

Cohen v Air & Liquid Sys. Corp.

2023 NY Slip Op 30741(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 190030/2022

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
Justice

PART 13

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INDEX NO. 190030/2022

DANIEL COHEN, HELENE COHEN,
Plaintiff,

MOTION DATE 01/17/2023

MOTION SEQ. NO. 001

- v -

AIR & LIQUID SYSTEMS CORPORATION, AMERICAN
BILTRITE, INC., AMTROL, INC., ANCHOR DARLING VALVE
COMPANY, ARMSTRONG INTERNATIONAL,
INC., ATWOOD & MORRILL CO., INC., BLACKMER PUMP,
BW/IP INTERNATIONAL CO., CARRIER CORPORATION,
CBS CORPORATION, CLARK RELIANCE CORPORATION,
CRANE CO., DEAN PUMP DIVISION, DEZURIK,
INC., DOMCO PRODUCTS TEXAS, INC., ELECTROLUX
HOME PRODUCTS, INC., ELLIOTT TURBOMACHINERY
CO., INC., FALK CORPORATION (THE), FLOWSERVE US,
INC., FLOWSERVE US, INC., FMC CORPORATION,
FOSTER WHEELER, LLC, GARDNER DENVER,
INC., GARDNER DENVER NASH, LLC, GENERAL
ELECTRIC COMPANY, GENUINE PARTS COMPANY,
GOODRICH CORPORATION, GOODYEAR CANADA,
INC., GOODYEAR TIRE & RUBBER COMPANY (THE),
GOULDS PUMPS, INC., GREENE, TWEED & CO.,
INC., GRINNELL CORPORATION, HALE PRODUCTS,
INC., HB FULLER, HENRY TECHNOLOGIES,
INC., HONEYWELL INTERNATIONAL, INC., HOWDEN
BUFFALO, INC., I.T.T. INDUSTRIES, INC., METROPOLITAN
LIFE INSURANCE COMPANY, NASH ENGINEERING
HOLDINGS LLC, PNEUMO ABEX CORPORATION,
PNEUMO-ABEX LLC, SPENCE ENGINEERING COMPANY,
INC., SPIRAX SARCO, INC., SPX COOLING
TECHNOLOGIES, INC., SUPERIOR LIDGERWOOD
MUNDY CORP., THRUSH CO., INC., TUTHILL
CORPORATION, UNION CARBIDE CORPORATION,
VELAN VALVE CORP., WARREN PUMPS LLC, WILLIAM
POWELL COMPANY (THE), YORK INTERNATIONAL
CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 167, 168, 209, 210, 211, 212, 213, 214, 215, 221

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 joint trials is granted for the reasons set forth below.

Here, plaintiff moves to join the instant action with *Valletti, et. al. v Air & Liquid Systems Corp., et. al.*, 190045/2022, and *Moran, et. al. v Air & Liquid Systems Corp., et. al.*, 190075/2022. Defendants oppose. Thereafter, plaintiff requested that consideration of the instant order to show cause be for the instant action and the Valletti action only as the plaintiff in the Moran action passed away. Below, the Court addresses and decides the motion with regard to the instant action and the Valletti action only.

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).

Plaintiff argues that consolidation of the two cases for joint trial as specified above is appropriate. With respect to the instant action and the Valletti action, plaintiff contends that both plaintiffs, Daniel Cohen and James Valletti, are currently living with pleural mesothelioma and

were exposed to asbestos during common periods of time and during the course of their employment while in engineering spaces on Naval ships, working on valves, pumps, and machinery. Plaintiff further contends that there are overlapping defendants and that both plaintiffs are represented by the same counsel.

In opposition, defendant Superior Lidgerwood Mundy Corporation argues that there are no common questions of law or fact, and that consolidation would be prejudicial to it. Opposing defendant further argues that there is no commonality as each plaintiff had unique worksites, did not work together, had different jobs, had different forms of exposure, and were exposed at different time periods. Defendant Blackmer joins defendant Superior Lidgerwood Mundy Corporation's opposition.

Here, reviewing all the *Malcolm* factors, the Court finds that both plaintiffs, Mr. Cohen and Mr. Valletti, had similar occupations serving on Naval ships. Both plaintiffs were exposed to asbestos through their employment and their handling of similar materials and equipment. In fact, defendant Superior Lidgerwood Mundy Corporation's opposition papers concede that plaintiffs Cohen and Valletti were "exposed to asbestos when...replac[ing] packing and gaskets associated with pumps and valves" on Naval ships. Affirmation in Support of Opposition to Plaintiffs' Motion for a Joint Trial, p. 4. Additionally, both plaintiffs developed pleural mesothelioma from which they both currently live with, the discovery in both of these actions are complete, and both plaintiffs have the same counsel. Thus, six of the eight *Malcolm* factors have been satisfied. There are common issues of law and fact in both actions. The CMO explicitly states that the Court may order joinder of cases based upon the *Malcolm* factors and that not all such factors must be present. Here, the *Malcolm* factors support joinder of the two actions. Although the two plaintiffs did not share the exact same worksite, this does not preclude joinder

of the cases for trial. Adequate safeguards can be put in place during the trial to avoid juror confusion. Thus, plaintiff's motion seeking a joint trial is granted as to the instant action with Valletti, et. al. v Air & Liquid Systems Corp., et. al., 190045/2022.

Accordingly, it is

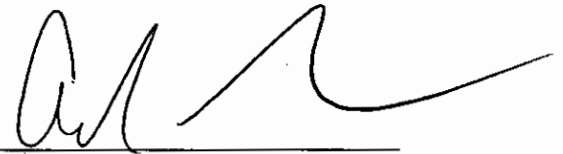
ORDERED that plaintiff's motion seeking a joint trial is granted as indicated above; and it is further

ORDERED that a joint trial is granted as to the instant action and Valletti, et. al. v Air & Liquid Systems Corp., et. al., 190045/2022; 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.

3/14/2023
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: