

Papsodero v Air & Liquid Sys. Corp.

2024 NY Slip Op 31212(U)

April 8, 2024

Supreme Court, New York County

Docket Number: Index No. 190102/2022

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

THOMAS LOUIS PAPSODERO, AMPARO PAPSODERO,
Plaintiff,

INDEX NO. 190102/2022
MOTION DATE 12/20/2023
MOTION SEQ. NO. 003

- v -

AIR & LIQUID SYSTEMS CORPORATION, ALFA LAVAL INC., A.O. SMITH CORPORATION, ARMSTRONG INTERNATIONAL, INC., ATWOOD & MORRILL COMPANY, INC., BARNES AND JONES, INCORPORATED, BOSTIK, INC., CARRIER CORPORATION, CLEAVER-BROOKS COMPANY, DAP PRODUCTS, INC, FMC CORPORATION, FORT KENT HOLDINGS, INC, GARDNER DENVER, INC., GOULDS PUMPS, LLC, H.B. SMITH COMPANY, INC, HEXION INC., HONEYWELL INTERNATIONAL INC., IMO INDUSTRIES, INC., INGERSOLL-RAND COMPANY, ITT CORPORATION, JERGUSON GAGE & VALVE COMPANY, KAISER GYPSUM COMPANY, INC., LENNOX INDUSTRIES, INC, NASH ENGINEERING CO., PROGRESS LIGHTING, INC., RICHARDS INDUSTRIES VALVE GROUP, SID HARVEY INDUSTRIES, INC., SPIRAX SARCO, INC., TRANE U.S., INC., UNION CARBIDE CORPORATION, WARREN PUMPS, LLC, WEIL MCLAIN CO., YORK INTERNATIONAL CORPORATION, AMERICAN BILTRITE, INC., BURNHAM LLC IND. AND AS SUC. TO KEWANEE BOILER AND BRYAN STEAM, LLC, CHAMPION INTERNATIONAL CORPORATION AS SUCCESSOR BY MERGER TO U.S. PLYWOOD-CHAMPION PAPERS, INC., CLA-VAL CO., COPES-VULCAN, INC., CURTISS-WRIGHT CORPORATION, FLOWSERVE CORP. SUCCESSOR TO DURCO, FLOWSERVE US, INC. IND. AND AS SUC. TO NORDSTROM VALVES, FLOWSERVE US, INC. IND. AND AS SUC. TO EDWARD VALVES, INC., ROCKWELL MANUFACTURING INC., GESTRA INC., DURAMETALLIC CORP., ALDRICH PUMPS, CAMERON PUMPS, VOGT VALVES, AND WILSON-SNYDER CENTRIFUGAL PUMPS, GOODRICH CORPORATION IND. AND AS SUC. TO F/K/A THE BF GOODRICH COMPANY SUCCESSOR -IN- INTEREST BY MERGER WITH COLTEC INDUSTRIES, INC. AND GARLOCK, INC., GOODYEAR TIRE & RUBBER COMPANY, GRUNDFOS PUMPS CORPORATION USA, HOMASOTE COMPANY, H.B. FULLER COMPANY, INTERNATIONAL PAPER COMPANY IND. AND AS SUC. TO OTIS FALLS PULP & PAPER COMPANY, J.H. FRANCE REFRACTORIES CO., INC., MILWAUKEE VALVE COMPANY IND. AND AS SUC. TO HAMMOND VALVE,

DECISION + ORDER ON MOTION

MTH PUMPS/MTH TOOL COMPANY, INC., MILTON ROY LLC, NICHOLSON STEAM TRAP, INC., ROPER PUMP COMPANY, ROTH PUMP COMPANY, SLANT-FIN CORPORATION, SPX COOLING TECHNOLOGIES, INC. IND. AND AS SUC. TO INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO MARLEY COOLING TOWER COMPANY, SUPERIOR BOILER WORKS, INC., WEIR VALVES & CONTROLS USA, INC. IND. AND AS SUC. TO ATWOOD & MORRILL, CO., INC., WEYERHAEUSER COMPANY, GOODRICH CORPORATION, HUBBELL INCORPORATED (DELAWARE), LEVITON MANUFACTURING CO., TENNECO AUTOMOTIVE OPERATING COMPANY INC., AURORA PUMP COMPANY, BORGWARNER MORSE TEC LLC, CYCLOTHERM OF WATERTOWN, INC., RAIN BIRD CORPORATION IND. AND AS SUC. TO HAMMOND VALVE, GOODYEAR CANADA, INC., CANVAS MW, LLC, F/K/A THE MARLEYWYLAIN COMPANY, LLC AND CANVAS SX, LLC, F/K/A SPX, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 223, 224, 225 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 a joint trial is granted for the reasons set forth below.

Here, plaintiff moves for a joint trial of two asbestos actions. Plaintiff seeks to consolidate the instant action with *Stein as Executor for the Estate of Thomas McCormick v Air & Liquid Systems Corp., Individually and as Successor by Merger to Buffalo Pumps, Inc., et al.*, 190052/2023. Defendants Burnham LLC ("Burnham") and Jenkins Bros. ("Jenkins") oppose on the basis that plaintiff has not demonstrated sufficient commonalities between the cases, that a joint trial would violate moving defendants' due process rights, and would be judicially inefficient. Defendant Velan Steam Trap Corporation ("Velan Steam Trap") also opposes the instant order to show cause, joining in defendants Burnham and Jenkins' opposition.

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 argues that consolidation of the cases for joint trial as specified above is appropriate. Plaintiff contends that both plaintiffs, Thomas McCormick and Thomas Papsodero, were exposed to asbestos during the course of their service with the United States Navy from similar asbestos-containing machinery aboard naval vessels (including gaskets, pumps, valves, and traps). Plaintiff further contends that both plaintiffs developed pleural mesothelioma from such exposure and the exposure occurred during “substantially overlapping years starting in the 1960s”. See Affirmation of Derell D. Wilson, Esq. dated December 18, 2023, p. 9-10. Moreover, both cases are at the same stage of discovery and both plaintiffs are represented by the same counsel.

Defendants Burnham, Jenkins, and Velan Steam Trap argue that the plaintiffs did not have similar enough worksites or occupations and that plaintiffs’ dates of exposure differ.

Defendants further argue that each matter requires different witnesses on their part and that a joint trial will not necessarily be resolved more quickly.

Here, reviewing all the *Malcolm* factors, the Court finds, and it is undisputed, that both plaintiffs, Mr. McCormick and Mr. Papsodero, were exposed to asbestos through their employment with the United States Navy, working aboard naval vessels, and their handling of similar materials and equipment. Additionally, both plaintiffs developed pleural mesothelioma from their exposure to asbestos, such overlapping period of exposure time being approximately 24 years. The discovery in both of these actions are complete, and both plaintiffs have the same counsel. 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.

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 with *Stein as Executor for the Estate of Thomas McCormick v Air & Liquid Systems Corp., Individually and as Successor by Merger to Buffalo Pumps, Inc., et al.*, 190052/2023; and it is further

ORDERED that all parties to appear in Court on June 4, 2024 at 9:30am in room 422 of 60 Centre Street, New York, NY 10007 for trial. Counsel must be prepared for jury selection on such date; and it is further

ORDERED that, within 14 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.

4/8/2024
DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES
TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE