

Rullo v ABB, Inc.

Supreme Court of New York, New York County

December 12, 2023, Decided

INDEX NO. 190272/2020

Reporter

2023 N.Y. Misc. LEXIS 23092 *; 2023 NY Slip Op 34365(U) **

[1]** GIUSEPPE RULLO, MARIA RULLO, 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., CLARK-RELIANCE CORPORATION, CLEAVER-BROOKS INC., CONVAL, INC., COPERS-VULCAN INC., CRANE CO., INDIVIDUALLY AND AS, CRANE ENVIRONMENTAL. INC., CRANE PUMPS & SYSTEMS, INC., CRESCENT ELECTRIC SUPPLY COMPANY, INC. OF NEW YORK, CROSBY VALVE, LLC, DAV CORPORATION, EATON CORPORATION, ELLIOTT COMPANY, ERICSSON, INC., FLOWSERVE US, INC., FMC CORPORATION, GARDNER DENVER, INC., GENERAL CABLE CORPORATION, GEROSA INCORPORATED, GOULD ELECTRONICS, INC, GOULD 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., JOHN E. POTENTE & SONS, INC., KENNEDY ELECTRICAL SUPPLY CORP., MINE SAFETY APPLIANCES COMPANY, LLC, MUNACO SEALING SOLUTIONS, NASH ENGINEERING COMPANY, THE, OKONITE COMPANY, INC., THE, OLYMPIC GLOVE AND SAFETY CO., INC., ROCKWELL AUTOMATION, INC., RSCC WIRE & CABLE LLC, SCHNEIDER ELECTRIC USA, INC., SIEMENS INDUSTRY, INC., SPIRAX SARCO, INC, TREADWELL CORPORATION, TRIANGLE PWC, INC., UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION., VIACOMBCBS, INC., 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, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

factors, consolidation, joint trial, cases, joinder, joined, oppose, exposed to **asbestos**, discovery, deceased, disease, instant action, lung cancer, documents, mechanics, contends, exposure, exposed, argues, Valve, phase

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

[2]** The following e-filed documents, listed by NYSCEF document number (Motion 001) 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205 were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, it is ordered that plaintiffs order to show cause seeking a joint trial is granted for the reasons set forth below.

Here, plaintiff moves for a joint trial of two actions. Plaintiff seeks to consolidate the instant action with *Scandaliato v ABB. Inc., et al.*, 190085/2021. Defendants oppose and plaintiff replies.

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; [*2] (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, Giuseppe Rullo and Paul Scandalato, were exposed to *asbestos* during the course of their employment as mechanics at Consolidated Edison [*3] Company of New York ("Con Ed"), working on similar equipment and machinery; i.e. boilers, valves, pumps, and gaskets. Plaintiff also argues that Mr. Scandalato was exposed to *asbestos* from 1963 to 1980 and Mr. Rullo was exposed from 1969 through 1980. Plaintiff further contends that both plaintiffs developed lung cancer and are currently living with such illness. Moreover, both actions are in the same phase of discovery [*3] and both plaintiffs are represented by the same counsel.

Defendants Triangle PWC, Inc. ("Triangle") and all remaining defendants jointly oppose, except for Kennedy Electrical Supply Corp. ("Kennedy") who separately opposes, and defendant Velan Valve Corp., who joins in both Triangle's and Kennedy's respective opposition papers.

Opposing defendants argue that plaintiff failed to meet the burden to establish sufficient commonalities amongst the two actions, consolidation of the two actions for trial would violate due process, and it would be contrary to judicial economy.

Here, reviewing all the [Malcolm](#) factors, the Court finds,

and it is undisputed, that plaintiffs, Mr. Rullo and Mr. Scandalato, were both exposed to *asbestos* through their employment and their handling of similar materials and equipment. Moreover, Mr. Rullo and Mr. Scandalato were both Con Ed mechanics for similar durations. Additionally, both plaintiffs developed lung cancer from which both plaintiffs are currently living with, the discovery in these actions is in the same phase, and the plaintiffs have the same counsel. Thus, seven of the eight [Malcolm](#) factors have been satisfied.

There are common issues of law and fact in both actions. [*4] 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 actions. As Hon. Manuel Mendez previously held, "[j]udicial economy would be served by consolidating the actions of [*4] 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.*, 190150/2018, mot. 008. Decision/Order dated December 11, 2019, p. 3. Moreover, the CMO specifically permits the joint trial of two actions where, as here, three or more of the [Malcolm](#) factors have been met and the two plaintiffs share the same disease. 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 *Scandalato v ABB, Inc., et al.*, 190085/2021.

Accordingly, it is

ORDERED that a [*5] joint trial is granted as to *Rullo et al., v ABB, Inc., et al.*, 190272/2020, and *Scandalato v ABB, Inc., et al.*, 190085/2021; 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.

12/12/2023

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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