

Baldino v Air & Liquid Sys. Corp.

2019 NY Slip Op 30145(U)

January 17, 2019

Supreme Court, New York County

Docket Number: 190255/16

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:
ROSARIO BALDINO, as personal Representative for the
Estate of ANTHONY BALDINO and , ROSARIO BALDINO,
Individually,

Plaintiff(s)

-Against-

AIR & LIQUID SYSTEMS CORPORATION, , et al.,

Defendants.

INDEX NO. 190255 /16

MOTION DATE 01-09-2019
MOTION SEQ. NO. 002,
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:

1 - RICHARD AGOSTO (Index No. 190240/16) and JOSEPH PRESTIA (Index No.
190240/15) living, with lung cancer, to be tried jointly on March 19, 2019;

2- ROBERT GOURLEY(Index No. 190197/16) and FRED HADDAD (Index No.
190164/16)deceased with lung cancer, to be tried jointly;

3- ANTHONY BALDINO(Index No. 190255/16) and ANTHONY CELARDO (Index
No. 190254/16) deceased with Mesothelioma, to be tried jointly;

4- THOMAS KNUDSEN (Index No.190309/16) and PETER McNALLY (Index No.
190028/16) deceased with mesothelioma.

Of the Eighteen (18) cases in this In Extremis Cluster of cases Plaintiffs' motion
seeks to consolidate 8 cases-of these Asbestos related actions- for trial into four (4)
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, and (e) all
resulting in the same damages (mesothelioma or 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

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

consolidation will serve the interest of judicial economy.

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:

THOMAS KNUDSEN:

Died on May 4, 2017 as a result of Pleural mesothelioma. Was exposed to asbestos from the 1950's through the 1990's. from 1954-56 when he worked as an apprentice electrician at residential sites handling asbestos containing boilers and pipes. Then as a seaman/fireman in the U.S. Navy from 1956-1958 when he worked in the presence of others removing asbestos insulation from pumps, pipes and boiler parts, and when they mixed and installed asbestos-containing cement. From 1958-1961 when he again worked as an apprentice electrician repairing asbestos containing Linotype machines, installed asbestos-containing control panels and was present when others installed asbestos containing pipe insulation. Finally, from 1961- early 1990's when he worked as an electrician in residential, commercial and industrial sites (including the Astoria and Ravenswood powerhouses) when he removed and installed asbestos-containing control panels, switchgear, electrical equipment, and worked in the presence of asbestos containing boilers and furnaces, and was present when other trades installed asbestos containing joint compound and pipe insulation.

PETER McNALLY:

Died on October 1, 2016 as a result of Pleural mesothelioma. Was exposed to asbestos from the 1960's through 2002. From 1960-1963 he was an apprentice electrician and worked at residential sites installing asbestos-containing electrical wires and equipment, plaster, ceiling tiles, insulation and plaster, and worked in the presence of others installing asbestos-containing plaster, ceiling tiles and insulation. From 1963-1965 he was a Seaman/fireman in the U.S. Navy performing maintenance on asbestos-containing valves and pipes, and was present when other trades removed and installed asbestos-containing electrical cable. He also worked in the presence of asbestos containing boilers. From 1965-1967 he was an apprentice electrician removing asbestos containing boilers and pumps and installed asbestos-containing electrical equipment into walls with asbestos-containing plaster and panel boards. He also worked in the presence of other trades that handled asbestos-containing pipes, ceiling and floor tiles and mixed asbestos-containing plaster. From 1967-2002 he was a journeyman electrician and worked at industrial and residential sites installing asbestos-containing electrical equipment. He also worked in the presence of asbestos-containing boilers and of other trades while they installed asbestos-containing pipes, valves, insulation and plaster.

RICHARD AGOSTO:

Living with lung cancer, 76 years old. Diagnosed May 10, 2016. Exposed from 1961-2003 while employed at the New York City Transit Authority. First as a maintainer's helper cleaning up equipment rooms containing asbestos-containing pumps, gaskets, compressors and motors. Then as a maintainer when he performed maintenance on asbestos containing pumps, valves, fans, compressors, electrical panels and insulation. He also worked in the presence of other trades that performed maintenance on asbestos-containing switches and relays.

JOSEPH PRESTIA:

Living with lung cancer, 82 years old. Diagnosed on January 11, 2017. Exposed from 1954- 2002 when he worked as a construction worker and construction contractor. From 1954-1957 he worked at residential sites in Italy installing asbestos-containing brick, cement and plaster. Was present when other trades installed asbestos-containing pipe covering. From 1957-1962 he worked as a construction worker in France installing asbestos-containing cement, plaster, sheetrock and brick, and worked in the presence of others installing these. From 1962-1970 he worked as a construction worker in New York City installing asbestos-containing pipe insulation, cement and fire brick. From 1962-1968 also worked in his own home installing asbestos-containing ceiling tile, joint compound and paint. From 1970-2002 he was an independent construction worker and worked with and in the presence of others using asbestos-containing joint compound, pumps, boilers, electrical equipment, tiles, caulking, cement and insulation.

ROBERT GOURLEY:

Died from lung cancer on September 6, 2016. Was exposed to asbestos from 1960's to the 1990's as an auto mechanic, while in the U.S. Navy and when worked construction as a carpenter/laborer. From mid 1960's was a mechanic removing and replacing asbestos containing brakes. From 1967-1969 served in U.S. Navy as a boiler tender performing maintenance on boilers with asbestos containing pipes, pumps and turbines, and was present when other trades performed this work. From 1970-1994 worked as a carpenter/laborer and exposed from asbestos-containing joint compound, sheetrock, floor tiles, boilers, gaskets, pumps and valves.

