

Murphy v E.I. Du Pont De Nemours & Co.

2024 NY Slip Op 30285(U)

January 22, 2024

Supreme Court, New York County

Docket Number: Index No. 156207/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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LORI MURPHY,

Plaintiff,

- v -

E.I. DU PONT DE NEMOURS & COMPANY, THE
SHERWIN-WILLIAMS COMPANY, GENUINE PARTS
COMPANY D/B/A NAPA, BASF CORPORATION,
INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO
AND D/B/A GLASSURIT AND R-M COMPANY F/K/A
RINSHED MASON COMPANY, PPG INDUSTRIES,
INC., PFIZER, INC., SUCCESSOR-IN-INTEREST TO
WYETH, INC., AMERICAN HOME PRODUCTS
CORPORATION AND BOYLE-MIDWAY, RECKITT
BENCKISER, INC., F/K/A RECKITT & COLMAN,
INC., SUCCESSOR-IN-INTEREST TO BOYLE-MIDWAY,
THE SAVOGRAN COMPANY, SAFETY-KLEEN SYSTEMS,
INC., SHELL OIL COMPANY, UNITED STATES STEEL
CORPORATION, RADIATOR SPECIAL COMPANY,
UNIVAR USA, INC., INDIVIDUALLY F/K/A AND
SUCCESSOR IN INTEREST TO CHEMCENTRAL CORP.
AND VAN WATERS & ROGERS, TEXACO, INC., ASHLAND
LLC F/K/A ASHLAND, INC., SUNOCO, INC. (R&M) F/K/A
SUN COMPANY, INC. AND F/K/A SUN OIL COMPANY,
INC., and ICC CHEMICAL CORPORATION,

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 025) 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 446, 447, 448, 449, 450, 451, 452, 453, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, and 467

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

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff’s motion to consolidate for discovery purposes is denied, for the reasons set forth in the following memorandum decision.

**DECISION + ORDER ON
MOTION**

Background

This is an action for, *inter alia*, wrongful death, breach of warranty, failure to warn, products liability, and fraud, arising out of the employment of plaintiff's decedent James Murphy ("Murphy") at an automotive plant in Tarrytown, New York (the "Tarrytown plant") operated by nonparty General Motors ("GM"), through which he was allegedly exposed to the carcinogen benzene, contracted acute myeloid leukemia ("AML"), and subsequently passed away in 2018. Further details of plaintiff's allegations are set forth in this court's prior decision and order dated May 29, 2020, which resolved motions by several defendants to dismiss the action (NYSCEF Doc. No. 235), to which the reader is referred.

Since that time, the parties have been engaged in discovery, during which time nonparty Emilio Tucci, Murphy's former coworker at the Tarrytown plant, was deposed. The record before the court shows that both Murphy and Tucci worked in the paint department at the Tarrytown plant from 1979-1996, albeit with differing responsibilities, and with a three-year gap between 1982-1985 for Tucci (Tucci EBT tr., NYSCEF Doc. No. 424 at 14-18; Laurie Murphy EBT tr., NYSCEF Doc. No. 434 at 46-47; Powell EBT tr., NYSCEF Doc. No. 435 at 18-23). During this time both men were exposed to primers, paints, and solvents supplied to the Tarrytown plant by defendants BASF Corporation ("BASF"), E.I. DuPont De Nemours & Company ("DuPont"), and PPG Industries, Inc. ("PPG") (Tucci EBT tr., NYSCEF Doc. No. 424 at 20-24, 30-32, 36-44, 50, 56, 61-62, 73, 81-85, 90, 95, 102, 104; Powell EBT tr., NYSCEF Doc. No. 435 at 22-23, 28-29, 31-32; Annichiarico EBT tr., NYSCEF Doc. No. 436 at 15-16, 19-26, 32-40, 43-47, 52-53, 57-76, 83-84; Arnoux EBT tr., NYSCEF Doc. No. 437 at 23-29, 35-36).¹

¹ Powell, Annichiarico, and Arnoux are also former coworkers of Murphy and Tucci at the Tarrytown plant.

Plaintiff's counsel herein subsequently began to represent Tucci, who filed a complaint against nine of the defendants in the present action, in an action captioned *Tucci v Ashland, LLC, et al.*, bearing Index No. 159245/2022 and pending in this court before the Hon. Mary V. Rosado (the "*Tucci* action"). Tucci alleges that he contracted Multiple Myeloma ("MM") after being exposed to benzene at the Tarrytown plant, and at other GM plants in Doraville, Georgia, and Arlington, Texas (Tucci complaint, NYSCEF Doc. No. 451).

During the course of this action, plaintiff has discontinued against, or settled with, various defendants. As of the date hereof, the remaining defendants are DuPont, Shell USA Inc. ("Shell"), BASF, PPG, Safety-Kleen Systems Inc. ("Safety-Kleen"), and Sunoco (R&M), LLC ("Sunoco"). All of these parties except for Safety-Kleen are also defendants in the *Tucci* action. Shell, BASF, and PPG made motions to dismiss the *Tucci* action, which were resolved by Justice Rosado On May 22 and 26, 2023 (decisions and orders, NYSCEF Doc. Nos. 115-117 [*Tucci* action]). Approximately two weeks thereafter, counsel made simultaneous motions in the instant action and the *Tucci* action to consolidate the two cases for joint discovery. BASF, PPG, Safety-Kleen, and Sunoco all opposed both motions.

Standard of Review

"When 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" (CPLR 602). A motion to consolidate is addressed to the discretion of the court (*Cromwell v CRP 482 Riverdale Ave., LLC*, 163 AD3d 626, 627 [2d Dept 2018]). Factors counseling against consolidation or joint trial include limited commonalities between the actions to be joined, disparate legal theories, different procedural

stages of the separate cases, potential prejudice to opposing parties, and potential juror confusion or unwieldy litigation (*id.* at 628; *Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 2003] [“Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter”]). “[T]here is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]).

Discussion

There are insufficient common questions of law and fact, militating against joining this action and the *Tucci* action for purposes of joint discovery. While plaintiff’s decedent herein and *Tucci* both worked at the Tarrytown plant between 1979 and 1996, they had different responsibilities and workstations (albeit within the same department) and developed different diseases. Moreover, *Tucci* continued to work for GM at additional plants outside New York State for another 26 years. It is unclear where he was exposed to the products that are alleged to have caused him to develop MM. Thus, a substantial portion of *Tucci*’s case may very well have nothing to do with his time at the Tarrytown plant, at all. The limited commonalities presented by these circumstances would counsel against joinder (*Cromwell*, 163 AD3d at 628).

The limited commonalities observed above are in addition to the vastly different procedural postures of the two cases. In the instant action, the parties have been conducting discovery for a few years, have exchanged many documents, and have deposed several witnesses. In the *Tucci* action, by contrast, issue was only joined last year, and discovery is in its

infancy. Because of the limited commonalities between the two cases, the vast amount of discovery already conducted in the instant action will have only limited utility to the *Tucci* action, in which discovery will be necessary regarding the rest of Tucci's career with GM – a period covering 26 years and two other plants outside New York State. While it is theoretically possible to avoid prejudice to an earlier filed case by setting up an expedited discovery schedule (*see, Vasquez*, 10 AD3d at 519), in this instance, the court does not believe such an approach is feasible given the larger number of factual issues in *Tucci* not relevant to the instant action. Even allowing that there are certain commonalities between the cases, consolidation is not favored where it would cause undue delay (*Abrams*, 1 AD3d at 119).

Plaintiff argues that the delay in conducting discovery is not sufficient reason to bar consolidation; but the cases cited by plaintiff for that proposition are distinguishable (*Plot Realty LLC v DeSilva*, 45 AD3d 312, 313 [1st Dept 2007] [consolidating encroachment and title cases involving a common building]; *Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 AD2d 169, 169-70 [1st Dept 1999] [consolidating three cases arising out of a single fire]; *Amtorg Trading Co. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993] [consolidating pending landlord-tenant proceedings in Civil and Supreme Courts]). Here, there are significantly more differences in the underlying facts. Moreover, to the extent that duplication of effort may become an issue, the parties may stipulate to the use in the *Tucci* action of all discovery exchanged herein, and may cross-notice any further depositions so that all matters can be dealt with expeditiously. That way, discovery in the instant action may conclude within the next few months rather than at the close of the process in the *Tucci* action, where discovery is just beginning. The cause of judicial economy, therefore, is not furthered by joining these two actions.

Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the parties are to appear for a virtual status conference via Microsoft Teams on February 28, 2024, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



<u>1/22/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE