

**Cunningham v AERCO Intl.**

2017 NY Slip Op 30490(U)

March 15, 2017

Supreme Court, New York County

Docket Number: 190136/2014

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 11

-----X  
IN RE NEW YORK CITY  
ASBESTOS LITIGATION

-----X  
WALTER CUNNINGHAM, et al,

Index No. 190136/2014

Plaintiffs,

-against-

AERCO INTL, et al,

Defendants.

-----X  
HON JOAN A. MADDEN, J.

In this motion, with respect to the eleven actions from the Asbestos In Extremis Clusters, transferred to this court for trial, The Williams Law Firm, counsel for plaintiffs, seeks consolidation for joint trial of these eleven actions in the following two trial groups.

In Trial Group 1, plaintiffs seek to consolidate eight mesothelioma cases:

- John Dawson            Index No. 190273/15
- Randy Schwartz       Index No. 190199/15
- Edward Cox            Index No. 190093/15
- Robert Keith          Index No. 190071/15
- Ralph Nuneville       Index No. 190039/15
- Robert Opel            Index No. 190081/15
- Elizabeth Reno        Index No. 190070/15
- Roney Temor            Index No. 190139/15

In Trial Group 2, plaintiffs seek to consolidate three lung cancer cases:

- Johnnie L. Sykes       Index No. 190201/15
- William Anderson      Index No. 190089/15
- Walter Cunningham    Index No. 190136/14

In the alternative, with respect to Trial Group 1, plaintiffs seek to consolidate the eight mesothelioma cases into two trial groups consisting of :

Trial Group 1

Randy Schwartz	Index No. 190199/15
Edward Cox	Index No. 190093/15
Ralph Nuneville	Index No. 190039/15
Roney Temor	Index No. 190139/15

Trial Group 2

John Dawson	Index No. 190273/15
Robert Keith	Index No. 190071/15
Robert Opel	Index No. 190081/15
Elizabeth Reno	Index No. 190070/15

Under this alternative consolidation, the three lung cancer cases would be designated Trial Group 3.

Pursuant to NYCAL precedent, defendants designated a lead counsel to submit joint opposition, and various defendants have submitted supplemental papers opposing the motion. This motion is made pursuant to CPLR 602(a) on the grounds that common issues of law and fact exist warranting a joint trial. Defendants oppose consolidation arguing, *inter alia*, that differences predominate over common factors, and a jury will be unable to fairly assess the issues and evidence as to the individual defendants, when the differences are considered in the context of the particulars of the individual actions, together with the number of plaintiffs and defendants. Under CPLR 602(a), the Court has discretion to order joint trials where common questions of law and fact exist. In asbestos litigation, it has been stated that, "[t]he joint trial format has potential to reduce the costs of litigation, make more economical use of the trial court's time and

speed the disposition of cases (see Matter of City of Rochester, 57 A.D.2d 700, 701) as well as to encourage settlements (see In re: Joint E&S Dist. Asbestos Litig.(Findley v.Blinken), 129 Bankruptcy 710, 815)." In re New York City Asbestos Litigation Brooklyn Naval Yard Shipyard Cases, 188 A.D.2d 214, 224 (1st Dept 1983). However, actions should not be joined for trial where joinder would prejudice or deny a party a fair trial. (see e.g. Johnson v. Celetex Corp., 899 F.2d 1281 (2d Cir 1990), cert denied, 498 U.S. 920 (1990), or where individual issues predominate (see e.g. Bender v. Underwood, 93 A.D.2d 747, 748 (1<sup>st</sup> Dept.1983). In its decision in In re New York City Asbestos Litigation (Konstantin/ Dummit), 121 A.D.3d 230, 242, (1<sup>st</sup> Dept 2014), the First Department acknowledged that courts generally consider the following set of criteria as guidelines, as articulated in Malcolm v. National Gypsum Co., 995 F.2d, 346, 350-351 (2nd Cir 1993), in deciding whether to consolidate cases: (1) common worksite; (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. "Not all of the factors need to be present; consolidation is proper so long as 'individual issues do not predominate over common questions of law and fact.'" Id. citing In re New York City Asbestos Litigation, 99 A.D.3d 410, 411 (1<sup>st</sup> Dept. 2012).

At the outset, I note that in NYCAL "[i]t has been routine to join cases together for a single trial." Konstantin/Dummit, supra at 242 (internal citation omitted). See e.g., Baruch v. Baxter Healthcare Corp., 111 A.D.3d 574 (1<sup>st</sup> Dept. 2013)(affirming a trial court decision consolidating three asbestos cases for joint trial where plaintiffs were exposed to asbestos during an overlapping period of 40 years, even though there were differences among plaintiffs, including

that one plaintiff had mesothelioma while two other plaintiffs had lung cancer); In re New York City Asbestos Litigation, 2011 New York Misc LEXIS 2248 (Gische, J, Sup Ct N Y Co, 2011) (consolidation of eight asbestos cases for joint trial where plaintiffs claimed exposure to asbestos from similar products and equipment and in similar ways, while engaged in a variety of occupations and at a variety of work sites, and where one plaintiff was living and seven were deceased); In re New York City Asbestos Litigation (Ballard), 2009 WL 2996083 (Feinman, J, Sup Ct NY Co) (consolidating nine asbestos cases for joint trial where six plaintiffs were living and three were deceased, and plaintiffs alleged that their exposure to asbestos occurred while they were engaged in occupations related to maintenance, inspection and repair.)

In more recent consolidations, this court has consolidated groups of two to three cases for consolidation. For instance, with respect to five cases in the Early Law Firm's April 2014 In Extremis cluster of six cases, I consolidated two cases for joint trial with three separate trials; in a July 27, 2015 decision with respect to five cases in the Belluck and Fox April 2014 In Extremis cluster, I consolidated the cases for joint trial into two trial groups consisting of two cases in each trial group with one case to be tried separately; in a December 3, 2014 decision, with respect to 15 cases in the Weitz and Luxenberg April 2014 In Extremis group, I consolidated the cases for joint trial into four trial groups, consisting of two to three cases in each group, with four cases to be tried separately.

Considering the foregoing appellate and trial court precedent, and applying the Malcolm factors, I conclude the cases should be consolidated into four trial groups with the Keith and Reno cases to be tried separately. Mr. Keith alleges exposure from his work as an inspector, an occupation which is distinguishable from the construction, maintenance and repair related

occupations alleged by the other plaintiffs. As to Ms. Reno, her case should also be tried separately. Although she alleges exposure from home renovation work and bystander exposure from helping with automotive brake work, she also alleges take home exposure from handling and laundering her spouse's work clothes, which allegation differs from other types of alleged exposure.

There is sufficient commonality in Trial Groups 1 through 4 to warrant consolidation. Plaintiffs in each group are represented by the same counsel, and in all cases discovery is complete. Moreover, with the exception of Trial Group 4, plaintiffs in each group are all either living or deceased,<sup>1</sup> and either had or suffer from, the same disease, either peritoneal mesothelioma, mesothelioma, or lung cancer. Thus, as discussed below, the medical evidence as to the etiology and pathology of the disease will overlap.

Trial Group 1 consists of the cases of Randy Schwartz (Index No. 190199/15) and Roney Temor (Index No. 190139/15). Plaintiffs' papers indicate both Mr. Schwartz and Mr. Temor are living and suffering from mesothelioma, and both allege exposure to asbestos from work during the 1970's into the 1990's, so that the medical and state of the art evidence will apply to both cases. While Mr. Schwartz alleges exposure from work as a plumber, roofer and mechanic, he also alleges, like Mr. Temor, exposure as a construction worker, and both allege exposure from similar products including insulation, cement, boilers, pumps, valves, joint compound and brakes. Thus, consolidation is warranted as the type of sites at which exposure is alleged, as well as the type of products and the manner of exposure, are similar. Moreover, twelve defendants are

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<sup>1</sup>This is based on information at the time of submission of this motion.

common to both cases.<sup>2</sup> To the extent defendants argue generally that the law of different jurisdictions may apply, absent any analysis with respect to this issue, such general statement is an insufficient basis to deny consolidation. However, this determination does not preclude the parties from raising this issue before the trial court for consideration.

Trial Group 2 consists of the cases Edward Cox (Index No. 190093/15) and Ralph Nuneville (Index No. 190039/15). Both Mr. Cox and Mr. Nuneville allege exposure to asbestos during the 1960's into the 1970's caused them to develop peritoneal mesothelioma, so that the medical and state of the art evidence will overlap. While Mr. Cox alleges exposure from work as a plumber, steamfitter and pipefitter, and Mr. Nuneville from work as a seaman, both allege work in navy shipyards and exposure to asbestos in insulation, pumps, valves, gaskets and packing so that the type of sites, products and manner of exposure are similar. In addition, thirteen defendants are common to both cases.<sup>3</sup> Moreover, like the issues in Trial Group 1, to the extent defendants argue the law of different jurisdictions may apply to each case, such general statement, absent analysis, is an insufficient basis to deny consolidation, but may be raised before the trial court.

Trial Group 3 consists of the cases of John Dawson (Index No. 190273/15) and Robert Opel (Index No. 190081/15). Both Mr. Dawson and Mr. Opel are deceased and allege exposure to asbestos in the 1940's into the 1970's, caused them to develop mesothelioma. Thus, the medical and state of the art evidence will overlap as well as the evidence with respect to the types

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<sup>2</sup>Bell & Gossett, Bendix, DAP, Gould Pumps, Grinnell, Ingersoll Rand, J-M Mfg., Karnak, NAPA, Sherwin Williams, Trane and Union Carbide.

<sup>3</sup>Atwood, Blackmer, Buffalo Pumps, Edward, Fairbanks, Gould Pumps, Grinnell, IMO, Ingersal Rand, Kennedy, Rockwell, Union Carbide, and Warren.

of products and manner of exposure. Both Mr. Dawson and Mr. Opel allege exposure to asbestos in insulation and cement. Moreover, two defendants are common to both cases.<sup>4</sup>

Trial Group 4 consists of Johnnie Sykes (Index No. 190201/15), William Anderson (Index No. 190089/15) and Walter Cunningham (Index No. 190136/14).<sup>5</sup> The medical and state of the art evidence will overlap as to these three plaintiffs who all smoked tobacco and allege exposure to asbestos caused them to develop lung cancer during construction related work in the 1970's. Specifically, as to the state of the art evidence, while Mr. Cunningham alleges exposure from the 1950's into the 1990's, and Mr. Sykes from the 1960's into the 1990's, and Mr. Anderson only in the 1970s, this difference does not warrant denying consolidation. While there is not exact commonality of periods of exposure, as noted in Konstantin/Dummitt, this need not defeat consolidation, as in "Malcolm, there was no commonality where exposures among plaintiffs began in the 1940s and ended in the 1970s, and some plaintiffs were exposed throughout that period but others were exposed for much shorter periods with it." Id., at 243.<sup>6</sup>

In addition, while the occupations of these plaintiff differ, Mr. Sykes alleges exposure as a member of a maintenance gang, Mr. Cunningham as a pipefitter, machinist, and maintenance and construction worker, and Mr. Anderson during work with joint compounds hanging wall fabrics

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<sup>4</sup>These defendants are Burnham and Union Carbide. In this connection it is noted that in Opel, only four defendants are listed in plaintiffs' chart.

<sup>5</sup>While defendants argue that the Sykes case should not be included as his estate had not been added at the time of submission, this decision assumes this substitution has now been effectuated.

<sup>6</sup>See e.g., In re New York City Asbestos Litigation (Ballard), supra, (in the nine cases consolidated for joint trial, plaintiffs alleged exposure between the 1950s and the 1980s; there was an overlap of periods of exposure in the 1960s and the 1970s, as eight of the nine plaintiffs alleged exposure during this period; and one plaintiff alleged exposure between 1957 and 1962).



and laying floor tiles, they all allege exposure to asbestos in insulation, and Mr. Andersen and Mr. Cunningham allege exposure from sheetrock and joint compound. Mr. Sykes and Mr. Cunningham allege exposure from work with valves and gaskets. Thus, the type of products and manner of exposure to such products are similar. Moreover, Union Carbide is a defendant in both Sykes and Anderson, and four defendants, Fairbanks, Gould Pumps, Grinnell, and IMO are common to both Cunningham and Sykes.

In dividing the cluster into the foregoing trial groups, while there is not exact commonality of work sites or occupations, I conclude that exact commonality of worksites and occupation is not necessary for consolidation, and that consolidation should not be denied based on the number of asbestos containing products to which plaintiffs allege exposure. Such a strict construction would undermine the purpose of consolidation; that is, to conserve judicial resources and litigation expenses and to foster settlements. With the use of intelligent management techniques, including juror notebooks, explanatory and limiting instructions, and individualized verdict sheets and jury instructions in the final charge, the jury should be able to differentiate and evaluate the evidence as to each plaintiff and defendant, so as to prevent bolstering or other prejudice to the defendants. As noted above, within each trial group, the above conclusions are supported by the anticipated evidence which overlaps as to the manner of exposure, types of products and equipment, and types of work sites, so that there is sufficient commonality as to these factors to warrant consolidation.

This approach with respect to occupations, products, work sites and manner of exposure is supported by the previously discussed cases and by the First Department's holding in Konstantin/Dummit. In that case, in addressing consolidation, the court noted that, "some trial

courts have rejected a narrow focus on specific locations of exposures and types of work in favor of an analysis that considers whether two or more plaintiffs were 'engaged' in an occupation related to maintenance, inspection and/or repair and were 'exposed to asbestos in the traditional way, that is, by working directly with material for years.' (see e.g. Matter of New York City Asbestos Litigation, 201 New York Slip Opinion [U], \*6 (Sup Ct NY Co 2010) (joining cases of residential drywaller, Navy pipefitter, home renovator, plant electrician, powerhouse worker, and Navy electrician for trial, where their injuries 'resulted from 'insulation exposure from boilers, valves, pumps, and other insulated equipment'). Other courts have focused on the types of asbestos product to which the plaintiffs were exposed, and whether they were manufactured and distributed by different defendants (see e.g. Bishofsberger, 2012 New York Slip Opinion [U]).” Konstantin/Dummit. supra at 242-243

Moreover, to the extent defendants' arguments regarding the multiplicity of, and lack of commonality of parties, work sites and products, relates to consolidation of eleven cases into two groups, these arguments have been addressed with the division of this cluster into four trial groups, of two to three cases each and two separate trials.

For the foregoing reasons, it is

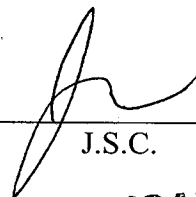
ORDERED that plaintiff's motion to consolidate is granted to the extent of consolidating for joint trial into Trial Group 1, Randy Schwartz (Index No. 190199/15) and Roney Temor (Index No. 190139/15) ; consolidating for joint trial into Trial Group 2, Edward Cox (Index No. 190093/15) and Ralph Nuneville (Index No. 190039/15);consolidating for joint trial into Trial Group 3, John Dawson (Index No. 190273/15) and Robert Opel (Index No. 190081/15);consolidating for joint trial into Trial Group 4, Johnnie Sykes (Index No.

190201/15), William Anderson (Index No. 190089/15) and Walter Cunningham (Index No. 190136/14); and it is further

ORDERED that Robert Keith (Index No. 190071/15) and Elizabeth Reno (Index No. 190070/15) shall be tried separately; and it is further

ORDERED that the trial court shall determine the order in which the Groups shall be tried.

DATED: March 15, 2017

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.