

Klock v Albany Intl. Corp.

2017 NY Slip Op 33323(U)

March 28, 2017

Supreme Court, Onondaga County

Docket Number: 2015EF3734

Judge: Charles C. Merrell

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At a Term of the Supreme Court of the State of New York, held for the County of Onondaga at Lowville, New York on the 8th day of December, 2016.

PRESENT: HON. CHARLES C. MERRELL
Justice of the Supreme Court

**STATE OF NEW YORK
SUPREME COURT COUNTY OF LEWIS**

CHRISTINE KLOCK, Administratrix of the Estate of WILLIAM McINTOSH, Deceased,

Plaintiff,

v.

ALBANY INTERNATIONAL CORP., et al.

Defendants.

DECISION AND ORDER

Index No. 2015EF3734
RJI No. 33-15-3680

LEONARD M. GAUMES and DONNA G. GAUMES, his spouse,

Plaintiffs,

v.

CBS CORPORATION f/k/a VIACOM, INC. as successor in interest to CBS CORPORATION f/k/a WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Defendants.

Index No.: 2016EF1906
RJI No.: 33-16-1879

APPEARANCES: LEVY KONIGSBERG, LLP
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Appliances Company and Union Carbide Corporation

Merrell, C. C., J.S.C.

Plaintiffs in these two asbestos actions have jointly moved for an Order consolidating the above actions for a joint trial to commence on July 10, 2017. CPLR §602(a) provides for consolidation of cases involving common questions of law or fact as may tend to avoid unnecessary costs or delay.

Plaintiffs contend that both William McIntosh and Leonard Gaumes were diagnosed with mesothelioma, caused by their exposure to asbestos at a common work site, Gouverneur Talc Company, during overlapping periods of time. Plaintiffs further contend there are common defendants in each case represented by the same counsel, and that Vanderbilt Minerals LLC is the main Defendant in both actions. Plaintiffs assert that both cases will involve testimony at trial from the same fact and expert witnesses, and that there are common questions of law and fact in both cases.

The Gaumes action was commenced on May 8, 2016. It is scheduled for trial on July 10, 2017. The McIntosh action was commenced September 5, 2015 and is trial ordered for May 7, 2018. The Court has not issued a scheduling order in McIntosh, pending the outcome of this motion.

Defendants Vanderbilt Minerals, LLC ("Vanderbilt"), CertainTeed Corporation ("CertainTeed"), Troy Belting & Supply Company ("Troy Belting"), Mine Safety Appliances Company ("MSA") and Union Carbide Corporation ("Union Carbide") object to the consolidation on several grounds; including non-existent or lagging discovery in the McIntosh action; that Defendants would be unduly prejudiced by an early trial date; that the motion filed by McIntosh is deficient and does not provide any evidentiary proof of common questions of law or fact; and that the totality of the substantive differences between the two cases precludes consolidation.

The generally accepted criteria to be analyzed by the Court in determining whether to consolidate asbestos cases are as follows: (1) common work site; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether plaintiffs are represented by same counsel; and (8) type of cancer alleged (Malcolm v. National Gypsum Co., 995 F.2d 346 [2d Cir. 1993]). The Court is to apply these factors in a flexible manner (Matter of New York City Asbestos Litigation (Konstantin), 121 AD3d 230, 243-244 [1st Dept. 2014], *aff'd* 27 NY3d 1172 [2016]).

Although the Plaintiffs shared overlapping periods of employment at Gouverneur Talc Mine ("Gouverneur Talc"), which is the source of their claims against Vanderbilt, their other potential asbestos exposures are quite different. Mr. Gaume's other possible exposures and work places include Rushmore Paper Mill from 1958 to 1969, his work as a mechanic while in the Army from 1958 to 1963; work on asbestos-containing brake pads on personal vehicles, and possibly use of asbestos-containing spackling and joint compound while performing home repairs.

Mr. McIntosh was not deposed before his death. No product identification witnesses have been deposed as of the date of the motion. Mr. McIntosh's answers to interrogatories provide his only work history and list potential asbestos exposures as a roofer; laborer at the Groveton Paper Company; laborer and mechanic at a different mine; welder at several work places; degreasing machine operator, self-employed as a roofer and sider; and a loader operator and construction worker where involved working with concrete. Mr. McIntosh's Estate claims Mr. McIntosh was exposed in the course of his welding work as a result of his use of asbestos-containing gloves, coats and blankets manufactured by Defendant MSA.

Plaintiffs both worked at Gouverneur Talc. Mr. Gaumes worked as a laborer, repairman's helper and trammer. He alleges exposures both above ground and below ground in the mine. Mr. McIntosh's occupations, as set forth in answers to interrogatories, were maintenance mechanic, mixer, crusher, operator and truck driver. Given the lack of discovery in the McIntosh matter it is difficult to discern whether the circumstances of Plaintiffs' exposures are similar, other than they both worked at the same talc mine and were exposed to talc dust. Mr. Gaume's period of exposure at Gouverneur Talc was from 1969 to 2003. Mr. McIntosh's alleged period of exposure at Gouverneur Talc is alleged to be from 1978 to 1989.

Both Plaintiffs allege mesothelioma as a result of asbestos exposure, with Mr. McIntosh having passed away on November 23, 2015 before his deposition was completed. Plaintiffs are represented by separate counsel. There is an open issue regarding venue in the McIntosh case being more properly fixed in St. Lawrence County, but that consideration is given little weight insofar as this motion is concerned.

There is a distinct difference with respect to the status of discovery. The Gaumes action is scheduled for trial on July 10, 2017 and discovery has been completed. The McIntosh action was commenced on September 4, 2015 and as of December 8, 2016 product identification discovery and co-worker depositions had not been completed, although Plaintiff's counsel in McIntosh contend they will comply with Gaumes' Scheduling Order deadlines. Mr. McIntosh appears to claim and/or have potential exposures from several other work places and numerous other products. Defendants contend they will not have sufficient opportunity to explore discovery and prepare their cases with respect to other exposures prior to a July 2017 trial date. Given Mr. Gaume's medical condition the Court will not delay his case and consolidate the cases for trial in May 2018.

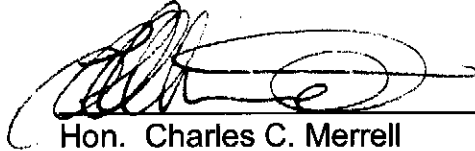
After reviewing all the motion submissions, the Court finds that the respective discovery postures of these cases precludes consolidation for a trial in July 2017, the trial date in the Gaumes case. Plaintiffs' belated request for consolidation in McIntosh, in light of significant outstanding discovery, would unduly prejudice Defendants in preparing for a July 2017 trial date. Further, although there appear to be some common questions of law and fact with respect to Vanderbilt, there were significant differences in the work histories and exposures unrelated to Vanderbilt involved with these Plaintiffs. It cannot be said on this record that there are more facts and issues in common than unique to each. Significant discovery is ongoing in McIntosh which would prejudice a substantial right of the McIntosh Defendants to have time to prepare their defenses and develop potential cases against third party defendants and CPLR Article 16 parties. Under all the circumstances presented the

fairest result is to deny the motion for consolidation. Plaintiffs' joint motion is therefore denied.

The foregoing constitutes the Decision and Order of the Court. So Ordered.

ENTER

Dated: March 28, 2017



Hon. Charles C. Merrell
Justice of the Supreme Court