

Appleton v Allied Signal, Inc.
2017 NY Slip Op 32652(U)
December 22, 2017
Supreme Court, New York County
Docket Number: 190289/16
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:
SHAREN APPLETON as Executrix for the Estate of
WILLIAM APPLETON,
Plaintiff(s)

-Against-

ALLIED SIGNAL, INC., ET AL.,
Defendants.

INDEX NO. 190289 /16
MOTION DATE 12-06-2017
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to Consolidate :

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1-2
Answering Affidavits — Exhibits cross motion 3, 4, 5-6,
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 - WILLIAM APPLETON (Index No. 190289/ 16) and LEONARD K. HOWELL(index No. 190208/16) deceased , with mesothelioma;
Group 2- JOHN WATTS (Index No. 190281/16)deceased Mesothelioma, to be tried individually;
Group 3- JOHN KERTESZ(Index No. 190327/16) living with lung cancer, to be tried individually;
Group 4- WILLIE B. VANDERHALL (Index No. 190131/16) deceased Lung Cancer, to be tried individually;

Of the five (5) cases in this Cluster of cases Plaintiffs' motion seeks to consolidate two cases, of these Asbestos related actions, for trial into one group . 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 (packing, pipes, boilers, pumps, gaskets, valves, insulation, steam traps), and (e) all resulting in the same damages (mesothelioma); (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.

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

Defendants jointly 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 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 and status with the other plaintiffs in the proposed groups.

It is alleged that the plaintiffs in the actions for which consolidation is sought, were exposed to asbestos in the following manner:

WILLIAM APPLETON:

Died at age 75 as a result of mesothelioma. Was exposed to asbestos-laden dust during his work as a boiler man in the United States Navy on various ships from 1958 to 1978. As a Boiler man Mr. Appleton was exposed to Asbestos-laden dust from his work removing and replacing asbestos-containing gaskets, insulation, and packing on boilers, piping, pumps, valves and steam traps. He was also exposed while working as a boiler inspector from 1978-1991 at various commercial locations.

LEONARD K. HOWELL:

Died at age 82 as a result of mesothelioma. Was exposed to asbestos-laden dust during his work as a Machinist Mate in the United States Navy on various ships from 1953-1974. As a Machinist Mate Mr. Howell was exposed to asbestos-laden dust from his work removing and replacing asbestos-containing gaskets, insulation, and packing on boilers, piping, pumps, valves and steam traps.

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

- Group 1: Appleton and Howell;
- Group 2: Watts;
- Group 3: Kertesz;
- Group 4: Vanderhall;

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 to are too diverse and numerous thereby resulting in juror confusion; (3) There is no common defendant in these cases; (4) The plaintiffs were exposed to Asbestos during different periods of time; and (5) There are unique claims and defenses that permeate each individual case preventing consolidation.

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]).

Plaintiffs are not proposing to consolidate cases of living plaintiffs with cases of deceased plaintiffs. “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 of the those plaintiffs that are deceased. This risk is obviated by the grouping plaintiff suggests of consolidating the cases of the deceased plaintiffs in one group, and trying the remaining plaintiffs cases individually .

Similarly Plaintiffs are not proposing to consolidate cases of plaintiffs suffering from lung cancer with those of plaintiff’s suffering from Mesothelioma.

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]). Plaintiffs are proposing that the cases with exposure related to their service with the U.S. Navy, such as Appleton and Howell be consolidated.

Judicial economy would be served by consolidating the actions of deceased plaintiffs, with mesothelioma and whose exposure was related to their service in the U.S. Navy and to similar products such as gaskets, insulation and packing on boilers, piping, pumps, valves and steam traps (Appleton and Howell). In these case grouping (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 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 (N.Y. App. Div. 2d Dep't 1994); In Re New York City Asbestos Litigation 121 A.D.3d 230, 990 N.Y.S.2d 174, 2014 N.Y. Slip Op 05054 ([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 - WILLIAM APPLETON (index No. 190289/16) and LEONARD K. HOWELL (Index No. 190208/16) both deceased , with mesothelioma, with overlapping asbestos exposure from 1953 through 1978, whose exposure was through work on marine vessels and U.S. Navy ships, removing and replacing gaskets, insulation, packing on boilers, piping, pumps, valves and steam traps;

Group2- JOHN WATTS (Index No. 190281/16) deceased with Mesothelioma, to be tried individually;

Group 3- JOHN KERTESZ (Index No. 190327/16) living with lung cancer, to be tried individually;

Group 4- WILLIE B. VANDERHALL (Index No. 190131/16) deceased with Lung Cancer, to be tried individually;

ORDERED that the cases are to be tried in the order that they are grouped giving preference to the cases of living plaintiffs, and it is further

ORDERED that the parties appear for a conference in Part 13 located at 71 Thomas Street, Room 210, New York, N.Y. 10013, on January 31, 2018 at 2:15 P.M.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: December 22, 2017



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE