

Brooks v Air & Liquid Sys. Corp.

2017 NY Slip Op 32611(U)

December 13, 2017

Supreme Court, New York County

Docket Number: 190034/14

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
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This Document Relates to:

RONALD BROOKS,
Plaintiff(s),
-against-

INDEX NO. 190034/14
MOTION DATE 10-25-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

AIR & LIQUID SYSTEMS CORPORATION, et al.,
Defendants.

The following papers, numbered 1 to 25 were read on this motion to Consolidate :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to Consolidate is granted to the extent of consolidating for trial the following cases in the following manner:

- Group 1 - Brooks, Connelly, and Linscott (Living , Lung Cancer/Pleural disease), with overlapping asbestos exposure within the period from 1966 through 1989, whose exposure was through work on vessels during service with the United States Navy and commercial work;
Group 2- Harvey and Maioriello (Living, Lung Cancer/Abestosis), with overlapping asbestos exposure within the period from 1960 through 1987, whose exposure was through work in powerhouses and on commercial construction projects;
Group 3- Calimano and Cummins (Living, Lung Cancer), with overlapping asbestos exposure within the period from 1963 through 2002, whose exposure was through commercial maintenance and repairs work;
Group 4- Surace and Weigold, Sr. (Living, with Lung Cancer/Asbestosis) overlapping asbestos exposure within the period from 1953 through 2002, whose exposure was from commercial and residential settings, and work as mechanics;
Group 5- Kellner and Soreca (Living, Lung Cancer/Pleural Disease) overlapping asbestos exposure within the period from 1942 through 1979, whose exposure to asbestos was from pipe insulation, pipe covering and ceiling tile during service in the United States Navy, and performing commercial and residential work;
Group 6 - Lippa, Jr. and Sammartino (Deceased, Lung Cancer and Asbestosis) overlapping asbestos exposure within the period from 1970 through 2000, whose exposure was through commercial and residential settings commercial and residential work involving dust from clean up and removal of asbestos products from premises , and exposure to insulation materials;
Group 7 - LaTorre (Deceased, Lung Cancer) to be tried individually;

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

**Group 8- Orrin (Deceased, Lung Cancer/Pleural Disease), to be tried individually;
Group 9- Pepe (Deceased, Lung Cancer) to be tried individually;
Group 10- Resua (Deceased, Lung Cancer) to be tried individually;
Group 11-Sheehan (Deceased, Mesothelioma).**

Plaintiffs' motion seeks to consolidate these eighteen Asbestos related actions for trial. Plaintiffs allege consolidation is proper because the actions (1) have the same central issue: (a) exposure to the same exact substance (Asbestos), (b) during a related period of time, [c] in a similar manner , (d) all coming from similar sources (brakes, pads, pipes, boilers, pumps, gaskets, valves, insulation, etc...), and (e) all resulting in the same damages (lung cancer); (2) will require consideration of the same factual evidence; (3) Raise the same core legal issues; (5) are based on a similar set of facts and (6) seek the same relief. Finally plaintiffs argue that consolidation will serve the interest of judicial economy.

Defendants jointly and individually submit written opposition to the motion. Separately defendants submit supplemental opposition to the motion for consolidation, and in essence argue that (1) there are factual differences among the cases that preclude consolidation; (2) consolidation would not serve judicial economy and would prejudice defendants because consolidation would cause jury confusion; (3) consolidation of more than two cases is not permitted in the updated Case Management Order - Section XXV.B - requiring consolidation of no more than two plaintiffs for jury trial, or a maximum of three cases upon a showing of good cause; (4) consolidation is not proper because the plaintiffs do not satisfy the Malcolm factors of common work site, similar occupations, common remaining defendants, similar time of exposure, status, and similar type of cancer with the other plaintiffs in the proposed groups.

It is alleged that the plaintiffs in these actions were exposed to asbestos in the following manner:

Ronald Brooks: (Living with Lung Cancer)

Exposed to Asbestos while working as a construction worker, fireman, and during service as electrician's mate in the U.S. Navy, (1974-1989). He slept in the presence of asbestos containing pipe insulation, and was exposed to asbestos containing equipment while in the presence of other trades, and was personally exposed to asbestos-insulated piping and asbestos-containing equipment while cleaning and performing maintenance on switchboards, circuit breakers and pyrometers.

Vincent J. Calimano: (Living with Lung Cancer)

Exposed to Asbestos while working as union sheet metal worker (1963-1975) and plant operator at St. Clair's Hospital with exposure to insulation on hanging ductwork, plumbing repair, boilerwork, and cutting asbestos rope. He also worked in the vicinity of steamfitters mixing asbestos with cement to seal boiler doors, and tradesmen installing sheetrock in Manhattan (1976-1979).

Joseph Connelly: (Living with Lung Cancer)

Exposed to Asbestos while working during service as a seaman in the United States Navy (1966-1968), and as a union iron worker, insulator and union asbestos worker mixing Asbestos with water, applying insulation material on boilers, applying wet compound to seams to let it dry and sanding (1970-1988).

Maurice F. Cummins: (Living with Lung Cancer)

Exposed to Asbestos as a union painter (1963-2002) while working with joint compound and drywall, and exposure to asbestos containing boiler components including gaskets and ropes to seal boiler doors, he was also exposed to Asbestos from the cutting of fire doors to create holes for locks and push bars.

James Harvey: (Living with Lung Cancer)

Exposed to Asbestos as a child in the 1960s from his father, a union boilermaker who was employed at powerhouses, while present during construction of boilers and when washing his father's clothes, also exposed from his mother who worked as a press-operator at Insulation Manufacturer through contact with her clothing and working part-time at that location as a teenager cleaning up asbestos-containing products after use on circuit breakers (late 1960s/early 1970s). Asbestos exposure through employment as mechanic's assistant at Willie's Texaco (early 1970's), working at Majestic Molding as a maintenance mechanic (1977) and after returning to Insulation Manufacturing as a full-time maintenance mechanic. He handled asbestos containing products while transporting them to be used in manufacturing circuit breakers (1974-1985); he concurrently worked for powerhouses and was exposed to asbestos containing dust while handling and walking along the wooden plank that the turbine deck was constructed from (1981-1982); he was exposed to asbestos panels while performing boiler maintenance (1986) and was exposed to asbestos containing casing and dust while removing internal fan parts and welding (1987).

Albert Kellner: (Living with Lung Cancer)

Exposed to asbestos during renovation of his home, while working as an auto mechanic and while in the United States Navy. He was exposed to asbestos containing dust while sanding brake pads and cleaning brake drums (1963-1979). Concurrently he performed renovations on his home in 1974 and was exposed to asbestos containing dust when cutting and shaving sheet rock and spackle and asbestos containing ceiling tiles. He was exposed to asbestos containing dust when mixing materials to install pipe insulation, cleaning turbines and sleeping in the presence of asbestos containing pipe insulation while working as a boatswain and damage control specialist in the United States Navy.

Basil LaTorre: (Deceased Asbestosis/Lung Cancer)

Exposed to asbestos as a contracted plumber (1970-1982), when he cut, scrapped and installed asbestos-containing pipe covering, gaskets, and insulation. When he worked as a mechanic for the New York Public Library where he installed and repaired boilers and associated piping, resulting in exposure to asbestos containing products including external insulation, gaskets, packing, rope and refractory material (1982-2000).

Robert Linscott: (Living with Lung Cancer)

Exposed to asbestos as an auto mechanic during which time he was exposed to asbestos dust while performing maintenance on brake pads and clutches (1972-1981). Exposed during his service in the United States Navy as a communications specialist breathing asbestos containing dust while other trades installed insulation for boilers, pumps, pipes, generators, and draft blowers (1983-1988).

Louis Lipa, Jr.: (Deceased Lung Cancer)

Exposed to asbestos when he worked at Hooker Chemical (1953-1985), with a two year break in the late in 1960s when he joined the United States Air Force. While employed at Hooker Chemical he was exposed to asbestos as a yard laborer handling boxes of asbestos pipe covering that he broke and created dust. As a chemical reactor operator he used asbestos cement and pipe covering, as a boiler helper he used asbestos cement and other refractory products such as fire bricks, and for six months in 1984 he was involved in asbestos abatement.

Mario Maioriello: (Living Asbestosis/Lung Cancer)

Exposed to asbestos while working as a union laborer for multiple employers (1968-1984), he also performed general construction, demolition and cleanup work involving concrete, cement, and insulation removal at commercial buildings, and from

cleaning up after sheetrock workers on a daily basis. He worked in close proximity to tradesmen that handled asbestos containing material and asbestos used in connection with products like boilers, pumps, valves, turbines, ceiling and floor tiles, gaskets, pipe covering, firebrick and cement.

Harold Orrin: (Deceased Pleural disease/Lung Cancer)

Exposed to asbestos while serving as a Merchant Marine seaman (1944-1960). Also while spending six months as a laborer at the Brooklyn Naval Yard in 1944. He was primarily exposed to asbestos insulation on the pipes, asbestos insulation in the kitchens, mess rooms, birthing areas and boiler/engine rooms. He mixed asbestos directly into joint compound to create a paste for application to pipes, pumps and valves. He was exposed to asbestos in 1969 when he personally installed a new floor in his home which involved cutting breaking and sanding asbestos tiles.

Jack Pepe: (Deceased Lung Cancer)

Exposed to asbestos while working at Merganthaller Linotype Printing Company (from 1952-1967) by working in the stockroom handling small parts and one pound paper bags containing asbestos cement. In 1960 he was trained as an in-house Linotype mechanic-builder-finisher replacing asbestos containing gaskets and insulation. He was also exposed in his employment as head machinist using asbestos cement to repair and maintain Linotype and Intertype components (1968-1977).

Ronald Resua: (Deceased Lung Cancer)

Exposed to asbestos while working for Colgate Palmolive (1956-1961) where he wore asbestos gloves and pads used for the manufacture of toothpaste, and worked in the presence of asbestos containing insulation for pipes and vats. He used asbestos containing gloves, pads, and hoods while studying for his bachelor and master degrees (1972-1980), and was exposed to asbestos in his employment as a controlled substance analyst and criminologist in an NYPD crime lab (1972-1985) by using asbestos-containing gloves, pads, and hoods.

Patrick Sammartino: (Deceased Asbestosis/Lung Cancer)

Exposed to asbestos performing a complete conversion of the basement of his home into an apartment for his daughter and her husband (1977). He was exposed to asbestos insulation while ripping down walls, ceiling tiles and sheetrock without a mask, and from dust in vinyl asbestos floors and old sheetrock that were broken into pieces and put into bags.

James L. Sheehan: (Deceased Mesothelioma)

Exposed during his service in the United States Navy as a gunner for two years, where he was exposed to asbestos containing cement, pipe covering and gaskets from daily repairs performed on the ship by other crewmen (1952-54). Also exposed to asbestos containing products while working as a union insulator in commercial buildings and powerhouses, by chipping off old insulation and mixing dry powder cement with water and applying the mixture to boilers, pipes, pumps and valves.

Arthur Soreca: (Living Lung cancer)

Exposed to asbestos while visiting his father who worked in the Brooklyn Navy Yard, breathing asbestos dust while observing workers apply pipe insulation and washing his dad's work clothes (1942-1961). Also exposed while serving as a seaman in the United States Marines aboard a ship. He was exposed to asbestos dust while observing other trades installing asbestos-containing pipe covering (1961-1963). He was subsequently exposed to asbestos containing ceiling tile while installing cable in commercial and residential sites (1963-1965).

Rudolph T. Surace: (Living Lung Cancer)

Exposed to asbestos while serving in the United States Air Force aboard a transport ship and as an aircraft mechanic (1953-1957). As an aircraft mechanic he removed and replaced old asbestos gaskets. He was subsequently exposed when he worked as a home renovator, foreman and laborer at commercial sites (1957-1976) and while installing asbestos products renovating and repairing his home, through the use of roofing products, asbestos containing joint compound, floor and ceiling tiles. Also exposed while working as a union carpenter from (1977-1995). As a carpenter he installed, replaced and removed asbestos-containing floor tiles, ceiling tiles and insulation, and applied and sanded joint compound to drywall. Exposed to asbestos dust from brakework as a bystander while visiting his son's automotive repair shop.

William Weigold, Sr.: (Living Lung Cancer/Asbestosis)

Exposed to asbestos while working as a union carpenter, home renovator and self-employed mechanic (1957-2002). He was exposed to carpentry materials, roofing, sheetrock, wall, floor and ceiling tiles all containing asbestos. In renovating his own home and other residences he was exposed to asbestos while tearing down and putting up sheet rock, plaster, joint compound and drywall. He was also exposed by performing disc and drum brake work and by being in close proximity to people in trades that handled asbestos containing materials including dust from powdered cement.

Plaintiff proposes that the court order the cases consolidated in the following groups:

- Group 1: Connelly, Cummins, Maioriello and Surace ;**
- Group 2: Calimano, Harvey and Weigold, Sr.;**
- Group 3: Brooks, Kellner, Linscott and Soreca ;**
- Group 4: LaTorre, Resua, and Sammartino ;**
- Group 5: Lippa, Jr. and Sheehan ;**
- Group 6: Pepe ;**
- Group 7: Orin.**

The defendants oppose the groupings proposed by the plaintiff and allege that these actions cannot be consolidated because: (1) The plaintiffs lack a common work site and occupation; (2) The manner of exposure and products to which they claim they were exposed are too diverse and numerous thereby resulting in juror confusion; (3) There is no common defendant in some of these cases; (4) The plaintiffs were exposed to Asbestos during different periods of time; (5) There are unique claims and defenses that permeate each individual case preventing consolidation; and (6) There is prejudice in consolidating the case of plaintiffs with different diseases.

Pursuant to CPLR §602, consolidation lies within the sound discretion of the Court, but is generally favored where there are common questions of law or fact, unless the party opposing the motion demonstrates prejudice of a substantial right in a specific, non-conclusory manner. The burden is on the party opposing the motion to demonstrate prejudice (In Re New York City Asbestos Litigation Konstantin and Dummit, 121 A.D.3d 230, 990 N.Y.S.2d 174, 2014 N.Y. Slip Op 05054 ([1st. Dept. 2014]; Champagne v. Consolidated R.R. Corp., 94 A.D.2d 738, 462 N.Y.S.2d 491 [2nd. Dept. 1983]; Progressive Insurance Company v. Vasquez, 10 A.D.3d 518, 782 N.Y.S.2d 21 [1st. Dept. 2004]; *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 (N.Y.A.D. 1st Dept. 2006).

It is usually sufficient, to warrant consolidation of actions, if evidence admissible in one action is admissible or relevant in the other (*Maigur v. Saratogian, Inc.*, 47 A.D.2d 982, 367 N.Y.S.2d 114 [3rd. Dept. 1975]). Where it is evident that common issues are

presented consolidation is proper. Consolidation of actions is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent injustice which would result from divergent decisions based on the same facts (Chinatown Apartments, Inc., v. New York City Transit Authority, 100 A.D.2d 824, 474 N.Y.S.2d 763 [1st. Dept. 1984]).

Mass toxic tort cases, including asbestos cases, may be consolidated if they meet the requirements of the general rule governing consolidation of cases (In re Asbestos Litigation, 173 F.R.D.81, 38 Fed.R.Serv.3d 1013 [1997]). Consideration in evaluating consolidation of asbestos cases should be given to the following factors: “(1) Common work site; (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 are represented by the same counsel; and (8) types of cancer alleged (Malcolm v. National Gypsum Co., 995 F.2d 346, 25 Fed. R. Serv.3d 801 [2nd. Circuit 1993]). Not all of these factors need be present and consolidation is appropriate so long as individual issues do not predominate over the common questions of law and fact (See CPLR 602(a); In re New York City Asbestos Litigation, 121 A.D.3d 230 [supra]).

There are differences in the groupings the plaintiff proposes. Although all but one of the plaintiffs suffer from lung cancer some of the plaintiffs are living, while some are deceased. Some of the plaintiffs were exposed in a variety of ways, some in a single manner. There are also similarities that provide a basis for consolidation after reconfiguration.

“The presence of wrongful death claims and personal injury actions in a consolidated trial is somewhat troublesome... The dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living.” (Malcolm v. National Gypsum Co., [Supra], citing to In re Joint Eastern and Southern Districts Asbestos Litigation (Drago), 125 F.R.D. 60). The defendants may be prejudiced by the presence of deceased plaintiffs in the living plaintiff’s case. This risk of prejudice to the defendants prevents consolidation of the living plaintiffs’ case with the case that has deceased plaintiffs.

The fact that some of the plaintiffs may present with different types of disease and with Lung Cancer does not prevent consolidation of the cases. The Appellate Division First Department in affirming the Trial court’s consolidation of the Konstantin and Dummit cases found no medical evidence suggesting any significant differences between pleural and peritoneal types of mesothelioma that would prevent consolidation when both types of the disease are present in the case (see In re New York City Asbestos Litigation (Konstantin, Dummit) supra). This standard can also be applied to those plaintiffs with lung cancer and either pleural or asbestosis disease.

The cases of plaintiffs with exposure related to their service with the U.S. Navy, on ships and at shipyards, present unique facts related to the state of the art and defenses that are not common or relevant to the other non-U.S. Navy plaintiffs. (See Borman v. A.O. Smith Water Products Co., 2015 WL 7188355, 2015 N.Y. Slip Op.32109(U)[Sup. Ct. N.Y. 2015]). Consolidation of these cases with those of the other plaintiffs is not warranted, due to their unique facts and defenses. “Federal Law may be implicated in these case and it could prove to be confusing for the jury to sort out the varying elements of liability and damages governed by New York’s negligence and product liability laws and those under Federal Maritime law.”(See In re New York City Asbestos Litigation (John Capozio, et al) 22 Misc.3d 1109(A), 880 N.Y.S.2d 225 [Sup. Ct. N.Y. County 2009]).

Defendants correctly argue that consolidation of more than two cases is generally not permitted in the updated Case Management Order - Section XXV.B - requiring consolidation of no more than two or more plaintiffs for jury trial or a maximum of three cases upon a showing of good cause. The cases have been reorganized by this Court and no group exceeds three plaintiffs, with a majority of the groupings with not more than two plaintiffs.

There is good cause for keeping the three plaintiffs together in Group 1 (Brooks, Connelly and Linscott) as all three are living with lung cancer, were exposed while serving as seamen in the United State Navy, and have commercial work exposure.

Judicial economy would be served by consolidating the actions of living plaintiffs, with lung cancer and whose exposure was through maritime and commercial work (Brooks, Connelly and Linscott); consolidating the actions of living plaintiffs with lung cancer and whose exposure was through work on powerhouses and commercial construction projects (Harvey, Maioriello); consolidating the actions of living plaintiffs with lung cancer whose exposure was through commercial union work performing maintenance and repairs (Calimano and Cummins); consolidating the actions of living plaintiffs with lung cancer with exposure from commercial, residential settings and work as mechanics (Surace and Weigold, Sr.); consolidating the actions of living plaintiffs with lung cancer with exposure during service in the United States Navy, performing commercial and residential work (Kellner and Soreca); deceased plaintiffs with lung cancer/ asbestosis and whose exposure was through commercial and residential work involving dust from clean up and removal of asbestos products from premises (Lipa, Jr. and Sammartino); consolidating the actions of individual deceased plaintiffs with lung cancer (LaTorre, Orrin, Pepe, Resua) and one individual deceased plaintiff with mesothelioma (Sheehan).

In these case groupings: (1) the central issue is the same, (2) it is the same plaintiffs' counsel in the actions, (3) the plaintiffs suffered from the same disease, (4) the plaintiffs in the group are either all living or all deceased, (5) the plaintiffs were exposed during overlapping periods, and in a similar manner.

The actions thus grouped meet the Malcolm criteria in that they have commonality, similarity in occupation and disease, similarity in the status of the plaintiff and overlapping exposure. These actions thus grouped have the same legal issues and similarity of facts, requiring consideration of the same or similar factual evidence. These commonalities favor consolidation which is in the interests of justice and judicial economy. (Flaherty v. RCP Assocs., 208 A.D. 2d 496 [2d Dep't 1994]; In Re New York City Asbestos Litigation 121 A.D.3d 230, 990 N.Y.S.2d 174 [1st. Dept. 2014]).

The remaining plaintiffs cannot be consolidated into any group, either because they are alive and the group under which they would be consolidated is composed of deceased plaintiffs, or because they are deceased and the group under which they would be consolidated is composed of living plaintiffs; or because they suffer from lung cancer and the other plaintiffs in the group suffer from mesothelioma.

Accordingly, it is ORDERED that Plaintiffs' motion is granted to the extent of consolidating the actions for trial in the following cases in the following manner:

Group 1 - RONALD BROOKS (index No. 190034/14), JOSEPH CONNELLY (Index Nos. 13295/1989 and 190216/14) and ROBERT B. LINSOTT (Index No. 190007/14) All Living with Lung Cancer/Pleural disease), with overlapping asbestos exposure during the period 1966 through 1989, whose exposure was through work on vessels during service with the United States Navy and commercial work;

