

Alder v A.O. Smith Water Prods.

2019 NY Slip Op 32690(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 190155/2018

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION		INDEX NO.	<u>190155/2018</u>
JOHN ALDER and ISABEL ALDER		MOTION DATE	<u>7/31/2019</u>
Plaintiff(s),		MOTION SEQ. NO.	<u>004</u>
- against -		MOTION CAL. NO.	_____
A.O. SMITH WATER PRODUCTS, et al.			
Defendants.			

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 ...	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4; 5; 6; 7-8; 9; 10</u>
Replying Affidavits _____	

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion to Consolidate is denied and the following cases shall be tried in the following manner:

- 1 - JOHN ALDER (Index No. 190155/2018) living with mesothelioma, to be tried individually;
- 2 – HUGH DEHAVEN (Index No. 190192/2018) living with mesothelioma, to be tried individually;
- 3 – GORDON SMEAL (Index No. 190145/2018) deceased from mesothelioma, to be tried individually;
- 4 – PRESTON CONAWAY (Index No. 190332/2018) living with mesothelioma, to be tried individually;
- 5 – EMANUEL PELLEGRINI (Index No. 190402/2018) deceased from mesothelioma, to be tried individually.

Of the eight (8) cases in this Cluster of cases, plaintiffs' motion seeks to consolidate five (5) - cases of these Asbestos related actions – for trial into two (2) groups or, in the alternative, for a joint trial of these five (5) cases in a configuration which this Court deems appropriate. Plaintiffs allege that consolidation of the Alder, DeHaven, and Smeal matters is appropriate because they share substantial commonality of fact and law and there is "good cause" for joinder. More specifically, they point to similarities amongst these plaintiffs regarding disease type, life/discovery status, occupation/worksites, dates of exposure, and who is representing them. Plaintiffs also allege that consolidation of the Preston Conaway and Emanuel Pellegrini matters is appropriate because of similarities concerning disease type, occupation/worksites, dates of exposure, life/discovery status, and who is representing them.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Defendants submit written opposition to the motion. Collectively, the many defendants oppose joinder of these cases, essentially arguing 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; and (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:

John Alder:

John Alder is 72 years old and is living with mesothelioma (see Exhibit F annexed in relevant pages). Mr. Alder worked for "The Salvage Association," a branch of Lloyd's of London, as a damage surveyor and "salvage officer" on numerous ships between 1980 and 1988 (Aff in Supp., Exh F at 24, 93-94). His role was to examine and survey ship damage, including in machinery spaces, where he worked almost every day and virtually every time he boarded a ship (Aff in Supp., Exh F at 26-27, 30-31). In doing so, he was exposed to the asbestos components of the ships' valves, pumps, engines, generators, compressors, turbines, boilers, and refrigeration equipment, which were all repaired in his presence using packing, gaskets, and insulation (Aff in Supp., Exh F at 30-54).

Hugh DeHaven:

Hugh DeHaven is 77 years old and is living with mesothelioma (see Aff in Supp., Exhibit G). Mr. DeHaven enlisted in the United States Navy in 1962 where he served on ships/submarines as a machinist mate and engine man for seven years (Aff in Supp., Exh G at 16-18, 28). During his service, he was exposed to asbestos in the machinery spaces of the USS Redfin, USS Intrepid, and USS Halfbeak (Aff in Supp., Exh. G at 18-28). Such exposure occurred as he replaced the packing, gaskets, and insulation on the ships' pumps and valves, including during "FRAMs" where all machinery on board was overhauled (*id.*).

Gordon Smeal:

Gordon Smeal died of mesothelioma at the age of 81 (see Jordan Fox's Email "Re: The Gordon Smeal Case 190145/2018" from 8/20/2019). Mr. Smeal joined the Navy when he was 19 years old (Aff in Supp., Exh. H at 42-43; Aff in Supp., Exh. I at 39). After basic training, he served on the USS Intrepid and the USS Wasp (which were in dry dock) where he was exposed to asbestos insulation and gaskets used within the ships' pumps and motors; this occurred as he moved around the ship's machinery spaces to perform cleanup duties (Aff in Supp., Exh H at 51-52, 57-58; Aff in Supp., Exh I at 39-47). Following his Naval service, he was further exposed to asbestos floor tiles and heaters while working as a laborer, to asbestos insulation while working as an insulator, and to asbestos brakes and clutches from tractor-trailers and forklifts while working at

"Selecto Flash" decal company and an army depo (Aff in Supp., Exh H at 72-82, 97-105; Aff in Supp., Exh I at 20-36).

Preston Conaway:

Preston Conaway is 78 years old and is living with mesothelioma (see Aff in Supp., Exhibit J). Mr. Conaway served as both a Naval and civilian electrician for several decades (Aff in Supp., Exh J at 39-40, 54, 78-79, 87-92, 95-97, 124-35, 140-47). He served aboard the USS Edisto and USS Wasp, where he was exposed to asbestos from arc shields, arc chutes, and contacts used in electrical products such as controllers, relays, and explosion proof switches (Aff in Supp., Exh J at 62-64, 67, 72, 83-84). He was also exposed to asbestos from observing the maintenance and repair of pumps performed using asbestos-containing gaskets and packing (Aff in Supp., Exh J at 68-70). After his Naval service, Mr. Conaway worked as an electrician for shipbuilders where he was exposed to asbestos from installing gaskets (on equipment) as well as from repairing cranes that utilized electrical components (Aff in Supp., Exh J at 87-92, 95-97). He then worked as a civilian electrician where he was further exposed to asbestos from electrical equipment, asbestos pipe, pumps, motors, and kilns which contained asbestos components (Aff in Supp., Exh J at 124-35, 140-47).

Emanuel Pellegrini:

Emanuel Pellegrini died of mesothelioma at the age of 76 (see Aff in Supp., Exhibit K). Mr. Pellegrini began his apprenticeship with the IBEW to become an electrician in 1961 (Aff in Supp., Exh K at 63, 78). Throughout his career as an electrician, he was exposed to asbestos from lighting fixtures, panels, switchgear, circuit breakers, heating units, wiring, controls, transformers, and switches (Aff in Supp., Exh K at 83-84, 95-99, 108-09, 114-15, 134-37, 161-63, 179-80, 191-93). Mr. Pellegrini was further exposed to asbestos as he implemented the electrical/motor controls for pumps and valves in mechanical rooms (Aff in Supp., Exh K at 220-28, 236-38). Lastly, he suffered bystander-exposure to asbestos from workers who sanded joint compound (Aff in Supp., Exh K at 84-85, 104-07, 185-86, 197-98), steamfitters who insulated valves and other equipment (Aff in Supp., Exh K at 171-73, 187-88, 274-76), and plumbers who sealed piping, all within his presence (Aff in Supp., Exh K at 198-99).

The plaintiffs propose that the court consolidate these cases in the following order:

1. John Alder, Hugh DeHaven, and Gordon Smeal;
2. Preston Conaway and Emanuel Pellegrini

The various defendants oppose the groupings proposed by the plaintiffs and essentially allege that these actions cannot be consolidated for the following reasons: (1) the plaintiffs lack a common work site and occupation; (2) the manner of exposure and products to which they claim they were exposed are too diverse and numerous, thereby resulting in juror confusion; (3) differences in the named defendants in these cases; (4) the plaintiffs were exposed to asbestos during different periods of time; and (5) there are unique claims and defenses permeating each individual case which prevent 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 shows that a substantial right will be prejudiced in a specific, non-conclusory way. The burden is on the party opposing the motion to demonstrate prejudice (*In Re New York City Asbestos Litigation Konstantin and Dummit*, 121 AD 3d 230, 990 NYS 2d 174, 2014 NY Slip Op 05054 ([1st Dept 2014]; *Champagne v Consolidated R.R. Corp.*, 94 AD 2d 738, 462 NYS 2d 491 [2nd Dept 1983]; *Progressive Insurance Company v Vasquez*, 10 AD 3d 518, 782 NYS 2d 21 [1st Dept 2004]; *Amcan Holdings, Inc. v. Torys LLP*, 32 AD 3d 337, 821 NYS 2d 162 [NYAD 1st Dept 2006]).

If evidence admissible in one action is admissible or relevant in the other, this is usually sufficient to warrant that such actions be consolidated (*Maigur v Saratogian, Inc.*, 47 AD 2d 982, 367 NYS 2d 114 [3rd Dept 1975]). Where it is evident that common issues are presented consolidation is proper. Consolidation of actions is appropriate when it will avoid unnecessary duplication of trials, save unnecessary costs and expenses, or prevent injustice which would result from divergent decisions based on the same facts (*Chinatown Apartments, Inc., v. New York City Transit Authority*, 100 AD 2d 824, 474 NYS 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]). All these factors need not be present, and consolidation is appropriate as 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]).

Here, plaintiffs are proposing that certain living plaintiffs be grouped 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 in an action may be prejudiced by the presence of a deceased plaintiff amid a living plaintiff’s case. This risk of prejudice prevents the consolidation of a living plaintiff’s case with that of a deceased plaintiff. The risk is ultimately obviated by separating the consolidated cases of deceased plaintiffs from those of living plaintiffs and, then, trying any remaining plaintiffs’ cases individually.

In accordance with the foregoing, Gordon Smeal’s case may not be joined into one group with those of John Alder and Hugh DeHaven because Gordon

Smeal is deceased (see Jordan Fox's Email "Re: The Gordon Smeal Case 190145/2018" from 8/20/2019) while the other plaintiffs are still alive.

As for John Alder and Hugh DeHaven, their cases also may not be joined together because the *Malcom* factors are not properly satisfied (see *Malcolm v National Gypsum Co., supra*). Firstly, the alleged time periods of exposure (*Malcom* factor number three) for Mr. Alder and Mr. DeHaven do not overlap (see Aff in Supp., Exh. D). In fact they are very far apart, with Mr. Alder alleging asbestos exposure in the 1980s and Mr. De Haven alleging such exposure in the 1960s. Combining these two cases would, therefore, be problematic as defendants could, for example, raise OSHA related state of the art defenses to Mr. Alder's claims but not to those of Mr. DeHaven's (see e.g., *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 two cases is not warranted because of the different time periods during which the plaintiffs allege asbestos-exposure and the unique defenses that could be raised in response to Mr. Alder's claims but not to those of Mr. DeHaven.

Preston Conaway's case also may not be joined with Emanuel Pellegrini's case because Mr. Conaway is alive while Mr. Pellegrini is deceased (see *Malcom v National Gypsum Co., supra*). The plaintiffs' motion to consolidate is denied.

Accordingly, it is ORDERED, that plaintiffs' motion to consolidate pursuant to CPLR § 602 is denied, and it is further,

ORDERED, that the living in-extremis cases: (1) JOHN ALDER - Index No. 190155/2018; (2) HUGH DEHAVEN - Index No. 190192/2018; and (3) PRESTON CONAWAY - Index No. 190332/2018 are scheduled for trial conferences on November 19, 2019 at 10:00 A.M. in Room 442, 60 Centre Street, New York, NY 10007, and it is further,

ORDERED that the deceased in-extremis cases: (1) GORDON SMEAL - Index No. 190145/2018 and (2) EMANUEL PELLEGRINI - Index No. 190402/2018 will be assigned to the list.

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



MANUEL J. MENDEZ
J.S.C.

Dated: September 9, 2019

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE