

Bucci v Air & Liquid Sys. Corp.
2018 NY Slip Op 30841(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 190354/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ANTHONY T. BUCCI and MICHELLE BUCCI,

Plaintiff,

- v -

AIR & LIQUID SYSTEMS CORP., *et al.*,

Defendants.

INDEX NO. 190354/15
MOTION DATE _____
MOTION SEQ. NO. 1

DECISION AND ORDER

-----X
HON. BARBARA JAFFE:

By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating the following accelerated cases for a joint trial: (1) Anthony T. Bucci, Index No. 190097/12; (2) Walter Johnsen, Index No. 190275/15; and (3) Charles V. Palermi, Index No. 190326/15.

Defendants jointly oppose the consolidation, and certain defendants oppose in the individual cases.

I. APPLICABLE LAW

A motion for a joint trial rests in the discretion of the trial court. (CPLR 602[a]; *Matter of New York City Asbestos Litigation [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). The party seeking consolidation bears the burden of demonstrating common issues. Once shown, the opposing

party bears the burden of demonstrating “prejudice to a substantial right.” (Vincent C. Alexander, Practice Commentaries, McKinneys Consol Law of New York, CPLR 602, C602-1). Allegations of prejudice must be specific (*Konstantin*, 121 AD3d at 245), although alleged prejudice to defendants in consolidated cases and potential juror confusion may be reduced by providing “limiting, explanatory and curative instructions,” giving notebooks to jurors to “assist them in recording and distinguishing the evidence in each case,” and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Id.*).

While judicial economy and efficiency should be considered in determining whether to consolidate, those interests “must yield to a paramount concern for a fair and impartial trial.” (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). Thus, for actions to be consolidated for a joint trial, there must be a “plain identity” of issues (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]), which are discerned by considering whether the actions share:

(1) worksites, (2) occupations, including mechanism of exposure, (3) times of exposure, (4) types of disease, (5) status as alive or deceased, (6) status of discovery, (6) counsel, and (7) type of cancer. (*Malcolm v Ntl. Gypsum Co.*, 995 F2d 346, 350-351 [2d Cir 1993]; *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016] [citing *Malcolm*]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013] [same]; *Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012] [same]).

Although not all of the factors need be demonstrated to establish a sufficient commonality among or between plaintiffs, “consolidation is appropriate so long as ‘individual issues do not predominate over the common questions of law and fact.’” (*Konstantin*, 121 AD3d

230, 242, quoting *Bernard*, 99 AD3d 410, 411). Moreover, a shared mechanism of exposure or product may render insignificant certain differences among worksites and occupations unless the differences impacted the mechanism of exposure such that the evidence should be heard separately. (*Konstantin*, 121 AD3d 230 at 242; *Matter of Ballard*, Sup Ct, New York County, Sept. 10, 2009, Feinman, J., index No. 190102/2008; see *Matter of Landry*, Sup Ct, New York County, Jan. 21, 2010, Feinman, J., index No. 111058/2003).

Many of the concerns about the consolidation of numerous actions for trial are no longer pertinent given the governing CMO provision. As of July 20, 2017, two cases may be joined for trial where a plaintiff demonstrates that joinder is warranted under *Malcolm* and New York State cases interpreting *Malcolm*. A maximum of three cases may be joined for trial, upon good cause shown and if three or more of the *Malcolm* factors are present and all three plaintiffs suffer(ed) from one of the following diseases: pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers.

II. PLAINTIFFS

A. Anthony T. Bucci

Bucci, now 62 years old, was diagnosed with cancer of the left and right lungs, which has spread to his brain. He is alleged to have been exposed to asbestos from approximately 1975 through the 1980s while employed as a general utility mechanic, mechanic B, and heavy equipment operator for Consolidated Edison (Con Ed), and while working at various Con Ed powerhouses within New York City. His exposure was from work he and others in his vicinity performed on asbestos-containing transformers, network protectors, pumps, valves, turbines and boilers and by using asbestos-containing gaskets, packing and insulation.

The defendants remaining in Bucci's action are Air & Liquid Systems Corporation, Alfa Laval, Anderson, Greenwood & Co., CBS Corporation, Crane Co., Crane Environmental, Inc., Crane Pumps & Systems, Inc., The Fairbanks Company, Flowserve US, FMC Corporation, Gerosa, Incorporated, Gould Pumps LLC, ITT LLC, Nosroc Corporation, Patterson Pump Company, Treadwell Corporation, Warren Pumps LLC, Weir Valves & Controls USA, Inc., and Zy-Tech Global Industries, Inc.

B. Walter Johnsen

Johnsen is 77 years old years old and suffers from lung cancer. He was allegedly exposed to asbestos from 1964 to 1977, while employed as a production man, auxiliary operator, operating mechanic, water tender, and watch supervisor for Con Ed, exclusively at the Waterside powerhouse in Manhattan. Johnsen was also allegedly exposed to asbestos from the work that he and others in his vicinity performed on asbestos-containing pumps, valves, boilers and turbines, and using asbestos-containing gaskets, packing, gloves and insulation.

The defendants remaining in his action are Alfa Laval, CBS, Crane, Crane Environmental, Crane Pumps, Fairbanks, Flowserve, FMC, Fort Kent Holdings, Inc., Gardner Denver, Inc., Gerosa Denver, Inc., Gerosa Incorporated, ITT, Milton Roy LLC, The Nash Engineering Company, New York Protective Covering Industries, Inc., Olympic Glove and Safety Co., Inc., Patterson, Rhone-Poulenc, Inc., Warren, Weir, The William Powell Company, and Zy-Tech.

C. Charles V. Palmeri

Palmeri, age 65, suffers from lung cancer. He is alleged to have been exposed to asbestos from approximately 1971 through the 1980s while employed by Con Ed as a stock handler, general utility mechanic, mechanic B, and mechanic A, and through his work at various

Con Ed powerhouses within New York City, and from the work that he and others in his vicinity performed on asbestos-containing transformers, network protectors, pumps, valves, turbines and boilers and by using asbestos-containing gaskets, packing, gloves, cable, and insulation.

The defendants remaining in his action are CBS, Crane, Crane Pumps, Crescent Electric Supply Company, Inc. of New York, Edward Vogt Valve Company, Environmental Elements Corporation, Fairbanks, FMC, Fort Kent, Gerosa Inc., Jenkins Bros., Leviton Manufacturing Co., The Okonite Company, Inc., Olympic Glove, RSCC Wire & Cable LLC, and Weir.

III. ANALYSIS

Pursuant to the amended CMO, plaintiffs must establish that good cause exists and that three or more of the *Malcolm* factors are present; it is undisputed that all three plaintiffs suffer from lung cancer. Plaintiffs argue that good cause is shown by the fact that having the cases consolidated for trial will promote judicial economy and will not prejudice the defendants, and they observe that not only do all of them suffer from lung cancer, but they all have a smoking history.

Defendants jointly oppose consolidation as it would violate their due process and equal protection rights, that jurors will be confused even if precautionary measures are implemented, and that presentation of testimony from the plaintiffs and witnesses will improperly bolster each case. They also allege that the plaintiffs do not suffer from sufficiently similar medical diseases, as only Bucci has brain cancer, and Bucci and Palmeri suffered from asbestosis, while Johnsen has been diagnosed with chronic obstructive pulmonary disease (COPD). Defendants observe that Johnsen worked exclusively at one worksite, and that only he was in the Navy, where he was allegedly exposed to piping insulated with asbestos, thus raising an issue as to the applicability of federal maritime law. While the plaintiffs may have had similar occupations, moreover,

defendants claim, their exposures differ, as Bucci worked with transformers and network protectors, while the others did not. (NYSCEF 178).

RSCC opposes on the ground that it is only a defendant in the Palmeri matter, that the facts in Palmeri have no meaningful commonality with the other two plaintiffs as they all worked at different worksites, and that only Palmeri worked in the receiving stockroom, cable yard, and transformer shop, and was thus uniquely exposed to asbestos contained in wire and cable products, resulting in multiple wire and cable defendants being named only in his case. It also observes that seven of the 16 remaining defendants are only in the Palmeri case. (NYSCEF 173).

Jenkins contends that the Palmeri case is not ready for trial, as two significant depositions have not yet been completed, and it has thus moved to vacate plaintiffs' note of issue. It is also a defendant only in Palmeri, and argues there is insufficient commonality among the three cases. (NYSCEF 196).

While Bucci has brain cancer along with his lung cancer, it is not clear that the addition of another cancer means that the CMO requirement has not been met, given that all three plaintiffs suffer from lung cancer. The same holds true for the two plaintiffs who suffer from asbestosis, and that one has COPD.

However, Johnsen is the only plaintiff with exposure related to his service with the Navy, and the only one who was exposed on ships and at shipyards. His Navy exposure may raise issues that are not relevant in the non-Navy cases. (*See In re New York City Asbestos Litig. [Carlucci]*, 2013 WL 5761459, 2013 NY Slip Op 32548[U] [Sup Ct, New York County] [consolidating for trial plaintiffs that had common worksite on Navy ships]; *In re New York City Asbestos Litig. [Horn]*, 2010 WL 3613150, 2010 NY Slip Op 32462[U] [Sup Ct, New York County] [same]; *In re New York City Asbestos Litig. [Capozio]*, 22 Misc 3d 1190[A], 2009 NY

Slip Op 50072 [Sup Ct, New York County 2009] [separating plaintiff from others based on Navy employment as federal law may be implicated]; *In re New York City Asbestos Litig. [Bauer]*, 2008 WL 3996269, 2008 NY Slip Op 32349[U] [Sup Ct, New York County 2008] [same]; *In re New York City Asbestos Litig. [Alholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375 [Sup Ct, New York County 2006] [if federal maritime law at issue, may confuse jury to sort of varying elements of liability and damage under negligence and products liability standards and those under federal maritime law]; *In the Matter of Seventh Jud. Dist. Asbestos Litig. [Ballard]*, 191 Misc 2d 625 [Sup Ct, Monroe County] [separating from joint trial two plaintiffs who were exposed to asbestos while in Navy]).

Johnsen also worked at only one Con Ed powerhouse, and his exposure began in the 1960s and ended in the 1970s while the others' began in the 1970s and ended in the 1980s. Of the 23 defendants remaining in his action, seven are in no other action. Plaintiffs have thus failed to show that at least three of the *Malcolm* factors have been satisfied.

While Palmeri and Bucci were exposed during the same period, worked at various Con Ed powerhouses, and had similar occupations, only Palmeri worked with or around asbestos-containing transformers, network protectors, and cable, and half of the remaining defendants in his action are in no other action. Indeed, there are seven defendants in common in these two cases, and 22 not in common. Moreover, that Palmeri's case may not be currently ready for trial is a significant factor, although the motion to vacate the note of issue has not yet been decided. Plaintiffs have thus failed to establish that there is sufficient commonality in the Bucci and Palmeri matters.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for consolidation is denied.

5/1/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 DO NOT POST

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE


 BARBARA JAFFE, J.S.C.
 HON. BARBARA JAFFE