Nauheimer v Union Carbide Corp.
2018 NY Slip Op 33220(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 190098/17
Judge: Manuel J. Mendez

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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RANDI NAUHEIMER, Individually and as Executor of the Estate of ROBERT WILLIAM NAUHEIMER,
Plaintiff(s)

-Against-

UNION CARBIDE CORP. , et al.,

Defendants.

INDEX NO. 190098 /17

MOTION DATE 12-12-2018
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

The following papers, numbered 1 to__ were read on this motion to Consolidate for trial :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits _____cross motion _____	3-4,
Replying Affidavits _____	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to Consolidate for trial the Nauheimer and Roqueta cases is granted.

Plaintiff's motion seeks to consolidate two asbestos related actions for trial. Plaintiff alleges 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 (1960-1980), [c] in a similar manner (construction and home renovation work), (d) all coming from essential similar sources (joint compound) , and (e) all resulting in the same damages (mesothelioma); (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, 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, and similar time of exposure .

It is alleged that the plaintiffs in these actions for which consolidation is sought, were exposed to asbestos in the following manner:

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

ROBERT WILLIAM NAUHEIMER:

Died on June 4, 2017 as a result of Pleural mesothelioma. Was exposed to asbestos from the 1960s through the 1980s. Mr. Nauheimer was exposed to asbestos in joint compound containing Calidria-asbestos fibers while performing residential renovation and construction work from 1970-1977 when he worked with is father-in-law in the residential construction trade, and when he did renovations to his home. He was exposed to asbestos from asbestos-containing joint compound that he, and coworkers in his presence, applied to sheetrock walls and sanded. He was also exposed to asbestos-containing brake lining from 1963 through the 1980s, while he attended automotive school from 1963 to 1964, and from occasional brake work he performed on personal and family member automobiles.

MICHAEL ROQUETA:

Died on April 3, 2017 as a result of Pleural mesothelioma. Was exposed to asbestos from the 1960s through the 1980s. Mr. Roqueta was exposed to asbestos in joint compound containing Calidria-asbestos fibers while performing residential renovation and construction work from 1968 through 1977. In 1968 he used joint compound to complete limited renovation work at his home. From 1968 through 1972 he worked with his father who was the superintendent of a three-building apartment complex. As part of that work he performed numerous jobs that included applying and sanding joint compound. He also used asbestos-containing DAP architectural grade caulking. From 1973 through 1975 he worked with a painter and spent approximately one third of his time applying and sanding joint compound. In 1976 he performed a large amount of joint compound work while renovating a 33 story apartment building in Forida. From the early to mid 1980s, while employed as a superintendent, he was exposed to asbestos from the boiler (asbestos insulation and gaskets).

Plaintiff requests that the court order the cases consolidated.

The defendants oppose the motion 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 plaintiffs claim they were exposed to are too diverse and numerous thereby resulting in juror confusion; (3) There is no common defendant in these cases, other than Union Carbide; (4) The plaintiffs were exposed to asbestos during different periods of time; and (5) There are unique claims and defenses that permeate each individual case preventing consolidation.

Defendants also argue that the motion should be denied because it is procedurally defective as the plaintiff only made a motion in the Nauhemimer case; therefore, the court cannot order joinder or consolidation with the Roqueta case because it is not before the court. Finally the defendants argue that the plaintiffs by making the motion waived their punitive damages claim.

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 or joinder of actions for trial, 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]).

Judicial economy would be served by joining for trial the actions of deceased plaintiffs with pleural mesothelioma and whose exposure was related to their work doing residential renovation or construction work using similar products such as joint compound during similar periods of time. In these cases consolidation or joinder is appropriate because (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 are deceased; (5) the plaintiffs were exposed during the same periods, and in a similar manner.

The actions thus consolidated meet the Malcolm criteria in that they have commonality, similarity in occupation and disease, similarity in the status of the plaintiff and similarity in the period of exposure. These actions thus consolidated 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 motion to consolidate the Nauheimer case with the Roqueta case is properly before the court. CPLR §602 allows the court, upon motion, to order a joint trial of any or all matters in issue when actions involving common questions of law or fact are pending before a court (See CPLR §602). If the actions are pending in different counties the motion may be made in any of those counties by any party to any one of the actions

(Gomez v. Jersey Coast Egg Producers, Inc., 186 A.D.2d 629, 588 N.Y.S.2d 589 [2nd. Dept. 1992]) as long as the motion is on notice to all the parties who would be affected by it. The court cannot make a Sua Sponte order of joinder or consolidation (see McKinney's Consolidated Laws of New York Annotated Section C602:3).

Defendants argue that plaintiff had to make two motions-one in each action-to obtain the remedy of joinder or consolidation. That is not what the statute requires or what the commentaries state. The statute requires that the party seeking consolidation or joinder make a motion, so the court cannot act to join or consolidate Sua Sponte. The commentary states that the motion can be made in either action the moving party seeks to join or consolidate, on notice to all parties affected. If there was a requirement that a motion be made in every action the party seeks to join or consolidate then a party seeking to consolidate actions pending in different counties would need to make separate motions in each county with the possibility of conflicting results. Logic dictates that the way to proceed is as stated in the commentary, one motion on notice to all affected parties.

The plaintiff herein made one motion to join these cases for trial and gave notice to all affected parties, therefore this motion is properly before the court.

Finally, after reading the CMO and the decision accompanying the CMO, this court finds that a plaintiff does not waive asserting a punitive damages claim by making a joinder or consolidation motion. The decision on the joinder motion will provide the defendants final definitive notice concerning whether a plaintiff will be proceeding with a punitive damages claim. If the joinder or consolidation motion is granted plaintiff cannot proceed with the punitive damages claim. The opposite would occur if joinder or consolidation is denied.

Accordingly, it is ORDERED that Plaintiffs' motion is granted, and it is further

ORDERED that the Robert William Nauheimer case, index number 190098/2017 is to be tried jointly with the Michael Roqueta case, index number 190040/2017, and it is further

ORDERED that the joined cases be placed on the deceased extremis trial list.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 13, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE