

Haley v ABB, Inc.
2019 NY Slip Op 33630(U)
December 11, 2019
Supreme Court, New York County
Docket Number: 190150/2018
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
*Justice*PART 13IN RE: NEW YORK CITY ASBESTOS LITIGATIONHELEN HALEY, Individually and as the personal
Representative of the Estate of EDWARD HAYLEY,INDEX NO. 190150/2018
MOTION DATE 12/4/2019
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

Plaintiffs,

-against-

ABB, INC., et al.,

Defendants.

The following papers, numbered 1 to 3 were read on this motion to consolidate:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED1- 23CROSS-MOTION ☐ YES ☒ NO

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to Consolidate is granted and the following cases are consolidated for trial:

1. EDWARD HALEY (Index No. 190150/18) and FREDERICK MEI (Index No. 190345/15), deceased from Mesothelioma, to be tried jointly.

Plaintiffs' move to consolidate these two 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, (d) all coming from similar sources (turbines, pumps, valves, heaters, boilers and electrical equipment, etc.), 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. Defendants argue that (1) there are factual differences among the cases that preclude

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

consolidation; (2) consolidation would not serve judicial economy and would prejudice Defendants because consolidation would cause jury confusion; (3) consolidation is not proper because Plaintiffs do not satisfy the Malcom factors of work site, similar occupations, common remaining Defendants, and similar time of exposure.

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

EDWARD HALEY: Deceased from Mesothelioma.

Died at the age of 76 as a result of mesothelioma. He was exposed to asbestos dust from turbines, boilers, pumps, valves, feedwater heaters and heat exchangers between 1963-1980, as a Mechanic in the Consolidated-Edison Power Generating Division. He was also exposed to asbestos dust as a bystander from the work done by others in his vicinity.

FREDERICK T. MEI: Deceased from Mesothelioma.

Died at the age of 86 as a result of mesothelioma. He was exposed to asbestos from turbines, pumps, valves, heaters, boilers and electrical equipment between 1969-1996, as a Mechanic in the Long Island Lighting Company (hereinafter "LILCO") power generating stations. He was also exposed to asbestos dust as a bystander from the work done by others in his vicinity.

The cases were transferred to this Court as part of the April 2019 In Extremis Cluster. The first action titled Helen Haley, Individually and as the personal Representative of the Estate of Edward Haley v. ABB, Inc., et al., Index No.: 190150/18, was commenced on May 9, 2018. The second action titled Frederick Mei v. A.F. Supply Corp., et al., Index No.: 190345/15, was commenced on October 22, 2015. Plaintiffs seek to consolidate the actions which are brought against (12) separate Defendants. Both Edward Haley and Frederick Mei are deceased. The actions involve common questions of law and fact that arise from similar incidents. Defendant's jointly oppose the motion.

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 (1st 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 [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 duplications 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 to 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 *Konstantin and Dummit*, 121 A.D.3d 230, 990 N.Y.S.2d 174, 2014 N.Y. Slip Op 05054 [1st Dept. 2014]).

Judicial economy would be served by consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was related to their work on similar products such as turbines, boilers, pumps, valves, feedwater heaters and heat exchangers etc. 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; and (5) the Plaintiffs were exposed during overlapping periods, in a similar manner.

The actions consolidated meet the *Malcom* criteria in that they have commonality, similarity in occupation and disease, similarity in the status of the Plaintiff, and overlapping exposure. These actions consolidated have the same legal issues and similarity of facts, requiring consolidation 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]).

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

ORDERED, that the actions are consolidated for trial as follows:

1. EDWARD HALEY (Index No. 190150/18) and FREDERICK MEI (Index No. 190345/15), deceased from Mesothelioma, to be tried jointly; and it is further,

ORDERED, that the parties appear for a pre-trial conference on the consolidated actions on Wednesday December 18, 2019 at 2:15 pm.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 11, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE