

**Matter of Chalco v Ajax Magnethermic Corp.**

2019 NY Slip Op 30170(U)

January 18, 2019

Supreme Court, New York County

Docket Number: 190373/16

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:
AZALIA CHALCO, as Executrix for the Estate of
WILSON CHALCO, and AZALIA CHALCO,
Individually,
Plaintiff(s)

-Against-

AJAX MAGNETHERMIC CORPORATION, et al.,
Defendants.

INDEX NO. 190373 /16
MOTION DATE 01-09-2019
MOTION SEQ. NO. 004,
MOTION CAL. NO.

The following papers, numbered 1 to 15 were read on this motion to Consolidate :

PAPERS NUMBERED

Table with 2 columns: Description of papers and Paper numbers. 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 In extremis cases in the following manner:

- 1 - PAUL MARGOLIS ( Index No. 190106/17), FRANCO OBRAMONTI (Index No. 190127/17) and HILTON SMITH (Index No. 190057/2017) living, with mesothelioma, to be tried jointly on March 26, 2019;
2- THOMAS MANTOVI (Index No. 190055/17), MICHAEL MARZIGLIANO ( Index No. 190134/17) and CASIMIR RAPPA (Index No. 19010317) living, with mesothelioma, to be tried jointly on March 26, 2019;
3- WALTER DOROSCHUK ( Index No. 190048/17) and EFRAIN FAY (Index No. 190115/17) living with Mesothelioma, to be tried jointly on April 2, 2019;
4- ROBERT ALBIN (Index No.190007/17) and PAUL ALSTON ( Index No. 190059/17) living with other cancer to be tried jointly on April 2, 2019;
5- FRANK IOVINO (Index No. 190346/16) and RONALD THOMPSON ( Index No. 190123/17) deceased from mesothelioma to be tried jointly;
6- THOMAS O'CONNELL ( Index No.190067/17) and FRANCISCO ROJAS ( Index No.190078/17) deceased from mesothelioma to be tried jointly;

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

7- THOMAS DONOVAN ( Index No. 190130/17) and ANTHONY SIMONE ( Index No. 190337/16) deceased from Lung cancer to be tried jointly;

8-WILSON CHALCO ( Index No. 190373/16) and FRANK MERCATANTE ( Index No. 190018/17) deceased from mesothelioma to be tried jointly;

9-ROBERT GADJA ( Index No. 190343/16) Living with lung cancer to be tried individually on April 9, 2019;

10- THOMAS SCOTT ( Index No. 190131/17) Living with lung cancer to be tried individually on April 9, 2019;

11- JOHN COSGRIFF ( Index No. 190121/17) deceased from lung cancer to be tried individually;

12-ARTHUR SHANAHAN ( Index No. 190011/17) deceased from lung cancer to be tried individually;

13- ERNEST EBANKS ( Index No. 190061/17) deceased from lung cancer to be tried individually;

14- FRANK ESPOSITO ( Index No. 190349/16) deceased from mesothelioma to be tried individually.

Of the Twenty four (24) cases in this In Extremis Cluster of cases Plaintiffs' motion seeks to consolidate 22 cases-of these Asbestos related actions- for trial into ten (10) 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 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:

**ROBERT ALBIN:**

Living with other cancer. Exposed from 1953- 2006 from work as a plumber and auto repair. Exposed to asbestos containing heating equipment, pipes, valves, boilers, rope, insulation, sheetrock, painting, taping, joint compound, cement, floor tiles, shingles, tar paper, pumps, and gaskets. Exposed while working as plumber and while other trades performed work with these products around him. As auto repairer exposed

to asbestos from brakes, brake pads, clutches and gaskets.

**PAUL ALSTON:**

Living with other cancer. Exposed from 1957-1993 from work as a utility worker with Consolidated Edison at powerhouses and commercial buildings. Exposed to asbestos containing gaskets, covering, packing and insulation on pumps, valves and steam traps. Also worked near others working on boilers and turbines using asbestos insulation.

**WILSON CHALCO:**

Deceased from Mesothelioma. Exposed from 1971 - 2006 from work as laborer and maintenance, and from working around others using asbestos containing products. Exposed to asbestos containing ovens, matrix boards, valves, pumps, gaskets, boilers and sheetrock.

