

Backer v ABB, Inc.
2021 NY Slip Op 32739(U)
December 17, 2021
Supreme Court, New York County
Docket Number: Index No. 190105/2020
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART 13

Justice

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INDEX NO. 190105/2020

LEONARD BACKER,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

ABB, INC., AIR & LIQUID SYSTEMS CORPORATION,
ALCOA INC., ALGOMA HARDWOODS, INC., ALLEN-
BRADLEY COMPANY, INC., ARMSTRONG
INTERNATIONAL, INC., ATWOOD & MORRILL CO.,
INC., AURORA PUMP COMPANY, BURNHAM
CORPORATION, BW/IP INTERNATIONAL CO., CARRIER
CORPORATION, CBS CORPORATION, CERTAIN-TEED
CORPORATION, CLEAVER-BROOKS COMPANY,
COMPUDYNE CORPORATION, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CONSOLIDATED
EDISON, INC., COOPER BUSSMANN, COOPER
CAMERON CORPORATION, COOPER INDUSTRIES,
INC., COURTER & COMPANY, INC., CRANE CO., CROWN
BOILER CO., EATON CORPORATION, ECR
INTERNATIONAL, INC., ELECTROLUX HOME PRODUCTS,
INC., FLOWSERVE US, INC., FMC CORPORATION, FORT
KENT HOLDINGS, INC., G & G ELECTRIC CO., INC., GG
OF FLORIDA INC., GENERAL CABLE CORPORATION,
GENERAL ELECTRIC COMPANY, GOULD
ELECTRONICS, INC., GOULDS PUMPS, INC., GRINNELL
CORPORATION, HONEYWELL INTERNATIONAL,
INC., HOWDEN BUFFALO, INC., HUBBELL
INCORPORATED (DELAWARE), I.T.T. INDUSTRIES,
INC., INGERSOLL RAND, INC., INTERNATIONAL PAPER
COMPANY, JENKINS BROS., KOHLER CO., LENNOX
INDUSTRIES, INC., LIGHTOLIER INCORPORATED, LOUIS
SHIFFMAN, INC., MARIO & DIBONO PLASTERING CO.
INC., METROPOLITAN LIFE INSURANCE COMPANY,
MILWAUKEE VALVE COMPANY, INC., NASH
ENGINEERING COMPANY (THE), NEW YORKER BOILER
COMPANY, INC., O-Z GEDNEY COMPANY
LLC, PEERLESS INDUSTRIES, INC., PROGRESS
LIGHTING, INC., RILEY POWER, INC., SCHNEIDER
ELECTRIC USA, INC., SIEMENS INDUSTRY, INC., SPENCE
ENGINEERING COMPANY, INC., SPIRAX SARCO,
INC., TACO, INC., TISHMAN CONSTRUCTION
CORPORATION, TISHMAN INTERIORS CORPORATION,
TISHMAN LIQUIDATING CORPORATION, TISHMAN
REALTY & CONSTRUCTION CO., INC., TISHMAN SPEYER
PROPERTIES, INC., UNION CARBIDE CORPORATION,
WARD LEONARD ELECTRIC CO., WARREN PUMPS

**DECISION + ORDER ON
MOTION**

LLC, WEIL MCLAIN, WEYERHAEUSER COMPANY,
 WILLIAM POWELL COMPANY (THE), YORK
 INTERNATIONAL CORPORATION, GENERAL RAILWAY
 SIGNAL COMPANY, GEORGE A. FULLER COMPANY,
 GIAMBOI AND SONS, INC., GIAMBOI BROS.,
 INC., GIAMBOI PLASTERING CORP., LEVITON
 MANUFACTURING CO., INC., MORSE DIESEL, INC.,
 MORSE DIESEL INTERNATIONAL, INC., NORTHRUP
 GRUMMAN CORPORATION, INDIVIDUALLY AND AS
 SUCCESSOR TO GEORGE A. FULLER COMPANY,
 PIRELLI CABLE CORPORATION, TREADWELL
 CORPORATION, TURNER CONSTRUCTION COMPANY,
 UNION SWITCH & SIGNAL INC., CAMERON
 INTERNATIONAL CORPORATION INDIVIDUALLY AND AS
 SUCCESSOR TO PENNSYLVANIA PUMP &
 COMPRESSOR COMPANY AND COOPER BESSEMER,
 ALRAY CONSTRUCTION CORP., INDIVIDUALLY AND AS
 SUCCESSOR TO R.E. HEBERT AND COMPANY,
 INC., R.E. HEBERT AND COMPANY, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 261, 262, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 322

were read on this motion to/for

CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents, it is ordered that plaintiff's order to show cause for joint trials is granted for the reasons set forth below.

Here, plaintiff moves for 3 joint trials as follows: (1) the instant action with Unger v AW Chesterton, Co., et. al., 190098/2020; (2) Katechis v Allied Building Products, Corp., et. al., 190330/19 with McGibbon v AO Smith Water Products, et. al., 190045/2020 and McLaughlin v Air & Liquid Systems Corp., et. al., 190076/2020; and (3) Ferreri v Alcoa, Inc., et. al., 190275/19 with Matier v Air & Liquid Systems Corp., et. al., 190228/19. Defendants oppose. Thereafter, plaintiff withdrew the third prong of the instant order to show cause. Below, the Court addresses and decides the remainder of the motion with regards to a joint trial of the numbers (1) and (2) listed above.

The Case Management Order dated June 20, 2017 (hereinafter referred to as the “CMO”) states that “[t]wo cases may be joined for trial where plaintiff demonstrates that joinder is warranted under *Malcolm v National Gypsum Co.* (995 F2d 346), and New York State cases interpreting *Malcolm*. *Malcolm* and its progeny list factors to measure whether cases should be joined; it is not necessary under *Malcolm* that all such factors be present to warrant joinder.” CMO, §XXV. B. The factors to be considered under *Malcolm* are “(1) common worksites; (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 were represented by the same counsel; and (8) type of cancer alleged”. *Malcolm*, 955 F2d at 350-351. The United States Court of Appeals, 2nd Circuit, further noted that “[c]onsolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well.” *Malcolm, id.* at 350 (internal quotations and citations omitted). As to consolidation of three cases, the CMO states that “[u]pon good cause shown, a Trial Judge in NYCAL may join a maximum of three cases for trial where it determines that 1) joinder is warranted under three or more of the factors described in *Malcolm* and New York State cases interpreting *Malcolm*, and 2) where the three plaintiffs share the same disease. For purposes of this section ‘same disease’ shall mean that all the plaintiffs in the three cases proposed to be joined for trial share one of the following four categories of disease: 1) pleural mesothelioma, or 2) non-pleural mesothelioma, or 3) lung cancer, or 4) other cancers.” CMO, §XXV. B.

Plaintiff argues that consolidation of the cases for joint trial as specified above is appropriate. With respect to the instant action and the Unger action, plaintiff contends that both plaintiffs, Leonard Backer and Edward Unger, are currently living with mesothelioma and were exposed to asbestos during the course of their employment as an electrician and an electrician’s

mate respectively, working on similar equipment and machinery. As to plaintiffs Anastasios Katechis, Gerard McGibbon, and John McLaughlin, plaintiff argues that all three plaintiffs developed mesothelioma, from which they all passed away, as a result of exposure to asbestos during the course of their employment working on similar materials such as asbestos containing joint compound and caulk. Moreover, the discovery in all five of these cases have been completed, and all five plaintiffs are represented by the same counsel.

In opposition, defendants argue that plaintiff's misleading and over generalization of the facts of the cases are insufficient to meet their burden to establish that the commonalities among the plaintiffs overshadow the unique circumstances of each case. Defendants further argue that a joint trial violates defendants' due process and equal rights protections. Defendants contend that, due to the number of different worksites that Mr. Backer and Mr. Unger worked at, with no commonality, each plaintiffs' unique worksites and exposure would prevent a joint trial. Defendants also argue that there are certain defendants in the two cases that do not overlap, as well as differing causes of action. According to defendants, a joint trial in asbestos matters fails to promote efficiency but, rather, would lead to juror confusion and be prejudicial to defendants.

Here, reviewing all the *Malcolm* factors, the Court finds, and it is undisputed, that both plaintiffs, Mr. Backer and Mr. Unger, had similar occupations. Both plaintiffs were exposed to asbestos through their employment and their handling of similar materials and equipment. Additionally, both plaintiffs developed mesothelioma from which they both currently live with, the discovery in both of these actions are complete, and both plaintiffs have the same counsel. Counsel for the opposing defendants in the instant action represent defendants Tishman Liquidating Corp., Aurora Pump Co., George A. Fuller Co., and William Powell Co., and such counsel represents Aurora Pump Co., Armstrong International, Grundfos, and Catepillar Inc. in

the Unger action. Thus, six of the eight *Malcolm* factors have been satisfied. There are common issues of law and fact in both actions. The CMO explicitly states that the Court may order joinder of cases based upon the *Malcolm* factors and that not all such factors must be present. Here, the *Malcolm* factors support joinder of the two actions. Although the two plaintiffs did not share common worksites, this does not preclude joinder of the cases for trial. Adequate safeguards can be put in place during the trial to avoid juror confusion. Thus, plaintiff's motion seeking a joint trial is granted as to the instant action with *Unger v AW Chesterton, Co., et. al., 190098/2020*.

Turning to the portion of plaintiff's motion seeking a joint trial of *Katechis v Allied Building Products, Corp., et. al., 190330/19* with *McGibbon v AO Smith Water Products, et. al., 190045/2020* and *McLaughlin v Air & Liquid Systems Corp., et. al., 190076/2020*, defendants raise the same arguments as in the Backer and Unger cases, arguing that the three plaintiffs here did not share a common worksite, there are certain defendants in the two cases that do not overlap, and there are differing causes of action such that defendants would be prejudiced by a joint trial. However, a review of the documents reveals that the three plaintiffs, Anastasios Katechis, Gerard McGibbon, and John McLaughlin, were exposed to the same asbestos-containing materials through their respective employment, from which all three plaintiffs developed pleural mesothelioma and subsequently passed away. Additionally, the discovery in the three actions are complete, and all such plaintiffs have the same counsel. Thus, five of the eight *Malcolm* factors have been satisfied. There are common issues of law and fact in these actions. As Hon. Manuel Mendez previously held, "[j]udicial economy would be served by consolidating the actions of deceased plaintiffs with mesothelioma and whose exposure was related to their work on similar products... . 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...in a similar manner.” *Haley v ABB, Inc.*, 190150/19, mot. 008, dated December 11, 2019. Moreover, the CMO specifically permits the joint trial of three actions where, as here, three or more of the *Malcolm* factors have been met and the three plaintiffs share the same disease. As stated above, although the plaintiffs did not share common worksites, this does not preclude joinder of the cases for trial. Adequate safeguards can be put in place during the trial to avoid juror confusion. Thus, plaintiff’s motion seeking a joint trial is granted as to *Katechis v Allied Building Products, Corp., et. al.*, 190330/19, *McGibbon v AO Smith Water Products, et. al.*, 190045/2020, and *McLaughlin v Air & Liquid Systems Corp., et. al.*, 190076/2020.

Accordingly, it is

ORDERED that plaintiff’s motion seeking a joint trial is granted; and it is further

ORDERED that a joint trial is granted as to the instant action and *Unger v AW*

Chesterton, Co., et. al., 190098/2020; and it is further

ORDERED that a joint trial is granted as to *Katechis v Allied Building Products, Corp., et. al.*, 190330/19, *McGibbon v AO Smith Water Products, et. al.*, 190045/2020, and *McLaughlin v*

Air & Liquid Systems Corp., et. al., 190076/2020; and it is further

ORDERED that, within thirty days of entry, plaintiffs shall serve a copy of this order

upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

12/17/2021
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: