

**Christy v A.O. Smith Water Prods. Co.**

2019 NY Slip Op 30192(U)

January 22, 2019

Supreme Court, New York County

Docket Number: 190116/15

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:
FREDERICK CHRISTY and CATHERINE CHRISTY,
Plaintiff(s)

-Against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

INDEX NO. 190116 /15

MOTION DATE 01-09-2019

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 9 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

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 following FIFO cases in the following manner:

1 - FREDERICK CHRISTY ( Index No. 190116/15) and GIOVANNY COLONNA ( Index No. 102153/03) living with lung cancer;

2- ROBERT FOLEY (Index No. 190475/12) and JOSEPH LUCENTI (Index No. 104390/05) deceased from lung cancer;

3- DON DONOVAN (Index No.190046/2015) and CLARENCE NIGHTENGALE (Index No. 190249/14) deceased lung cancer;

4- SALVATORE SCALFANI (Index No.190088/14) and RICHARD STANLEY (Index No. 190440/12).

The remaining cases on this transfer order dated June 26, 2018 are to be tried individually.

Of the Twenty two (22) cases in this FIFO Cluster of cases Plaintiffs' motion seeks to consolidate 11 cases-of these Asbestos related actions- for trial into five (5) groups . 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 , (d) all coming from similar sources, and (e) all resulting

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

in the same damages ( mesothelioma or 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 some 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 and status with the other plaintiffs in the proposed groups.

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

**FREDERICK CHRISTY:**

Living with lung cancer. Exposed 1954-1994. Exposed from work as plumber and steam fitter. Exposed to boilers, pipe covering, gaskets, pumps, valves and furnace cement. When other trades working around him worked with sheetrock, joint compound, and fireproofing spray at the Indian point powerhouse.

**GIOVANNY COLONNA:**

Living with pleural disease and lung cancer. Exposed 1972-2002. Exposed from work as a plumber. Exposed to asbestos containing boilers, pumps, valves, packing, gaskets, pipe covering, rope and insulation.

**WADE LEWIS:**

Living with lung cancer. Exposed from 1948 - 1992. Exposed from work as an auto mechanic, steel worker, in U.S. Navy and laborer. Exposed to asbestos containing firebrick. When other trades used asbestos containing pipe covering, cement, gaskets, floor tiles, ceiling tiles, boilers, furnaces, valves, generators, pumps, turbines, compressors, cranes, brakes, ovens, ladles, gloves and aprons. As a laborer installed wall board, used joint compound and worked with floor tiles.

**JOHN MARMARA:**

Living with lung cancer. Exposed from 1962-63. Exposed from work as an auto mechanic and at the Bethlehem shipyard. Exposed to gaskets, brakes, clutches and asbestos containing cement.

**ROBERT FOLEY:**

Deceased lung cancer. Exposed 1954-1991. Exposed from work as a steam fitter. Worked at various powerhouses and the World Trade Center. Exposed to asbestos containing pipe covering, cement, brick, wallboard, joint compound, floor tile, gaskets, packing, rope, engines, pumps, boilers, pipes, turbines, compressors, air conditioning equipment and generators.

**JOSEPH LUCENTI:**

Deceased lung cancer. Exposed 1954-1981. Exposed from work as a journeyman plumber at powerhouses and construction sites. Exposed to asbestos containing joint compound, floor tiles, sheetrock, pipes, gaskets, valves, pumps and boilers.

**SALVATORE SESSA:**

Deceased lung cancer. Exposed in 1970. Exposed from work as a construction worker. Exposed to asbestos containing joint compound, pumps, boilers, electrical equipment, tiles, caulking and cement insulation.

**DON DONOVAN:**

Deceased lung cancer. Exposed 1964-79. Exposed from work in the U.S. Navy. Exposed to asbestos containing batteries, motor controls, pumps, valves, air conditioning equipment, electrical equipment, control panels, switch gears and circuit breakers.

**CLARENCE NIGHTENGALE:**

Deceased lung cancer. Exposed 1967-1971. Exposed from work in the U.S. Navy. Exposed to asbestos containing insulation on boilers, turbines, pumps, valves, cement, gaskets, packing, boilers and pipes.

**SALVATORE SCALFANI:**

Deceased lung cancer. Exposed 1936-1970. Exposed from work as an auto mechanic, shipfitter, laborer and plumber. Exposed to asbestos containing brakes, boilers with asbestos insulation, pipe insulation, valves, generators, turbines, and sheetrock.

**RICHARD STANLEY:**

Deceased lung cancer. Exposed 1942-1955. Exposed from work in U.S. Navy shipyard. Exposed to asbestos containing insulation, pipe covering, cement, brick, wall board, joint compound, floor tiles, gaskets, packing, rope, engines, pumps, boilers, pipes, turbines, compressors and generators.

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

- 1: Christy and Colonna;
  - 2: Lewis and Marmara;
  - 3: Foley, Lucenti and Sessa;
  - 4: Donovan and Nightengale;
  - 5: Scalfani and Stanley;
- and that the remaining eleven cases be tried individually.

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 to 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; and (5) There are unique claims and defenses that permeate each individual case preventing 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 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 [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]).

Judicial economy would be served by consolidating the actions of living plaintiffs with lung cancer and whose exposure was from work in similar occupations and related to similar products such as boilers, pipe covering, gaskets, pumps, valves, furnace cement and fireproofing spray whose exposure was from the 1950's to 2002 ( *Christy and Colonna*); consolidating the actions of deceased plaintiffs from lung cancer whose exposure was from work in similar occupations and related to similar products such as asbestos insulation, pumps, valves, boilers, joint compound, floor tiles, and whose exposure was from the 1950's through the 1990's ( *Foley and Lucenti*); consolidating the actions of deceased plaintiffs from lung cancer , whose exposure was from work in similar occupations and related to similar products such as asbestos containing valves, gaskets, pipes, cement, insulation, electrical equipment, control panels, switchgear, circuit breakers, turbines, and whose exposure was from the 1960's to 1979 (*Donovan and Nightengale*); consolidating the actions of deceased plaintiffs from lung cancer, whose exposure was from work in similar occupations and related to similar products such as asbestos containing boilers, valves, rope, brake pads, joint compound, gaskets, pipes, packing, insulation, generators, turbines and compressors,

and whose exposure was from the 1930's through 1970 (Scalfani and Stanley).

In these case consolidations (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 all deceased or living ; (5) the plaintiffs were exposed during overlapping 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 overlapping 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 ([1<sup>st</sup>. Dept. 2014]).

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:

1 - FREDERICK CHRISTY ( Index No. 190116/15) and GIOVANNY COLONNA ( Index No. 102153/03) living with lung cancer;

2- ROBERT FOLEY (Index No. 190475/12) and JOSEPH LUCENTI (Index No. 104390/05) deceased from lung cancer;

3- DON DONOVAN (Index No.190046/2015) and CLARENCE NIGHTENGALE (Index No. 190249/14) deceased lung cancer;

4- SALVATORE SCALFANI (Index No.190088/14) and RICHARD STANLEY (Index No. 190440/12).

ORDERED that the remaining FIFO cases listed in this transfer order dated June 26, 2018 are to be tried individually, and it is further

ORDERED that the parties appear for a final pre-trial conference on the 22 FIFO actions in this transfer order, in Part 13 located at 60 Centre Street, Room 442 New York, N.Y. 10007, on February 20, 2019 at 2:15 P.M.

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

Dated: January 22, 2019

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST                       REFERENCE