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| Montebianco v A.O. Smith Corp. |
| 2018 NY Slip Op 30881(U) |
| May 2, 2018 |
| Supreme Court, New York County |
| Docket Number: 190185/15 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOSEPH L. MONTEBIANCO and MAUREEN G.
MONTEBIANCO, HIS WIFE,

Plaintiffs,

- v -

A.O. SMITH CORP., *et al.*,

Defendants.
-----X

INDEX NO. 190185/15
MOTION DATE _____
MOTION SEQ. NO. 1

DECISION AND ORDER

HON. BARBARA JAFFE:

By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating the following active cases for a joint trial: (1) Joseph Montebianco, Index No. 190185/15, and (2) John J. Reilly, Index No. 190412/14. Defendants jointly oppose the consolidation, and certain defendants oppose in the individual cases.

I. APPLICABLE LAW

A motion for a joint trial rests in the discretion of the trial court. (CPLR 602[a]; *Matter of New York City Asbestos Litigation [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). The party seeking consolidation bears the burden of demonstrating common issues. Once shown, the opposing party bears the burden of demonstrating “prejudice to a substantial right.” (Vincent C.

Alexander, Practice Commentaries, McKinneys Consol Law of New York, CPLR 602, C602-1). Allegations of prejudice must be specific (*Konstantin*, 121 AD3d at 245), although alleged prejudice to defendants in consolidated cases and potential juror confusion may be reduced by providing “limiting, explanatory and curative instructions,” giving notebooks to jurors to “assist them in recording and distinguishing the evidence in each case,” and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Id.*).

While judicial economy and efficiency should be considered in determining whether to consolidate, those interests “must yield to a paramount concern for a fair and impartial trial.” (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). Thus, for actions to be consolidated for a joint trial, there must be a “plain identity” of issues (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]), which are discerned by considering whether the actions share: (1) worksites, (2) occupations, including mechanism of exposure and product, (3) times of exposure, (4) types of disease, (5) status as alive or deceased, (6) status of discovery, (6) counsel, and (7) type of cancer. (*Malcolm v Ntl. Gypsum Co.*, 995 F2d 346, 350-351 [2d Cir 1993]; *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016] [citing *Malcolm*]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013] [same]; *Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012] [same]).

Although not all of the factors need be demonstrated to establish a sufficient commonality among or between plaintiffs, “consolidation is appropriate so long as ‘individual issues do not predominate over the common questions of law and fact.’” (*Konstantin*, 121 AD3d 230, 242, quoting *Bernard*, 99 AD3d 410, 411). Moreover, a shared mechanism of exposure or

product may render insignificant certain differences among worksites and occupations unless the differences impacted the mechanism of exposure such that the evidence should be heard separately. (*Konstantin*, 121 AD3d 230 at 242; *Matter of Ballard*, Sup Ct, New York County, Sept. 10, 2009, Feinman, J., index No. 190102/2008; see *Matter of Landry*, Sup Ct, New York County, Jan. 21, 2010, Feinman, J., index No. 111058/2003).

Many of the concerns about the consolidation of numerous actions for trial are no longer pertinent given the governing CMO provision. As of July 20, 2017, two cases may be joined for trial where a plaintiff demonstrates that joinder is warranted under *Malcolm* and New York State cases interpreting *Malcolm*. A maximum of three cases may be joined for trial, upon good cause shown and if three or more of the *Malcolm* factors are present and all three plaintiffs suffer(ed) from one of the following diseases: pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers.

II. PLAINTIFFS

A. Joseph Montebianco

At the age of 68, Montebianco suffers from colon cancer. He was allegedly exposed to asbestos while working as a telephone repair technician at commercial and residential properties from 1972 to the early 1980's. He also claims exposure when maintenance or boiler repair personnel handled asbestos insulation and asbestos gaskets on boilers, pumps and valves in his vicinity, and when he disturbed asbestos insulation on boilers, pumps and valves, causing dust to be released while he insulated cable in basements.

The defendants remaining in his action are Ingersoll-Rand, Trane, and Carrier.

B. John Reilly

Reilly suffers from lung cancer at the age of 48. He was allegedly exposed to asbestos in the late 1970s while performing renovations in his home, and from 1978 to 1983 while remodeling and renovating residences and commercial spaces. He claims that during his home renovation, he was exposed to asbestos-containing insulation when he removed a boiler from his basement and to asbestos-containing gaskets used in connection with pumps and valves that were later installed. He also alleges exposure to asbestos-containing joint plaster used in his presence during the renovation, and when he performed construction work, he alleges being exposed to asbestos-containing gaskets and insulation used in and on boilers that he demolished and removed. At various sites, he contends, he was additionally exposed to asbestos dust released from floor tiles he installed and joint plaster he used.

The defendants remaining in his action are American Biltrite, Carrier, Crown, Columbia, Mannington Mills, Weil-McLain, and Flowserve.

III. ANALYSIS

Pursuant to the amended CMO, plaintiffs must establish that joinder is warranted under *Malcolm* and New York State cases interpreting *Malcolm*.

Defendants deny that there was a common worksite shared by plaintiffs, as Reilly's work was uniquely restricted to single family homes, whereas most of Montebianco's work was performed at housing projects and apartment buildings. Not only were their occupations different, defendants maintain, but Montebianco's exposure was secondary, whereas Reilly worked directly with asbestos-containing products, and they also suffer from different forms of cancer.

Of the nine remaining defendants in both actions, there is only one in common. Trane and Ingersoll Rand contend that consolidating the cases when they are defendants in only the Montebianco case will violate their rights to a fair trial and due process, and that the difference between the plaintiffs outweigh any commonalities.

Montebianco and Reilly were both exposed during the 1970s and 1980s, and while their occupations and worksites differ, the mechanisms of their exposures do not, as they were allegedly exposed to asbestos-containing insulation and asbestos-containing parts on gaskets, boilers, pumps, and valves. However, Montebianco directly worked with asbestos-containing materials and was additionally exposed to joint plaster and floor tiles. And, the pathology of colon and lung cancer is different and will likely require different medical evidence.

Plaintiffs have thus failed to show that consolidation is warranted pursuant to the *Malcolm* factors, the CMO, and pertinent caselaw.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for consolidation is denied.

5/2/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE