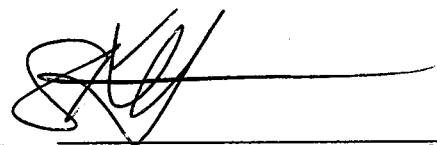
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 2.5.14.

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

Dated: 2-5-14



_____, J.S.C.
HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X

MARVIN GOLDEN,

Plaintiff,

Index No. 190160/13
Motion Seq. 001

DECISION & ORDER

-against-

ALLIANCE LAUNDRY SYSTEMS, et al.,

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended May 26, 2011 (“CMO”), which governs New York City Asbestos Litigation (“NYCAL”), plaintiff moves to vacate the August 22, 2013 written recommendation of Special Master Shelley Rosoff Olsen which upheld the objecting defendant’s request that this case be excluded from this court’s In-Extremis docket (“Recommendation”).¹ The Recommendation was issued on the ground that plaintiff Marvin Golden’s three days of asbestos exposure alleged to have occurred at New York City’s Brooklyn Navy Yard was not significant enough in duration and quality of exposure to earn inclusion on the In-Extremis docket. Plaintiff’s motion is opposed by Defense Liaison Counsel and defendant Hoffman/New Yorker, Inc. (collectively, “Defendants”). As set forth below, plaintiff’s motion to vacate the Recommendation is granted.

BACKGROUND

CMO § XIII(A) provides that NYCAL cases shall be placed on one of three dockets: an

¹ A copy of the Recommendation is submitted as exhibit A to the opposition papers.

In-Extremis Docket², a FIFO Docket³, and a Deferred Docket⁴. In-Extremis clusters are designated twice a year, in April and October. All other active cases are placed on the FIFO docket. Plaintiff Marvin Golden, now approximately 85 years old and suffering from mesothelioma, commenced this asbestos personal injury action on April 19, 2013. Based on his diagnosis, this matter was included in this court's October 2013 In-Extremis trial cluster.

Mr. Golden was deposed on July 11, 2013 and August 6, 2013.⁵ He testified that from April of 1946 through May of 1947 he was exposed to Kaylo-brand asbestos-containing pipe-coverings manufactured by Owens-Illinois while serving in the United States Coast Guard aboard the Coast Guard vessel "Mariposa", which was birthed in Staten Island. He testified to asbestos exposure while in dry dock at the Brooklyn Navy Yard (Deposition pp. 123-26, objections omitted):

- Q. Am I understanding you also worked at the Brooklyn Navy Yard when the US Coast Guard Mariposa was tied up for about three days?
- A. Did you say worked there?
- Q. You were at least stationed there?
- A. Stationed there, right.
- Q. You didn't perform any work when you were at the Brooklyn Navy Yard; is that

² In-Extremis cases are given a trial preference. The CMO provides that to be eligible for inclusion in an In-Extremis cluster, the plaintiff must be "terminally ill from an asbestos-related disease with a life expectancy of less than one year" (CMO XIII[A][1]). Objections to trial preferences by placement on the court's In-Extremis calendar have been informally referred to in NYCAL as "forum" objections.

³ FIFO cases are clustered and scheduled for trial in an order determined by the date that the action was commenced. CMO § XV(B)(1).

⁴ Cases on the Deferred Docket consist of all cases that do not meet the medical criteria necessary to be included on the FIFO or In-Extremis Dockets. CMO § XV(C).

⁵ A transcript of Mr. Golden's deposition testimony is submitted as exhibit Z to the moving papers ("Deposition"). A transcript of Mr. Golden's *de bene esse* deposition is submitted as exhibit E to the moving papers ("Video Deposition").

correct?

- A. Worked on the ship.
- Q. Okay. What exactly did you do when you were working on the ship?
- A. Chipped and painted, cleaned latrines. That's about it.
- Q. My understanding is that you also talked about being in the vicinity of others that were applying Kaylo insulation to piping; is that correct?
- A. That is correct.
- Q. Where exactly did you see this work being performed? Was it specific to one area of the ship or multiple areas?
- A. Two areas that I recall.
- Q. Can you tell me what those two areas are?
- A. The sleeping quarters below deck and the engine room. . . .
- Q. In the area in which you were present when they were applying the Kaylo, whose sleeping quarters was that work being performed in?
- A. In the -- our sleeping quarters, the general seamen. . . .
- Q. Okay. What was the air like when that work was being performed?
- A. Oh, the air. The air that would circulate through the sleeping quarters of a ship. Nothing special, no -- nothing mechanical. It's just the air that flowed through the area.
- Q. Was it dusty when the Kaylo product was being applied?
- A. Yes, it was.
- Q. Did you breathe that dust?
- A. I imagine I did. . . .
- Q. You also talked about work being performed in the machine room; is that correct?
- A. Engine room.
- Q. Okay. Were you present when the Kaylo was actually being applied in the engine room?
- A. When we visited the engine room at that time, they were working on the pipes there.
- Q. Would that have been the same, you would not have been wearing a mask?
- A. No, no mask.
- Q. That would have been a dusty type of work in which you believe you breathed the dust; is that correct?

A. That is correct.

Mr. Golden also testified that while living in Philadelphia as a child he was exposed to asbestos once every two to three weeks from press pads that his father used at the family's tailor shop (Video Deposition pp. 32-33, 39-40, 44-45, objections omitted):

Q. How long was your father a tailor?

A. As long as I know, from the time I was born until I was about 16 years old. . . .

Q. Okay. And at 4050 Market Street in Philadelphia, your family lived above your father's tailor shop?

A. That is...Behind and above. . . .

Q. Can you tell us what type of equipment was inside your father's tailor shop?

A. When you entered the shop from the street, there's a sewing machine on the right side of the store. There are cases for hanging garments on the left side, and further into the store was the pressing machine.

* * * *

Q. Did there ever come a time at Market Street where you had any involvement with the press?

A. Yes, I guess age nine or ten when the pads had to be changed on the Hoffman pressing machine, I would assist my father. . . .

Q. Could you describe the new pads, the appearance of the new pads that you would install?

A. Well, it was the shape of an ironing board, muslin cover with a string that ran along the edges that could be pulled tight and locked over the buck. Muslin color, dark brown, I guess or yellow... White/yellow, something like that. There were two layers of white material under the cover, probably three-quarters of an inch thick, cotton or flannel, and then a white asbestos sheeting about a quarter inch thick that was at the bottom.

* * * *

Q. Was there ever a time during that, you know, seven-year time period, from about when you were nine until you were 16, that you changed out these pads on your own without assistance of your father?

A. When I got older, I was able to handle the whole thing myself. . . .

Q. And could you walk us through in detail the process of changing out one of these press pads? . . .

- A. Okay. The machine would be turned off and cooled, because you couldn't take the...Mess around with it while the buck was hot. So after it cooled off, we would untie the string that attached the pad to the buck. We would pull it off, break it up; and of course, by breaking it up, we evidently were releasing dust from the asbestos, and we broke that up; and after we got the pad off and broken up, we would have to then scrape the buck, and we had a wire brush to scrape the remnants of the asbestos off the buck; and then after that was done, we'd have to sweep up the floor. There was dust from the...Taking the pad off the buck. There would be dust flying all over the room, and we would have to wait until that settled, and then we'd have to sweep the floor and dispose of the pad and put the new pad on.

Mr. Golden does not allege any other asbestos exposure.

On July 25, 2013, the Defendants submitted a formal objection to the inclusion of this case on the October 2013 In-Extremis docket by the Special Master. On August 4, 2013, the Special Master issued a written recommendation which denied the Defendants' forum objection. Upon reargument, the Special Master altered her prior recommendation, upheld the Defendants' forum objection, and issued the Recommendation at issue herein.

The parties assert diametrical positions regarding the "quality" of Mr. Golden's alleged asbestos exposure while his ship was stationed at the Brooklyn Navy Yard. Plaintiff contends that such exposure was a substantial contributing cause of his mesothelioma and as such the Special Master's Recommendation should be vacated. The Defendants contend that Mr. Golden's three days of alleged bystander exposure while he was stationed at the Brooklyn Navy Yard is not a significant nexus to New York City as to garner inclusion on this court's October 2013 In-Extremis docket when compared to his many years of exposure at his father's Philadelphia tailor shop.

DISCUSSION

The issue of so-called forum objections to a party's right to a trial preference in NYCAL was recently discussed in my decision in *Stitt v Burnham Corp, et al.*, 2013 NY Misc. LEXIS

4049, Index No. 190478/12 (Sup. Ct. NY. Co. Sept. 4, 2013), which was not disseminated until after the issuance of the Recommendation herein. In *Stitt* I explained that, in addition to the medical requirements set forth in the CMO⁶, a plaintiff must demonstrate some nexus to New York City for inclusion in this court's In-Extremis docket (*id.*, *supra*, at *6):

While the CMO does not expressly state that a NYCAL plaintiff must demonstrate a nexus between his exposure and New York City in order for his case to be placed in an In-Extremis cluster, this court has explicitly articulated such requirement as a qualifying standard, i.e., there "must be a nexus to New York City for a case to remain on an In-Extremis docket and that forum objections should be addressed on a case-by-case basis." *Logan v A.P. Moller-Maersk, Inc.*, Index No. 190203/12 (Sup. Ct. NY Co. June 17, 2013, Heitler, J.).⁷

Contrary to counsel's characterization of this court's prior decisions, I have never adopted a "significant exposure" requirement in terms of a plaintiff's placement on a NYCAL In-Extremis docket. Nor does the forum objection issue turn on whether a matter is properly venued in New York County (CPLR 500, *et seq.*) or whether New York State is a convenient forum (CPLR 327). As set forth in *Stitt*, the NYCAL In-Extremis requirement is a demonstrated nexus to New York City. While the parties have relied on the recommendations of prior Special Masters in respect of forum objection standards for many years, they have no basis in law.⁸ Rather, the judicial standards set forth in this court's decisions in *Logan* and *Stitt* control.

Mr. Golden's testimony which undeniably demonstrates a nexus to New York City

⁶ See FN2, *supra*.

⁷ In *Stitt* the court inadvertently cited *Logan* as having been decided on June 17, 2013 when it was in fact decided on February 15, 2013.

⁸ See recommendations in *O'Connor v Air & Liquid Systems Corp. et al.*, Index No. 190156/10, *Stitt v Burnham Corp., et al.*, Index No. 190478/12, *Lowe v. Air & Liquid Systems Corp. et al.*, Index No. 190332/11, and *Logan v. A.P. Moller-Maersk, Inc., et al.*, Index No. 190203/12, submitted respectively as exhibits E, F, G, and H to the opposition papers.

dictates that this case remain on the NYCAL In-Extremis docket. Moreover, under CPLR 3403 and CPLR 3407, Mr. Golden is entitled to a trial preference given his age and condition.⁹

Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate the Special Master's August 22, 2013 Recommendation is granted, and it is further

ORDERED that the Special Master is directed to place this matter on this court's October 2013 In-Extremis docket.

This constitutes the decision and order of the court.

DATED: 2.5.14



SHERRY KLEIN HEITLER, J.S.C.

⁹ In *Stitt* the court gave the plaintiff the option to transfer his case to and seek a trial preference in Suffolk County, New York because the entirety of his alleged exposure occurred there.