**JOHN COSGRIFF:**

Deceased from lung cancer. Exposed from 1960-1976 from work as insulator, mechanic, crane operator and crane operating engineer. Exposed to brakes and clutches from crane, and from work done by others in his vicinity spraying asbestos insulation, fireproofing, removing insulation from pipes, roof shingles, block insulation, firebrick, cement, wall board, plaster, floor and ceiling tiles, and insulation on turbines, boilers, pumps and valves.

**THOMAS DONOVAN:**

Deceased from lung cancer. Exposed from 1963-1981 while in the U.S. Navy, and when worked as elevator mechanic. Exposed to asbestos from the ship's engine, boiler room, pumps, packing, valves, gaskets, boilers, tubes and water consumption units. As elevator mechanic from electrical contacts, relays, rollers, steps, and trusses. Exposed from other trades performing work on boilers, floor and ceiling tiles, walls, joint compound, roofing products, compressors, turbines, generators, electrical products, cement, packing, fire proofing spray, firebrick, mica board, pipe and boiler covering.

**WALTER DOROSCHUK:**

Living with lung cancer and pleural disease. Exposed from 1960-1979 from work as Union Sheet metal worker. Exposed to asbestos containing heat resistant canvas/cloth, flexible duct connectors; and from other trades doing work such as boiler insulation, block insulation and using asbestos fireproofing spray.

**EFRAIN FAY:**

Living with lung cancer and pleural disease. Exposed from 1961-2002 from work as a contractor from removal, installation and repair of boilers, gaskets, piping, block, pumps, valves, internal and external insulation.

**ROBERT GADJA:**

Living with lung cancer and pleural disease. Exposed from 1973-2015 from work in the U.S. Navy, as boiler technician and Maintainer. Exposed to asbestos containing pump casings, packing, gaskets, insulation, pipes, valves, boiler insulation, white block insulation, firebrick and steam traps.

**FRANK IOVINO:**

Deceased from mesothelioma. Exposed from 1963-2000 from work in the U.S. Navy, work as a boiler tender and electrician. Exposed to asbestos containing switchgear, boilers, pumps, insulation, pipes and motors.

**THOMAS MANTOVI:**

Living with mesothelioma. Exposed from 1963-1979 from work in the U.S. Navy and as insurance agent where other trades worked with asbestos containing products. Exposed to asbestos containing insulation in printing machines, asbestos mufflers, clutches and brakes when worked as a mechanic assistant and inventory clerk; asbestos pumps and valves; and asbestos boilers, joint compound and floor tiles from other trades' work.

**PAUL MARGOLIS:**

Living with mesothelioma. Exposed from 1951-1976 from renovations and cleaning by others. Exposed to asbestos containing ovens, joint compound, tape, sheetrock, plaster, cement and insulation.

**MICHAEL MARZIGLIANO:**

Living with mesothelioma. Exposed from 1965 to the mid 1980's from work in the U.S. Coast Guard, as a laborer foreman and carpenter. Exposed to asbestos containing pipe insulation, sheetrock, joint compound, floor tiles, felt. As a mechanic on his automobile exposed to asbestos containing brakes.

**FRANK MERCATANTE:**

Deceased from mesothelioma. Exposed from 1966-2014. Exposed from work in home renovation, laborer, auto mechanic and as maintenance worker. Exposed to asbestos containing plaster, pumps, gaskets, valves, siding, insulation, cement, electrical panels, brakes, shingles, floor tiles, ceiling tiles and adhesives.

**THOMAS O'CONNELL:**

Deceased from mesothelioma. Exposed from 1955-1980. Exposed from work in the U. S. Navy, as a superintendent's assistant, as a plumber and steam fitter. Exposed to asbestos containing insulation, valves, gaskets, pipes, and was present while other trades handled asbestos containing cement, pipes and insulation.

**FRANCO OMBRAMONTI:**

Living with mesothelioma. Exposed from 1971-1979. Exposed from work as a cement mason and when other trades worked on pipe coverings, sheetrock, joint compound, vinyl asbestos tile, spray insulation and fireproofing, tape, plaster, gaskets, packing, wall board, pipe covering and asbestos cement.

**CASIMIR RAPPA:**

Living with mesothelioma. Exposed from 1952- 1975. Exposed from work in the U.S. Navy, as a phone installer and doing home renovations. Exposed to Joint compound, tiles, pipe and boiler insulation, sheetrock, pumps, pipes, gaskets, packing, wall board and panel board.

**FRANCISCO ROJAS:**

Deceased from Mesothelioma. Exposed from 1971-1990's. Exposed from work in Peruvian Navy, and as a construction helper. Exposed to asbestos insulation on piping, paint, joint compound, floor tiles, sheet rock and while other trades working around him used those products. Also exposed to automobile brakes.

**THOMAS SCOTT:**

Living with Lung cancer. Exposed from 1971-1984. Exposed from work in fishing vessels and as a non-union helper. Exposed to asbestos from ship engines, transmission and pumps, ship insulation and gaskets. Also exposed to asbestos from joint compound, floor tiles, sheetrock and wall board.

**ARTHUR SHANAHAN:**

Deceased from mesothelioma. Exposed from 1978-1992. Exposed from work as renovator. Exposed to asbestos containing roofing felts, floor and ceiling tiles, glazing, caulking, joint compound, fire doors, also present when boilers, pumps, valves, asbestos insulation and gaskets were removed. Also exposed to asbestos containing brakes and clutches.

**ANTHONY SIMONE:**

Deceased from lung cancer. Exposed from 1951-2002. Exposed from work in the U.S. Navy, and as gas and service station mechanic. Exposed to asbestos insulation on pipes, as a mechanic installed and removed brakes, clutches, mufflers and engine gaskets.

**HILTON SMITH:**

Living with mesothelioma. Exposed from 1966-2003.. Exposed from work on boilers and as a driller. Exposed to asbestos containing boilers, insulation, pumps, gaskets, packing, cement insulation, and from other tradesmen working on and with generators, HVAC, electrical equipment, switchgears, panels, switches, receptacles, floor tiles and refractory cement.

**RONALD THOMPSON:**

Deceased from Mesothelioma. Exposed from 1950-1989. Exposed from work as electrician at shipyard. Exposed from asbestos containing circuit breakers, panel boards, panel boxes, equipment motors, pipe covering, flange gaskets, press machines, pumps, insulation, packing, floor and ceiling tiles, joint compound, sheetrock, pipe covering, wall board, and electrical equipment.

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

- 1: Margolis, Ombramonti and Smith;
- 2: Mantovi, Marzigliano and Rappa;
- 3: Gadjia and Scott;
- 4: Doroschuk and Fay;
- 5: Albin and Alston;
- 6: Iovino and Thompson;
- 7: Cosgriff and Shanahan;
- 8: O'Connell and Rojas;

9-Donovan and Simone;  
10: Chalco and Mercantante,  
and that the remaining two cases of Ebanks and Esposito be tried individually.

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 living plaintiffs with mesothelioma and whose exposure was related to similar products such as insulation, joint compound, cement, tape, sheetrock, plaster, gaskets, packing, wall board, floor tiles, spray insulation and whose exposure was from the 1950's through the 2002 ( Margolis, Ombramonti and Smith); consolidating the actions of living plaintiffs with mesothelioma whose exposure was related to similar products such as asbestos insulation, pumps, valves, boilers, joint compound, floor tiles, mufflers, clutches, brakes, and whose exposure was from the 1950's through the mid 1980's ( Mantovi, Marzigliano and Rappa); consolidating the actions of living plaintiffs with lung cancer , whose exposure was related to similar products such as asbestos containing valves, gaskets, pipes, cement, insulation, fire proofing spray, floor tiles and whose exposure was from the 1950's through the 1990's (Dorschuk and Fay); consolidating the actions of living plaintiffs with other cancer , whose exposure was related to similar products such as asbestos containing water heaters, boilers, valves, rope, brake pads, clutches, sheetrock, tape, joint compound, gaskets, pipes, packing, insulation, and whose exposure was from the 1950's through 2006 (Albin and Alston);consolidating the actions of deceased plaintiffs who died from mesothelioma and whose exposure was related to similar products such as asbestos containing switchgear, boilers, pumps, insulation, pipes, joint compound, gaskets, floor and ceiling tiles and whose exposure was from the 1950's through 2002( Iovino and Thompson); consolidating the actions of deceased plaintiffs who died from mesothelima and whose exposure was related to similar products such as asbestos containing valves, gaskets, pipes, cement, insulation, joint compound, floor tiles, sheetrock, and whose exposure from the 1950's through the 1990's( O'Connell and Rojas); Consolidating the actions of deceased plaintiffs who died from Lung cancer and whose exposure was related to similar products such as pumps, packing, valves, gaskets, boilers, brakes, clutches, mufflers, joint compound, and whose exposure was from the 1950's through 2002 ( Donovan and Simone); and consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was related to similar products from the 1960's through 2014 ( Chalco and Mercantante).

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 ([1<sup>st</sup>. 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 - PAUL MARGOLIS ( Index No. 190106/17), FRANCO OBRAMONTI (Index No. 190127/17) and HILTON SMITH (Index No. 190057/2017) living, with mesothelioma, to be tried jointly on March 26, 2019;**

**2- THOMAS MANTOVI (Index No. 190055/17), MICHAEL MARZIGLIANO ( Index No. 190134/17) and CASIMIR RAPPA (Index No. 19010317) living, with mesothelioma, to be tried jointly on March 26, 2019;**

**3- WALTER DOROSCHUK ( Index No. 190048/17) and EFRAIN FAY (Index No. 190115/17) living with Mesothelioma, to be tried jointly on April 2, 2019;**

**4- ROBERT ALBIN (Index No.190007/17) and PAUL ALSTON ( Index No. 190059/17) living with other cancer to be tried jointly on April 2, 2019;**

**5- FRANK IOVINO (Index No. 190346/16) and RONALD THOMPSON ( Index No. 190123/17) deceased from mesothelioma to be tried jointly;**

**6- THOMAS O'CONNELL ( Index No.190067/17) and FRANCISCO ROJAS ( Index No.190078/17) deceased from mesothelioma to be tried jointly;**

**7- THOMAS DONOVAN ( Index No. 190130/17) and ANTHONY SIMONE ( Index No. 190337/16) deceased from Lung cancer to be tried jointly;**

**8-WILSON CHALCO ( Index No. 190373/16) and FRANK MERCATANTE ( Index No. 190018/17) deceased from mesothelioma to be tried jointly;**

**ORDERED that the remaining in Extremis cases listed in this transfer order dated May 2, 2018 are to be tried individually in the following manner:**

**ROBERT GADJA ( Index No. 190343/16) Living with lung cancer to be tried individually on April 9, 2019;**

**THOMAS SCOTT ( Index No. 190131/17) Living with lung cancer to be tried individually on April 9, 2019;**

**JOHN COSGRIFF ( Index No. 190121/17) deceased from lung cancer to be tried individually;**

**ARTHUR SHANAHAN ( Index No. 190011/17) deceased from lung cancer to be tried individually;**

**ERNEST EBANKS ( Index No. 190061/17) deceased from lung cancer to be tried individually;**

**FRANK ESPOSITO ( Index No. 190349/16) deceased from mesothelioma to be tried individually, and it is further**

ORDERED that the parties appear ready to proceed to trial in the consolidated actions of living plaintiffs, and in the actions of the individual living in extremis plaintiffs in Part 13 located at 60 Centre Street, Room 442, New York, N.Y. 10007, on the date and time stated in this order, and it is further

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

- FRANK IOVINO (Index No. 190346/16) and RONALD THOMPSON ( Index No. 190123/17) deceased from mesothelioma;
- THOMAS O'CONNELL ( Index No.190067/17) and FRANCISCO ROJAS ( Index No.190078/17) deceased from mesothelioma;
- THOMAS DONOVAN ( Index No. 190130/17) and ANTHONY SIMONE ( Index No. 190337/16) deceased from Lung cancer;
- WILSON CHALCO ( Index No. 190373/16) and FRANK MERCATANTE ( Index No. 190018/17) deceased from mesothelioma;
- JOHN COSGRIFF ( Index No. 190121/17) deceased from lung cancer;
- ARTHUR SHANAHAN ( Index No. 190011/17) deceased from lung cancer;
- ERNEST EBANKS ( Index No. 190061/17) deceased from lung cancer ;
- FRANK ESPOSITO ( Index No. 190349/16) deceased from mesothelioma.

ENTER:

Dated: January 18, 2019

  
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 MANUEL J. MENDEZ  
 J.S.C.

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

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST                       REFERENCE