FRED HADDAD:

Died from lung cancer on January 18, 2016. Was exposed to asbestos from 1956 to 1978 when he was in the U.S. Navy and when he worked as a laborer. From 1956-1959 he was in the U.S. Navy as a kitchen worker on various ships and was in the presence of dust he believes to be asbestos. From 1968-1973 he worked as a laborer doing cleaning duties in the presence of asbestos-containing pipe insulation and installed asbestos-containing roofing felt. He was also a quality control worker, working in the presence of asbestos-containing boilers, and was present when other trades performed maintenance on asbestos-containing felt, pumps, gaskets and valves. From 1973-1978 handled asbestos-containing felt for other trades to install, and worked in the presence of other trades installing felt and doing maintenance on asbestos-containing pumps.

ANTHONY BALDINO:

Died from Pleural mesothelioma on October 4, 2016. Exposed to asbestos from 1930 to 1969 when he was a machinist helper in the U.S. Navy and later when worked as a machinist and auto mechanic. From 1930-1940 he was exposed to asbestos from asbestos-containing cement, shingles and tiles while performed home renovations to his childhood home. From 1941-1945 while at a vocational school he worked in the presence of asbestos-containing insulation, electrical panels, boilers, and pipes. From 1943-1945 he worked as a helper in a pencil factory in the presence of asbestos-containing insulation. From 1945-1946 he was a Machinist Mate in the U.S. Navy and lived in the Barracks in the presence of asbestos containing insulation that he was required to clean. He was also in an engineering school where he handled asbestos-containing valves, pumps and gaskets. While a board the USS Kasaan Bay worked as a Machinist Mate and slept in the presence of asbestos-containing insulation which he repaired and others repaired in his presence. From 1946-1951 he returned to Brooklyn and lived in the presence of asbestos-containing insulation. In 1947 he was discharged and worked as a Millwright in the presence of asbestos insulation. From 1948- 1969 he was an auto mechanic performing work on asbestos-containing brakes and from 1949-1952 he worked for the New York City Department of Sanitation as an auto mechanic performing work on asbestos-containing brakes.

ANTHONY CELARDO:

Died from Pleural mesothelioma on December 13, 2017. Was exposed to asbestos from 1942 to 1967 when he worked as a shipfitter in the Brooklyn Navy Yard, as an auto mechanic, cable splicer and sanitation inspector. From 1942-1945 he was a shipfitter in the Brooklyn Navy Yard working with asbestos-containing boiler insulation and with and around other trades installing asbestos-containing insulation on pipes, pumps and ventilators. From 1945-1946 he worked as an auto wrecker handling asbestos-containing brakes and clutches. From 1948-1952 he worked for Consolidated Edison as a laborer and cable splicer at various sites, including the 14th street powerhouse, where he worked in the presence of other trades installing asbestos-containing insulation on pipes, pumps, motors and boilers. From 1952-1967 he was a Sanitation worker and inspector and was present at various industrial sites when other trades installed asbestos-containing insulation on boilers.

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

- 1: Thomas Knudsen and Peter McNally;
- 2: Richard Agosto and Joseph Prestia;
- 3: Robert Gourley and Fred Haddad; .
- 4: Anthony Baldino and Anthony Celardo.

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]).

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 1930's through the 1960's (*Baldino and Celardo*); consolidating the actions of deceased plaintiffs with lung cancer who performed similar work and whose exposure was related to their work on similar products and whose exposure was from the 1950's through 2003 (*Knudsen and McNally*); consolidating the actions of deceased plaintiffs who performed similar work and their exposure was related to their work on similar products and whose exposure was from the 1950's through the 1990's (*Gourley and Haddad*); and consolidating the actions of living plaintiffs with lung cancer and whose exposure was related to their work on similar products from the 1950's through 2003 (*Agosto and Prestia*).

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 or living ; (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 ([1st. Dept. 2014]).

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 - RICHARD AGOSTO (Index No. 190240/16) and JOSEPH PRESTIA (Index No. 190240/15) living, with lung cancer, to be tried jointly on March 19, 2019;

2- ROBERT GOURLEY(Index No. 190197/16) and FRED HADDAD (Index No. 190164/16)deceased with lung cancer, to be tried jointly;

3- ANTHONY BALDINO(Index No. 190255/16) and ANTHONY CELARDO (Index No. 190254/16) deceased with Mesothelioma, to be tried jointly;

4- THOMAS KNUDSEN (Index No.190309/16) and PETER McNALLY (Index No. 190028/16) deceased with mesothelioma to be tried jointly, and it is further


ORDERED that the remaining in Extremis cases listed in this transfer order dated May 2, 2018 are to be tried individually, and it is further

ORDERED that the parties appear ready to proceed to trial in the consolidated AGOSTO and PRESTIA actions, and in the actions of the remaining living in extremis plaintiffs MARIO PICCOLINO (190186/16) , ALLISON LINSKY (190149/16) and STANLEY B. LEWIS (190267/16) in Part 13 located at 60 Centre Street, Room 442, New York, N.Y. 10007, on March 19, 2019 at 10 A.M., and it is further

ORDERED that the parties appear for a final pre-trial conference on the remaining actions listed in this transfer order in Part 13 located at 60 Centre Street, Room 442 New York, N.Y. 10007, on March 6, 2019 at 2:15 P.M.

ENTER:

Dated: January 17, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE