

Aquitato v AMCHEM Prods., Inc.
2017 NY Slip Op 31096(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 190253/15
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
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This Document Relates to:
RICHARD AQUITATO, as Executor for the Estate of
SALVATORE AQUITATO, and JOHN AQUITATO,
Individually,

Plaintiff(s)

**-Against-
AMCHEM PRODUCTS, INC., et al.,**

Defendants.

INDEX NO. 190253 /15

MOTION DATE 05-18-2017

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 22 were read on this motion to Consolidate :

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits _____ cross motion _____

3-4,
5,6,7,8,9,10,11,12,13,14,
15,16,17,18,19,20,21

Replying Affidavits _____

22

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to Consolidate is granted to the extent of consolidating for trial the following cases in the following manner:

Group 1 - Carrili, Gallen, Gilbert (all Living , with mesothelioma, with overlapping asbestos exposure from 1957 through 2014, whose exposure was through construction, plumbing and auto mechanic work);

Group 2- Rallo and Wisse (both Living, with Lung cancer, with overlapping asbestos exposure from 1960 through 1990, whose exposure was through auto mechanic, plumbing and construction work);

Group 3- Simons (Living, with mesothelioma) to be tried individually;

Group 4- Pogacnik (Living ,with Mesothelioma) to be tried individually;

Group 5- Riccoboni and Sahm (Deceased, mesothelioma, with overlapping asbestos exposure from 1957 through 2001, whose exposure was through construction work);

Group 6- Bissonette, Debonera, Formanski and Moeller (Deceased, mesothelioma, with overlapping asbestos exposure from 1948 through 1994, whose exposure was through work on marine vessels, Navy ships and shipyards);

Group 7- Gibson and Heuer (Deceased, mesothelioma, with overlapping asbestos exposure from 1941 through 1988, whose exposure was through work on naval ships and auto mechanic work);

Group 8- Martinez (Deceased, mesothelioma) to be tried individually;

Group 9- Scott (Deceased, mesothelioma) to be tried individually;

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Group 10- De Curtis (Deceased, lung cancer) to be tried individually;
Group 11- E. Banks (Deceased, lung cancer) to be tried individually;
Group 12- Greene (Deceased, mesothelioma) to be tried individually;
Group 13 - Perillo (Deceased, Asbestosis/lung cancer) to be tried individually;
Group 14- Aquitato (Deceased, mesothelioma) to be tried individually;

Plaintiffs' motion seeks to consolidate these twenty two Asbestos related actions for trial. Plaintiffs allege consolidation is proper because the actions (1) have the same central issue: (a) exposure to the same exact substance (Asbestos), (b) during a related period of time, [c] in a similar manne , (d) all coming from similar sources (brakes, pads, pipes, boilers, pumps, gaskets, valves, insulation, etc...), and (e) all resulting in the same damages (mesothelioma, lung cancer); (2) will require consideration of the same factual evidence; (3) Raise the same core legal issues; (5) are based on a similar set of facts and (6) seek the same relief. Finally plaintiffs argue that consolidation will serve the interest of judicial economy.

Defendants jointly submit written opposition to the motion. Separately defendants submit supplemental opposition to the motion for consolidation, and in essence argue 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; (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, status, and similar type of cancer with the other plaintiffs in the proposed groups.

It is alleged that the plaintiffs in these actions were exposed to asbestos in the following manner:

Salvatore Aquitato: (Deceased Mesothelioma)

Exposed to Asbestos while working as a color Chemist, painter and home renovator from 1951- 1970.

James Bissonette: (Deceased Mesothelioma)

Exposed to Asbestos during his service in the U.S. Coast Guard as an electronic technician from 1982 -1986, while on a Coast Guard Cutter and while stationed at a Coast Guard base.

Roger Carilli: (Living Mesothelioma)

Exposed to Asbestos while working as an auto mechanic, home renovator and plumber. From 1961-63 worked in a gas station where he changed brakes and was exposed to asbestos as a result of pulling and cutting drum, unhooking springs that held brake linings, removing horseshoe brake pads and blowing out all the dust around the drum with a compressor. Also exposed while doing renovation in his own home in the 1970's, when working with Sheetrock, joint compound; and as a commercial and residential plumber from 1964 - 2014 installing and removing boilers, chopping boiler insulation, replacing firebrick, burners, rebuilding steam traps, and maintaining and repairing pumps and valves.

Spyrangelos Deboneras: (Deceased Mesothelioma)

Exposed to Asbestos as a Marine Engineer working on vessels and shipyards in the U.S. and Internationally from 1952-1979. He installed and removed Asbestos-containing pipe covering, block, cloth, cement, gaskets, and packing on pipes, boilers.

turbines, generators, pumps, valves, soot blowers, motors and other equipment on vessels at sea and at shipyards. He also worked around others performing the same duties on vessels at sea and at shipyards.

Ernest De Curtis: (Deceased Lung Cancer)

Exposed to asbestos as a plumber and part time taper from 1964 -1989. As a taper installed Sheetrock applying Joint compound. As a plumber replaced boilers, valves, asbestos gaskets, packing, pumps and other related components. Also broke through ceiling tiles to replace lead bends, drain lines, re-plug, rip and replace external boiler insulation. Also worked with other tradesmen in his vicinity who personally handled asbestos containing material and products.

Richard Ebanks: (Deceased Lung Cancer)

Exposed to asbestos in the merchant marine on ships, on shipyards and as an auto mechanic from 1961-1978. On board ships he was exposed to asbestos from the removal and replacement of insulation, gaskets on pumps and valves and insulation on turbines. As an auto mechanic he was exposed while installing brakes on vehicles. He also worked with other tradesmen who swept up asbestos dust in his vicinity and personally handled asbestos containing materials and products.

Benjamin Formanski: (Deceased Mesothelioma)

Exposed to asbestos in the U.S. Navy on board ships and at shipyards, as a Sheet metal helper and lathe operator from 1953 -1994. He repaired broken equipment, cleaned pipes, tubes, pumps, and the inside of boilers. Removed and replaced brick, and changed gaskets on pumps and valves. He worked with asbestos-containing or utilizing products such as boilers, pumps, valves, gaskets, packing, insulation, refrigeration units, turbines, steam traps and refractory cement. He also worked with or around other tradesmen in his vicinity that handled asbestos-containing material.

Thomas Gallen: (Living Mesothelioma)

Exposed to asbestos as a farm hand and carpenter in Ireland, as renovator on his own residence and as a union carpenter from 1967-1990. He performed maintenance on farm equipment replacing clutches and brakes; when performing home renovation as a carpenter he worked with Sheetrock, wood flooring and roof shingles. As a Union carpenter he was exposed to asbestos when he took down ceiling tiles, when he worked around electrical closets which exposed him to asbestos in electrical equipment and when he applied and sanded joint compound.. He also worked in proximity with steam fitters, carpenters, plumbers, and air conditioning technicians each of whom swept up asbestos dust in his vicinity and handled asbestos-containing material.

Wayne Gibson: (Deceased Mesothelioma)

Exposed to asbestos as auto mechanic, truck driver and boiler technician while in the U.S. Navy and after his discharge, from 1964-1985. As a boiler technician he used a fire-hose and rag to clean the inside and outside of the boiler. He used a screw driver and his hands to remove external asbestos insulation from gaskets on flanges of pumps, boiler, pipes and to remove and replace broken, cracked fire brick from the inside of the boiler on ships. As an auto mechanic he performed brake, clutch and engine repairs. He was also exposed to asbestos from brake work he performed on his, and others cars. He also worked around other tradesmen in his vicinity that personally handled asbestos-containing material and products.

Ernest Gilbert: (Living Mesothelioma)

Exposed to asbestos while working as a helper and steam pipe-fitter from 1957-1979. As a helper worked on fixing boat engines removing and replacing asbestos gaskets on different inboard and outboard engines. As a steam pipe fitter he was exposed to asbestos from installing and removing boilers, pumps, and asbestos insulated piping.

Cyril Greene: (Deceased Mesothelioma)

Exposed to asbestos as an auto mechanic and construction worker from 1950-1984. As a child exposed when visited his grand father's auto repair shop (who performed work such as cleaning, sanding and repairing brakes, clutches, engines, transmissions, gaskets and other parts), and when helping his grand mother wash his grandfather's clothes. As a construction worker when using and installing drywall, joint tape, joint compound, and while removing flooring, floor and ceiling tiles, insulation and paint.

Elsa Martinez: (Deceased Mesothelioma)

Exposed to asbestos while working as a garment press operator in a dry-cleaner from 1970-1973. Was required to scrape the asbestos-containing press pads using a scraper. This created dust and debris that she swept with a broom. This was required on a weekly or bi-weekly basis.

Karl Moeller: (Deceased Mesothelioma)

Exposed to asbestos on U.S. Navy ships and shipyards, and as a union carpenter from 1948-1978. As a seaman was regularly in the vicinity where other trades removed and re-insulated pumps. As union carpenter installed asbestos containing acoustical ceiling tiles while others installed walls and floors. His job required scoring, snapping and sanding of drywall, use of joint compound, tiles and performing activities creating dust and debris which had to be swept up. He was also exposed to asbestos when overseeing other workers performing these same functions.

Dominick Perillo: (Deceased Asbestosis/Lung Cancer)

Exposed to asbestos working as a laborer and auto mechanic from 1973-1980. As auto mechanic worked with brakes and clutches. Would take the wheels off the vehicle, pull the drums off and then blow them out along with the packing plate and internal parts; removed, cut and installed asbestos-containing gaskets. As a laborer serviced boilers, applied asbestos to boilers, piping, valves and pumps after scraping and removing the old insulation with a scraper. Swept up, bagged and removed the material. He also performed private home renovations which involved handling Sheetrock and mixing and applying joint compound.

Leon Pogacnik: (Living Mesothelioma)

Exposed to asbestos during his career as an architect from 1969-1991. Present while tradesmen were installing transite piping, installing walls, roofs, boilers, piping, valves, pumps and all the flooring. Exposed to asbestos containing products such as gaskets, pipe covering, sheet rock, roofing felts, insulation and floor and ceiling tiles. Also exposed to asbestos during renovation projects in his home. Exposed during supervision of construction work.

Jarome Rallo: (Living Lung cancer)

Exposed to asbestos while working as an auto mechanic from 1960-1990. Performed brake jobs suing air hose to blow brake dust off the backing plates and clutches. Removed old gaskets, exhaust pipes and asbestos lined mufflers. Handled asbestos containing products such as brakes, clutches, and gaskets, using a grinding machine to arc the brake shoes to make them fit the drums.

Dante Riccoboni: (Deceased mesothelioma)

Exposed to asbestos while working as a mason in the new construction and renovation of homes from 1964-1980. Installed Sheetrock and drywall, having to sand the joint compound located in the seams of walls. Also worked around sub-contractors who scored, snapped, sanded and installed asbestos-containing floor tiles.

Roger Sahn: (Deceased Mesothelioma)

Exposed to asbestos while working as a union carpenter and building maintenance from 1957-2001. Replaced asbestos containing tiles, repaired building walls using sheet rock and joint compound, built housing for large pressure valves, installed new ceilings.

Dawn Scott: (Deceased Mesothelioma)

Exposed to asbestos from 1972-1980, while working with asbestos containing black-pieces of plastic, while visiting the family owned pizza restaurant where she was present when the stone oven was scraped and scrubbed, and at home when major repair work was done, including replacement of floors, the beams on ceiling, installation of popcorn ceiling and wall painting which required filling holes with asbestos containing joint compound.

Joanne Simons: (Living Mesothelioma)

Exposed to asbestos from 1960-1979, when as a child renovations were done to the apartment where she resided (roughly every 3 years). These renovations required patching holes with joint compound and sanding the compound creating dust. Workers also removed the floors, breaking the old tiles and installing new asbestos-containing tiles. While in the building's basement the laundry room was near an old boiler covered in asbestos that was often worked on. She was also exposed when she visited her father's dry cleaner when asbestos-containing press pads were changed (which occurred about every three weeks to a month), and when the asbestos-covered boiler was being worked on. She also washed her father's dusty work clothes on a regular basis.

Robert Wisse: (Living Lung cancer)

Exposed to asbestos from 1966-1980 while working as an auto mechanic performing repairs, sanding new brakes and blowing out all ones (from 1966-75). While removing, installing and converting boilers (1970-74), which exposed him to asbestos in boilers, pumps, valves and insulation; and while supervising the conversion of an entire floor for Wang labs (1980) exposing him to asbestos in Wall-board, ceiling tiles, floor tiles and pipe covering.

Plaintiff proposes that the court order the cases consolidated in the following groups:

- Group 1: Carilli, De Curtis, Gallen, Gilbert, Riccoboni and Sahn;**
- Group 2: Martinez, Scott and Simons;**
- Group 3: Bissonette, Debonera, Ebanks, Formanski, Gibson, Heuer and Moeller;**
- Group 4: Greene and Rallo;**
- Group 5: Perillo and Wisse;**
- Group 6: Pogacnik; and**
- Group 7: Aquitato.**

The defendants oppose the groupings proposed by the plaintiff and allege that these actions cannot be consolidated because: (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) There is no common defendant in these cases; (4) The plaintiffs were exposed to Asbestos during different periods of time; (5) There are unique claims and defenses that permeate each individual case preventing consolidation; (6) There is prejudice in consolidating a living plaintiff with the cases of deceased plaintiffs, and (7) There is prejudice in consolidating the case of plaintiffs with different diseases.

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 demonstrates prejudice of a substantial right in a specific, non-conclusory manner. The burden is on the party opposing the motion to demonstrate prejudice (In Re New York City Asbestos Litigation Konstantin and Dummit, 121 A.D.3d 230, 990 N.Y.S.2d 174, 2014 N.Y. Slip Op 05054 ([1st. Dept. 2014]; Champagne v. Consolidated R.R. Corp., 94 A.D.2d 738, 462 N.Y.S.2d 491 [2nd. Dept. 1983]; Progressive Insurance Company v. Vasquez, 10 A.D.3d 518, 782 N.Y.S.2d 21 [1st. Dept. 2004]; *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 (N.Y.A.D. 1st Dept. 2006).

It is usually sufficient, to warrant consolidation of actions, if evidence admissible in one action is admissible or relevant in the other (*Maigur v. Saratogian, Inc.*, 47 A.D.2d 982, 367 N.Y.S.2d 114 [3rd. Dept. 1975]). Where it is evident that common issues are presented consolidation is proper. Consolidation of actions is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent injustice which would result from divergent decisions based on the same facts (*Chinatown Apartments, Inc., v. New York City Transit Authority*, 100 A.D.2d 824, 474 N.Y.S.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]). Not all of these factors need be present and consolidation is appropriate so 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]).

There are differences in the groupings the plaintiff proposes. Some of the plaintiffs are living, while some are deceased. Some of the plaintiffs suffered from lung cancer and some from mesothelioma. Some of the plaintiffs were exposed in a variety of ways, some in a single manner.

“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 may be prejudiced by the presence of deceased plaintiffs in the living plaintiff’s case. This risk of prejudice to the defendants prevents consolidation of the living plaintiffs case with the case of the those plaintiffs that are deceased.

The fact that some of the plaintiffs may present with different types of Mesothelioma does not prevent consolidation of the cases. Trial courts have ruled inconsistently where different plaintiffs who propose joint trials have different types of mesothelioma. However, the Appellate Division First Department in affirming the Trial court’s consolidation of the Konstantin and Dummit cases found no medical evidence suggesting any significant differences between pleural and peritoneal types of mesothelioma that would prevent consolidation when both types of the disease are present in the case (see In re New York City Asbestos Litigation (Konstantin, Dummit) Supra).

The cases of plaintiffs with exposure related to their service with the U.S. Navy, on ships and at shipyards, present unique facts related to the state of the art and defenses that are not common or relevant to the other non-U.S. Navy plaintiffs. (See 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 cases with those of the other plaintiffs is not warranted, due to their unique facts and defenses. “Federal Law may be implicated in these case and it could prove to be confusing for the jury to sort out the varying elements of liability and damages governed by New York’s negligence and product liability laws and those under Federal Maritime law.”(see In re New York City Asbestos Litigation (John Capozio, et al)22 Misc.3d 1109(A), 880 N.Y.S.2d 225 [Sup. Ct. N.Y. County 2009]).

Judicial economy would be served by consolidating the actions of living plaintiffs, with mesothelioma and whose exposure was through construction and mechanic work (Carili, Gallen and Gilbert); consolidating the actions of living plaintiffs with lung cancer and whose exposure was through construction, auto mechanic and plumbing work (Rallo, Wisse); consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was through construction work (Riccoboni and Sahn); consolidating the actions of deceased plaintiffs with mesothelioma and whose

exposure was through work in the U.S. Navy/Coast Guard ships, and shipyards (Bissonette, Debonera, Formanski and Moeller); consolidating the actions of deceased plaintiffs with mesothelioma whose exposure was through work on U.S. Navy ships and shipyards, and auto mechanic work (Gibson and Heuer). In these case groupings (1) the central issue is the same, (2) it is the same plaintiffs' counsel in the actions; (3) the plaintiffs suffered from the same disease (4) the plaintiffs in the group are either all living or all deceased; (5) the plaintiffs were exposed during overlapping periods, and in a similar manner.

The actions thus grouped meet the Malcolm criteria in that they have commonality, similarity in occupation and disease, similarity in the status of the plaintiff and overlapping exposure. These actions thus grouped have the same legal issues and similarity of facts, requiring consideration of the same or similar factual evidence. These commonalities favor consolidation which is in the interests of justice and judicial economy. *Flaherty v. RCP Assocs.*, 208 A.D. 2d 496 (N.Y. App. Div. 2d Dep't 1994); In Re New York City Asbestos Litigation 121 A.D.3d 230, 990 N.Y.S.2d 174, 2014 N.Y. Slip Op 05054 ([1st. Dept. 2014]).

The remaining plaintiffs cannot be consolidated into any group, either because they are alive and the group under which they would be consolidated is composed of deceased plaintiffs, or because they are deceased and the group under which they would be consolidated is composed of living plaintiffs; or because they suffer from lung cancer and the other plaintiffs in the group suffer from mesothelioma.

Accordingly, it is ORDERED that Plaintiffs' motion is granted to the extent of consolidating the actions for trial in the following cases in the following manner:

Group 1 - ROGER CARRILLI (index No. 190252/15), THOMAS GALLEN (Index No. 190343/15), ERNEST GILBERT (Index No. 190198/15) all Living, with mesothelioma, with overlapping asbestos exposure from 1957 through 2014, whose exposure was through construction, plumbing and auto mechanic work;

Group 2- JEROME RALLO (Index No. 190206/15) and ROBERT WISSE (Index No. 190313/15) both Living, with Lung cancer, with overlapping asbestos exposure from 1960 through 1990, whose exposure was through auto mechanic, plumbing and construction work;

Group 3- JOANNE SIMONS (Index No. 190353/15) Living, with mesothelioma, to be tried individually;

Group 4- LEON POGACNIK (Index No.190340/15) Living, with Mesothelioma, to be tried individually;

Group 5- DANTE RICCOBONI (Index No. 190352/15) and ROGER SAHM (Index No. 190174/15) Deceased, mesothelioma, with overlapping asbestos exposure from 1957 through 2001, whose exposure was through construction work;

Group 6- JAMES BISSONETTE (Index No. 190321/15), SPYRANGELOS DEBONERA (Index No. 190077/15), BERT FORMANSKI (Index No. 190339/15) and KARL MOELLER (Index No. 190314/15) Deceased, mesothelioma, with overlapping asbestos exposure

from 1948 through 1994, whose exposure was through work on marine vessels, Navy ships and shipyards;

Group 7- WAYNE GIBSON (Index No. 190187/15) and WILLIAM HEUER (Index No. 190205/15) Deceased, mesothelioma, with overlapping asbestos exposure from 1941 through 1988, whose exposure was through work on naval ships and auto mechanic work;

Group 8- ELSA MARTINEZ (Index No. 190208/15) Deceased, mesothelioma, to be tried individually;

Group 9- DAWN SCOTT (Index No. 190305/15) Deceased, mesothelioma, to be tried individually;

Group 10- ERNEST De CURTIS (Index No. 190251/15) Deceased, lung cancer, to be tried individually;

Group 11- RICHARD Ebanks(Index No. 190320/15) Deceased, lung cancer, to be tried individually;

Group 12- CYRIL GREENE (Index No. 190204/15) Deceased, mesothelioma, to be tried individually;

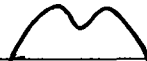
Group 13 - DOMINICK PERILLO (Index No. 190264/15) Deceased, Asbestosis/lung cancer, to be tried individually;

Group 14- SALVATORE AQUITATO (Index No. 190253/15) Deceased, mesothelioma, to be tried individually, and it is further

ORDERED that the cases are to be tried in the order that they are grouped giving preference to the cases of living plaintiffs.

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

Dated: May 19, 2017



MANUEL J. MENDEZ
J.S.C.

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