

Aylward v Air & Liquid Sys. Corp.

2022 NY Slip Op 30978(U)

March 17, 2022

Supreme Court, New York County

Docket Number: Index No. 190170/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ADAM SILVERA PART 13

Justice

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FRANCES AYLWARD, AS EXECUTRIX FOR THE ESTATE
OF CARL KENNETH AYLWARD, AND FRANCES
AYLWARD, INDIVIDUALLY,

Plaintiff,

INDEX NO. 190170/2017

MOTION DATE 11/29/2021

MOTION SEQ. NO. 003

- v -

AIR & LIQUID SYSTEMS CORPORATION, AMCHEM
PRODUCTS, INC., ATWOOD & MORRILL COMPANY,
CATERPILLAR, INC., CBS CORPORATION, F/K/A VIACOM
INC., CERTAINTEED CORPORATION, CHAPMAN VALVE
MANUFACTURING CO, CLEAVER BROOKS COMPANY,
INC., COMPUDYNE CORPORATION, CUMMINS,
INC., EATON CORPORATION, AS SUCCESSOR -IN-
INTEREST TO, FMC CORPORATION, GENERAL
ELECTRIC COMPANY, GOULD PUMPS LLC, ITT LLC.,
KEELER-DORR-OLIVER BOILER COMPANY, NAVISTAR,
INC., A/K/A INTERNATIONAL, OWENS-ILLINOIS,
INC., PFIZER, INC. (PFIZER), RILEY POWER INC, THE
FAIRBANKS COMPANY, U.S. RUBBER COMPANY
(UNIROYAL), U.S. RUBBER COMPANY (UNIROYAL),
WARREN PUMPS, LLC, WEIL-MCLAIN, A DIVISION OF
THE MARLEY-WYLAIN COMPANY, UNION CARBIDE
CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is ordered that plaintiff's order to show cause for a joint trial is granted for the reasons set forth below.

Here, plaintiffs move for a joint trial as follows: Frances Aylward as Executrix for the Estate of Carl Kenneth Aylward and Frances Aylward Individually v Air & Liquid Systems Corporation, et al., 190170/2017 with Sonia Serrano, as personal representative for the Estate of Salomon

Serrano and Sonia Serrano individually v A.O Smith Water Products Co., et al., 190246/2016. Defendants oppose. The Court addresses and decides the motion with regards to a joint trial below.

The Case Management Order dated June 20, 2017 (hereinafter referred to as the “CMO”) states that “[t]wo cases may be joined for trial where plaintiff demonstrates that joinder is warranted under *Malcolm v National Gypsum Co.* (995 F2d 346), and New York State cases interpreting *Malcolm*. *Malcolm* and its progeny list factors to measure whether cases should be joined; it is not necessary under *Malcolm* that all such factors be present to warrant joinder.” CMO, §XXV. B. The factors to be considered under *Malcolm* are “(1) common worksites; (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 were represented by the same counsel; and (8) type of cancer alleged”. *Malcolm*, 955 F2d at 350-351. The United States Court of Appeals, 2nd Circuit, further noted that “[c]onsolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well.” *Malcolm*, *id.* at 350 (internal quotations and citations omitted). Further, CPLR § 602(a) states that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Plaintiffs argue that the facts of the case support consolidation as per the factors set forth by *Malcom*. Plaintiffs also contend that common Defendants exists within the cases at hand, and trying these actions separately is a waste of Court resources.

The Defendants contend that “the facts and questions of law pertaining to each individual case predominate over the commonalities suggested by plaintiffs, thereby precluding

consolidation.” *See* Cleaver-Brooks, Inc.’s Affirmation in Opposition to Plaintiff’s Motion for Joint Trial, p.7, ¶ 21. Further, Defendants contend that the facts in *Malcom* differ than the cases at hand, as the consolidation in *Malcom* dealt with only one type of primary job site.

In reviewing all of the *Malcom* factors, the Court finds, and it is undisputed that both Carl Kenneth Aylward and Salomon Serrano have similar occupations. Both Plaintiffs’ careers involve the handling of asbestos related products through repair and maintenance of boilers. Further, both plaintiff’s developed pleural mesothelioma during the course of their employment and succumbed to their illness. Plaintiffs state that “Carl Kenneth Aylward and Salomon Serrano may not have been exposed at one common worksite; however, both were exposed to asbestos-containing products at commercial and hospital sites within the metropolitan New York area”. *See* Affirmation In Support Of Motion For Joint Trial, p.10, ¶ 19. While the note of issue was filed in the case of Salomon Serrano, discovery is not complete in the case of Carl Kenneth Aylward. Finally, Carl Kenneth Aylward and Salomon Serrano are both represented by Weitz & Luxenberg, P.C., and defendant Cleaver-Brooks is the sole remaining defendant in both cases.

This Court finds that 6 of the 8 factors in *Malcom* were satisfied. Between these two cases, there are common issues of law and fact. Notably, both the CPLR and the CMO specifically allow joinder, and the CMO permits joinder based upon the *Malcom* factors. Further, it is not necessary for all the *Malcom* factors to be satisfied and safeguards are available in order to prevent jury confusion. Here, the *Malcom* factors support a joint trial.

Accordingly, it is

ORDERED that a joint trial is granted as to Carl Kenneth Aylward v Air & Liquid Systems Corporation, et al., 190170/2017 and Salomon Serrano v A.O Smith Water Products Co et al., 190246/2016; and it is further

ORDERED that, within thirty days of entry, plaintiffs shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

3/17/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE