

<b>Matter of Macaluso</b>
2017 NY Slip Op 31097(U)
May 17, 2017
Supreme Court, New York County
Docket Number: 190285/15
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:
MARY MURPHY-CLAGETT as Temporary Administrator
for the Estate of PIETRO MACALUSO,

JOSEPH FLEIGNER,

INDEX NO. 190285 /15

RUTH STORY, Individually and as legal representative
of the Estate of EUGENE STORY,

KELLY O'CONNOR, Personal Representative of the
Estate of RAYMOND FLOOD, Deceased

MOTION DATE 05-17-2017
MOTION SEQ. NO. 013
MOTION CAL. NO.

The following papers, numbered 1 to 10 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

Replying Affidavits

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 cases of Pietro
Macaluso and Raymond Flood. Consolidation is denied with respect to the remaining
cases in this group. The case of Eugene Story and the case of Joseph Fleigner are to be
tried separately.

Plaintiffs' motion seeks to consolidate these four 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 manner ( dust) , (d) all coming from similar sources
( boilers, pumps, gaskets, valves, insulation), and (e) all resulting in the same damages
( mesothelioma, 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 A.O. Smith Corporation, Peerless Industries Inc., Good Year Tire &
Rubber Company, Pentair Water Pool and Spa, Inc., Velan Valve Corp. , Hallen
Construction Co., ABB, Inc., Trane, Armstrong International, inc., and Cemex submit
written opposition to the motion. All of the other defendants join in opposing the motion
for consolidation, and together all defendants argue that (1) there are factual differences
among the cases that preclude consolidation ; (2) consolidation would not serve judicial

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

economy and would prejudice defendants because consolidation would cause jury confusion.

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

Pietro Macaluso-( deceased)

Was exposed to Asbestos dust while employed as a construction laborer performing home renovations (from joint compound, sheet rock, floor tiles, and electrical equipment), and also while employed as a plumber's helper (from boilers and boiler insulation) during the period 1972 to 1982.

Eugene Story-(deceased)

Was exposed to Asbestos dust from valves, pumps, hot water heaters, turbines and boilers from ships during the period of 1945 to 1968, while attending the U.S. Merchant Marine Academy, while a member of the Merchant Marine, while a Chief Marine Inspector for the U.S. Navy, while a Marine Inspector for Caltrex, and while acting as president of Delaval Nordstrum in New York and Sweden.

Raymond Flood-(deceased )

Was exposed to Asbestos dust while performing renovations on his personal residence (from Sheetrock, spackle, tape, flooring, roofing, shingles and felt). As a bystander he was exposed to Asbestos dust while working as a baggage handler at JFK airport when mechanics changed brakes on airplanes ( 1963 to 1969). He was also exposed to Asbestos dust from pool heaters which had Asbestos components and insulation. It is alleged that the heaters had Asbestos in the gaskets and insulation that required removal and scraping with a knife and wire brush. These were removed and changed hundreds of times. The exposure to Asbestos dust from pool heaters was from 1982 to 1994. In all Mr. Flood was exposed to Asbestos dust from the 1960's to 1994.

Joseph Fleigner-(living)

Was exposed to Asbestos dust directly and as a bystander while employed by Consolidated Edison from insulation on steam pipes and valves located inside and outside of underground manholes, when outside contractors removed insulation on expansion joints associated with steam pipes, when pipe insulation, gaskets and packing were removed on valves connected to steam pipes, when asbestos transite pipes were cut to replace existing asbestos transite pipe used to house electrical cables located underground, when others replaced packing and gaskets on valves and steam traps, and when others repaired pumps, boilers and turbines. Exposure was from 1969 to the late 1980's.

The defendants allege that these actions cannot be consolidated because: (1) The plaintiffs lack a common worksite 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) The unique claims and defenses in the navy matters defeat consolidation; (6) There is prejudice in consolidating a living plaintiff with the cases of deceased plaintiffs, and (7) The plaintiffs don't have the same disease because peritoneal mesothelioma is a distinct disease from pleural mesothelioma, thereby defeating consolidation.

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 ([1<sup>st</sup>. Dept. 2014]; Champagne v. Consolidated R.R. Corp., 94 A.D.2d 738, 462 N.Y.S.2d 491 [2<sup>nd</sup>. Dept. 1983]; Progressive Insurance Company v. Vasquez, 10 A.D.3d 518, 782 N.Y.S.2d 21 [1<sup>st</sup>. Dept. 2004]; *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 (N.Y.A.D. 1<sup>st</sup> 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 [3<sup>rd</sup>. 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 [1<sup>st</sup>. 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 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 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 [2<sup>nd</sup>. 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]).

Although there is no common defendant, the plaintiffs share common counsel. The plaintiffs all suffer from the same disease, Mesothelioma. The plaintiffs all claim exposure to Asbestos dust : Plaintiffs Macaluso and Flood from construction work and from asbestos insulation in boilers and pipes; Plaintiff Story from insulation in valves, pumps, hot water heaters, turbines, boilers and pipes on Ships and Shipyards. Plaintiff Fleigner from insulation in pipes, valves, packing, gaskets, pumps, boilers and turbines in powerhouses, inside, and outside of underground Manholes.

Although there is no common Worksite, the plaintiffs were all exposed to Asbestos in a similar manner, as tradespeople working in or around products containing asbestos. The period of exposure for all plaintiffs overlaps : Plaintiff Macaluso was exposed from 1972 to 1984, Plaintiff Story from 1945 to 1968, Plaintiff Flood from the 1960's to 1984 and Plaintiff Fleigner from 1969 to the late 1980's. In all of these cases discovery is complete and the cases are ready for trial.

One difference in all the cases is that plaintiff Fleigner is living while plaintiffs Macaluso, Story and Flood are deceased. “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 Fleigner case with the case of the other plaintiffs.

The fact that three of the plaintiffs- Macaluso, Fleigner and Story- were diagnosed with Pleural mesothelioma and plaintiff Flood was diagnosed with Peritoneal Mesothelioma does not prevent consolidation of the Flood case with any of the other plaintiffs. 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 in the record 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). There is no evidence in this record suggesting any significant differences in Pleural and Peritoneal types of mesothelioma preventing consolidation of the Macaluso and Flood cases.

Finally, the Story case , who was the only one with exposure related to his service with the U.S. Navy, and the only one exposed on ships and at shipyards, presents unique facts related to the state of the art and defenses that permeate this individual case, and 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 this case with that of the other plaintiffs is not warranted, due to its unique facts and defenses. “Federal Law may be implicated in this 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 Pietro Macaluso and Raymond Flood actions since (1) the central issue in both actions is the same, in essence, they were both exposed to asbestos from construction work and from Asbestos insulation (2) it is the same plaintiffs’ counsel in both actions; (3) they suffered from the same disease (4) they are both deceased; (5) they were exposed during overlapping periods, and in a similar manner.

The Macaluso and Flood actions involve 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 ([1<sup>st</sup>. Dept. 2014]).

Accordingly, it is ORDERED that Plaintiffs' motion is granted to the extent of consolidating for trial the action filed under index number 190311/15 titled MARY MURPHY-CLAGETT as Temporary Administrator for the Estate of PIETRO MACALUSO, with the action filed under index number 190147/15 titled KELLY O'CONNOR, Personal Representative of the Estate of RAYMOND FLOOD, deceased, and it is further

ORDERED that the remainder of the motion for consolidation is denied, and it is further

ORDERED that the action filed under index number 190245/15 titled JOSEPH FLEIGNER, is to be tried separately, and it is further

ORDERED that the action filed under index number 190285/15 titled RUTH STORY, Individually and as Legal Representative of the Estate of EUGENE STORY is to be tried separately, and it is further

ORDERED that the first case to be tried is the case of the living plaintiff JOSEPH FLEIGNER, to be followed by the trial of the consolidated action, to be followed by the trial of EUGENE STORY, and it is further

ORDERED that the parties appear for a pre-trial settlement conference on July 5, 2017 at 2:15 P.M. at IAS Part 13 located at 71 Thomas Street, Room 210, New York, N.Y. 10013.

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

Dated: May 17, 2017

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

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