

Esposito v ABB, Inc.
2021 NY Slip Op 32740(U)
December 14, 2021
Supreme Court New York County
Docket Number: Index No. 190163/2019
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA
Justice

PART 13

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LORETTA ESPOSITO, AS EXECUTRIX OF THE ESTATE
OF NICHOLAS J. ESPOSITO, JR., DECEASED, LORETTA
ESPOSITO,

INDEX NO. 190163/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

Plaintiff,

- v -

ABB, INC., AIR & LIQUID SYSTEMS CORPORATION,
ARMSTRONG INTERNATIONAL, INC., AURORA PUMP
COMPANY, BEAZER EAST INC., BELDEN WIRE & CABLE
COMPANY, LLC, BW/IP, INC., CBS CORPORATION,
CLARK-RELIANCE CORPORATION, CLEAVER-BROOKS
INC., CONVAL, INC., COPES-VULCAN INC., CRANE CO.,
INDIVIDUALLY AND AS SUCCESSOR TO AND DOING
BUSINESS AS, CRANE ENVIRONMENTAL, INC., CRANE
PUMPS & SYSTEMS, INC., CROSBY VALVE, LLC, EATON
CORPORATION, ELLIOTT COMPANY, ERICSSON
INC., FLOWSERVE CORPORATION, FLOWSERVE US,
INC., FMC CORPORATION, GARDNER DENVER,
INC., GENERAL CABLE CORPORATION, GENERAL
ELECTRIC COMPANY, GEROSA, INCORPORATED,
GOULD ELECTRONICS, INC., GOULDS PUMPS,
LLC, GRAYBAR ELECTRIC COMPANY INC., GRINNELL
LLC, ITT LLC, INDIVIDUALLY, DOING BUSINESS AS AND
SUCCESSOR TO ITT CORPORATION, BELL & GOSSETT
COMPANY AND/OR BELL & GOSSETT DIVISION, FLOJET
CORPORATION, THE HOFFMAN SPECIALTY
MANUFACTURING COMPANY, ITT FLUID PRODUCTS
CORPORATION, J.R. CLARKSON COMPANY, THE,
LLC, JENKINS BROS., MINE SAFETY APPLIANCES
COMPANY, LLC, MUNACO SEALING SOLUTIONS,
INC., NASH ENGINEERING COMPANY, THE, OKONITE
COMPANY, INC., THE, OLYMPIC GLOVE AND SAFETY
CO., INC., RSCC WIRE & CABLE LLC, SCHNEIDER
ELECTRIC USA, INC., SIEMENS INDUSTRY, INC., SPIRAX
SARCO, INC., TRANE US, INC., FORMERLY KNOWN AS
AMERICAN STANDARD, INC., INDIVIDUALLY, AS
SUCCESSOR TO AND DOING BUSINESS AS,
TREADWELL CORPORATION, TRIANGLE PWC,
INC., UNION CARBIDE CORPORATION, VELAN VALVE
CORP., VIKING PUMP INC., WARREN PUMPS LLC, WEIL-
MCLAIN, WEIR VALVES & CONTROLS USA, INC.,
WILLIAM POWELL COMPANY, THE, YUBA HEAT
TRANSFER LLC, ZY-TECH GLOBAL INDUSTRIES,
INC., JOHN DOE 1 THROUGH JOHN DOE 75, CUMMINS
INC., INDIVIDUALLY, AS SUCCESSOR TO AND DOING

**DECISION + ORDER ON
MOTION**

BUSINESS AS CUMMINS ENGINE COMPANY AND ONAN
CORPORATION,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 326, 327, 328, 329,
330, 331, 332, 333, 334, 335, 336, 337, 339, 341, 343, 344, 345, 346

were read on this motion to/for

REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is ordered that plaintiff's motion to reargue is granted. Here, plaintiff seeks to reargue a prior motion seeking a joint trial with *Pontieri v ABB, Inc.*, 190351/17. Defendants The Nash Engineering Co., Weir Valves & Controls USA, Inc. d/b/a Atwood & Morrill Co., Inc., and Aurora Pump Co. oppose and plaintiff replied.

In a prior decision dated March 18, 2021 (hereinafter referred to as the "Prior Decision"), the Court denied plaintiff's motion for joinder on the grounds that the plaintiffs from the two cases did not share a common worksite. CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep't 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted).

Plaintiff argues that this Court misapprehended the law and the facts, as six of the seven factors set forth in *Malcolm v National Gypsum Co.*, 995 F2d 346 (2nd Cir. 1993), were met. In opposition, defendants herein aver that the Court did not misapprehend the law or facts in the Prior Decision, and further argue that plaintiff is merely attempting to get a second bite at the

apple as plaintiff's arguments here were made in the prior motion. Preliminarily, the Court notes that such argument fails as the instant motion is one to reargue rather than renew such that the Court will reconsider arguments and law plaintiff made during the prior motion that the Court may have misapprehended or overlooked.

As to joinder, 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).

Plaintiff correctly argues that the Court misapprehended the law and the facts in the Prior Decision. Here, reviewing all the *Malcolm* factors, the Court finds that both plaintiffs, Mr. Esposito and Mr. Pontieri, had similar occupations in that both worked several jobs and became mechanics, both plaintiffs were exposed to asbestos between 10 and 20 years, both plaintiffs developed lung cancer from which they both passed away, the discovery in both of these actions are complete, and both plaintiffs have the same counsel and opposing defendants in the instant

action represent defendants Gerosa Inc., Treadwell Corp., and Weir Valves & Controls USA, Inc. d/b/a Atwood & Morrill Co., Inc. in the Pontieri action. Thus, seven of the eight *Malcolm* factors have been satisfied. It is clear that there are common issues of law and fact. 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. The Court's Prior Order overlooked all seven of these *Malcolm* factors in favor of one. Here, an overwhelming amount of 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 to reargue is granted and the original motion seeking a joint trial of the instant action with Pontieri v ABB, Inc., 190351/17 is granted.

Accordingly, it is

ORDERED that plaintiff's motion to reargue is granted and, upon reargument, the Court vacates its prior order, dated March 18, 2021; and it is further

ORDERED that the instant action is joined with Pontieri v ABB, Inc., 190351/17 for trial; 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.

12/14/2021
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: