

<b>Matter of Agovino v Aerco Intl.</b>
2018 NY Slip Op 31321(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 190037/16
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:
SALVATORE J. AGOVINO, et al.,
Plaintiff(s)

-Against-

INDEX NO. 190037 /16

AERCO INTERNATIONAL , et al.,

MOTION DATE 06-20-2018

MOTION SEQ. NO. 004

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 5 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

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:

- 1 - ANTHONY BOTTA (CIPRUT) ( Index No. 190370/ 15) and JOHN P. ANDERSON (Index No. 190058/16) deceased , with mesothelioma, to be tried jointly;
2- SALVATORE J. AGOVINO, et al., (Index No. 190037/16) deceased with Mesothelioma, to be tried individually;
3- LOUIS J. PANETTA ( CAPILETS) ( Index No. 190060/16) deceased with Mesothelioma, to be tried individually;

Of the four (4) cases in this Cluster of cases Plaintiffs' motion seeks to consolidate 3 cases-of these Asbestos related actions- for trial into two (2) groups . 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, turbines, brakes, press pads, etc...), 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 some 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:

**ANTHONY BOTTA:**

Died on December 22, 2016 as a result of mesothelioma. Was exposed to asbestos from the 1950's through the 1980's, first when his father returned home with asbestos-laden clothes from the Brooklyn Navy Yard, and then while working as a sheet metal worker at commercial and residential sites. During this time period he was exposed to asbestos-containing insulation, pumps, boilers, valves, pipes, flooring materials, roofing cement and joint compound.

**JOHN P. ANDERSON:**

Died on April 20, 2017 as a result of mesothelioma. Was exposed to asbestos from the 1960's through the 1990's while working in Consolidated Edison Power houses. During this time period he was exposed to asbestos-containing insulation, pumps, boilers, valves, pipes, cement and refractory.

**LOUIS J. PANETTA:**

Died on July 25, 2017 as a result of mesothelioma. Was exposed to asbestos from the 1950's through the 2000's while working as a pressman at various commercial printing houses. During this time period he was exposed to asbestos-containing insulation, brakes and press pads. He was also exposed to asbestos containing cement, floor tiles, and joint compound while performing home renovations in the late 1960's.

**SALVATORE AGOVINO:**

Died on January 5, 2017 as a result of mesothelioma. Was exposed to asbestos from the 1930's to the 1950's when he performed maintenance work on coal burning furnaces and renovated his personal residence. During this time he was exposed to asbestos-containing cement and joint compound. During the early 1980's he was again exposed to asbestos containing flooring and roofing products while working as a construction project manager.

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

- 1: Anthony Botta, John P. Anderson and Louis J. Panetta;
- 2: Salvatore Agovino.

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 ([1<sup>st</sup>. Dept. 2014]; Champagne v. Consolidated R.R. Corp., 94 A.D.2d 738, 462 N.Y.S.2d 491 [2<sup>nd</sup>. Dept. 1983]; Progressive Insurance Company v. Vasquez, 10 A.D.3d 518, 782 N.Y.S.2d 21 [1<sup>st</sup>. Dept. 2004]; *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 (N.Y.A.D. 1<sup>st</sup> 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 [3<sup>rd</sup>. 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 [1<sup>st</sup>. 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 [2<sup>nd</sup>. 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]).

Judicial economy would be served by consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was related to their work on similar products such as insulation, boilers, pipes, pumps, valves and cement and whose exposure was from the 1950's through 1980's and the 1960's through the 1990's (*Botta and Anderson*). In these case consolidations (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 consolidated 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 consolidated 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 ([1<sup>st</sup>. Dept. 2014]).**

The remaining plaintiffs cannot be consolidated although they are both deceased and died from the same disease, because they were exposed during different periods, to different products and in a different manner.

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:

1 - ANTHONY BOTTA (CIPRUT) ( Index No. 190370/ 15) and JOHN P. ANDERSON (Index No. 190058/16) deceased , with mesothelioma, to be tried jointly;

2- SALVATORE J. AGOVINO, et al., (Index No. 190037/16) deceased with Mesothelioma, to be tried individually;

3- LOUIS J. PANETTA ( CAPILETS) ( Index No. 190060/16) deceased with Mesothelioma, to be tried individually, and it is further

ORDERED that the cases are to be tried 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 August 15, 2018 at 2:15 P.M.

ENTER:

**MANUEL J. MENDEZ**  
J.S.C.

Dated: June 26, 2018

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST                       REFERENCE