

Borman v A.O. Smith Water Prods. Co.
2015 NY Slip Op 32109(U)
August 3, 2015
Supreme Court, New York County
Docket Number: 190115/08
Judge: Barbara Jaffe
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8/14/15
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

BORMAN, FRANCES

INDEX NO. 190115/08

-v-

A.O. SMITH WATER PRODUCTS CO.

MOTION DATE _____

MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1

Answering Affidavits — Exhibits _____ | No(s) 2-9

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

AUG 04 2015

COUNTY CLERK'S OFFICE
NEW YORK

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Dated: 8/3/15

[Signature], J.S.C.
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
IN RE: NEW YORK CITY ASBESTOS LITIGATION
-----X

This Document Relates To:

FRANCES BORMAN, as Administratrix for the Estate of
GEORGE BRADY,

Index No. 190115/08

Plaintiff,

DECISION AND ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., *et al.*,

Defendants.

-----X
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NEW YORK

By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following "FIFO" (First In, First Out) cases for a joint trial: (1) George Brady, Index No. 190115/08; (2) John Carey, Index No. 126304/93; (3) Robert Castorina, Index No. 123077/01; (4) William Falkenmeyer, Index No. 190116/10; (5) Charles Frick, Index No. 190120/08;

(6) Donald McCormick, Index No. 190195/09; (7) Bart Miceli, Index No. 100057/99; (8) Paul Miller, Index No. 190174/09; (9) Edward Morgan, Index No. 123392/1997; (10) Richard Nash, Index No. 116095/02; (11) Dennis Padula, Index No. 101177/99; (12) Romeo Pettinelli, Index No. 118400/98; and (13) John Ward, Index No. 118998/02. Plaintiff seeks to try the cases in two groups: (a) Group one - Brady, Carey, Falkenmeyer, Frick, McCormick, Miceli, Miller, and Ward; and (b) Group two - Castorina, Morgan, Nash, Padula, and Pettinelli.

Defendants jointly oppose; separate opposition is submitted by defendants Oakfabco, Inc. in the Brady and Frick actions, Cleaver Brooks, Inc. in the Frick and Pettinelli actions, Neles-Jamesbury Inc. in the Miceli action, Domco Products Texas, Inc. (Azrock) in the Morgan action, Velan Valve Corp. in the Miceli action, and Bird Incorporated in the Padula matter.

I. APPLICABLE LAW

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court. (See *Matter of New York City Asbestos Litigation [Dummit]*, 121 AD3d 230 [1st Dept 2014]; *In re New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]).

Generally, in order to join actions for trial, there must be a “plain identity between the issues involved in the []two controversies.” (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]). A motion for a joint trial should be granted unless the opposing party demonstrates prejudice to a substantial right (*in re New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012]), and allegations of prejudice must be specific and not conclusory (*Dummit*, 121

AD3d at 245). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*).

In determining whether to consolidate individual plaintiffs' cases for a joint trial where exposure to asbestos is alleged, courts consider the factors set forth in *Malcolm v Ntl. Gypsum Co.*, 995 F2d 346 (2d Cir 1993), which follow, in pertinent part:

- (1) whether the plaintiffs worked at a common or similar worksite;
- (2) whether the plaintiffs had similar occupations, as a "worker's exposure to asbestos must depend mainly on his occupation," such as those who worked directly with materials containing asbestos as opposed to those who were exposed to asbestos as bystanders;
- (3) whether the plaintiffs were exposed to asbestos during the same period of time;
- (4) whether the plaintiffs suffer or suffered from the same disease, as the jury at a consolidated trial will hear evidence about the etiology and pathology of different diseases, and prejudice may result where the jury learns that a terminal cancer engenders greater suffering and shorter life span than does asbestosis;
- (5) whether the plaintiffs are alive; "dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living"; and
- (6) the number of defendants named in each case.

(*Malcolm*, 995 F2d at 350-353).

To reduce juror confusion and minimize any alleged prejudice to defendants in consolidated cases, the court may use techniques such as providing "limiting, explanatory and curative instructions," giving notebooks to jurors to "assist them in recording and distinguishing the evidence in each case," and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Dummitt*, 121 AD3d at 245).

II. PLAINTIFFS' INFORMATION

1. George Brady

Brady passed away from lung cancer on May 31, 2007 at the age of 78. From 1946 to 1964, he served in the US Navy, and worked as a boilermaker on ships and at shipyards, when he was allegedly exposed to asbestos-containing boilers, evaporators, turbines, generators, pipes, gaskets, and blankets. From 1968 to 1986, Brady worked at Lehman College as a fireman, custodial engineer, and superintendent, maintaining boilers, pumps, and valves, and thereby allegedly exposing himself to asbestos-containing jackets, gaskets, lagging, cement, pipe insulation, and spray. From 1966 to 2007, Brady was employed as a superintendent at a building in the Bronx, where he was allegedly exposed to asbestos-containing boilers, valves, pumps, and joint compound. Defendants remaining in his action are Crane Co., Goulds, Oakfabco, and Westinghouse. (Affirmation of Thomas M. Comerford, Esq., dated May 11, 2015 [Comerford Aff.]).

2. John Carey

Carey died from lung cancer on February 17, 2010 at the age of 75. From 1959 to 1993, he worked as a steamfitter at worksites throughout New York State, including powerhouses, universities, hospitals, schools, manufacturing plants, and commercial buildings. He was allegedly exposed to asbestos from insulation, firebrick, and gaskets used with generators, boilers, pumps, and valves. Defendants remaining in his action are Crane Co., Foster Wheeler, and Owens-Illinois, Inc. (Comerford Aff.).

According to defendants, Carey spent almost his entire career working at the Indian Point powerhouse, and he smoked a pack of cigarettes a day from 1945 to 1960. (Affirmation of

Andrew J. Mundo, Esq., dated June 8, 2015 [Mundo Aff.]).

3. Robert Castorina

Castorina passed away on March 12, 2013 from lung cancer at the age of 69. From 1963 to 1998, he worked as a carpenter for numerous employers and at commercial and residential worksites in the metropolitan New York area. During that time, he was allegedly exposed to asbestos from sweeping and cleaning up asbestos-containing materials and while other workers were using asbestos, including mixing and applying asbestos insulation on boilers and piping and using asbestos-containing gaskets to maintain and repair pumps and valves; air-brushing electrical motors in elevators; and working with joint compound and floor tiles while putting up walls. He also was present when asbestos was sprayed during the construction of the World Trade Center, and worked in every building in Coop City, including the powerhouse. (Comerford Aff.).

Defendants remaining in his action are A.O. Smith, Burnham, Crane Co., DB Riley, Foster Wheeler, Goodyear, Goulds, Kohler, Mario & DiBono, Owens-Illinois, Inc., Peerless, Tihman (WTC), Westinghouse, and Weil-McLain. (*Id.*).

Defendants note that Castorina is the only plaintiff who alleged exposure from cutting rubber blankets while working at a printing company, and that between 1963 and 1998, he worked at over 80 different sites. (Mundo Aff.).

4. William Falkenmeyer

Falkenmeyer died at the age of 60 from lung cancer on July 18, 2008. He worked as a wire lather in 1968, an asbestos worker from 1974 to 1975, and a truck driver and dispatcher from 1976 to the 1990s. As an asbestos worker, he sprayed asbestos-containing ceiling

insulation in various structures. From 1977 to 1979, while working for Wechter Fuel Oil, he removed boilers and was exposed to insulation and rope. As a dispatcher, Falkenmeyer was allegedly exposed to asbestos-containing brakes while performing vehicle repairs. Defendants remaining in his action are Burnham, Foster Wheeler, Peerless, Westinghouse, and Weil-McLain. (Comerford Aff.).

Defendants contend that Falkenmeyer worked directly with asbestos products on a very limited basis between 1977 and 1979, and that as most of his work was as a truck driver and dispatcher, his exposure to boilers and roofing material was minimal. They also observe that Falkenmeyer smoked cigarettes for approximately 50 years. (Mundo Aff.).

5. Charles Frick

Frick passed away from lung cancer on January 11, 2007 at the age of 75. From the 1960s to the mid-1980s, he worked for Tulio Oil Company as a boiler serviceman, and was allegedly exposed to asbestos by installing and removing boilers at various worksites in the metropolitan New York area which exposed him to asbestos-containing insulation, cement, and gaskets. He also maintained the boilers in his own home and another house he owned, and performed home improvement in the 1960s, exposing him to wallboard, joint compound, and vinyl asbestos tile. Defendants remaining in his action are Burnham, Cleaver Brooks, Crane Co., Oakfabco, Owens-Illinois, Peerless, and Weil-McLain. (Comerford Aff.).

Defendants observe that Frick had a 62-year history of smoking cigarettes. (Mundo Aff.).

6. Donald McCormick

McCormick died from lung cancer on April 23, 2013 at 79 years old. From 1952 to 1995, he worked for Alcoa Reynolds Metal in Massena, New York. Between 1971 and 1995, he

worked in the remount/ingot plant as a helper, furnace worker, melter, and truck driver, and was allegedly exposed to asbestos from cleaning up asbestos-containing insulation materials, aprons, and spats, by using asbestos-containing cloth plugs, and by working near insulation on boilers, pumps, valves, and motors. Defendants remaining in his action are Goulds, Owens-Illinois, and Westinghouse. (Comerford Aff.).

Defendants contend that McCormick's exposures differ from those of the other plaintiffs due to the location and the nature of his employment, and observe that he smoked cigarettes for 62 years. (Mundo Aff.).

7. Bart Miceli

On August 22, 2011, Miceli died from mesothelioma at the age of 86. From 1950 to 1980, he worked as a maintenance person and foreman at three nuclear power powerhouses, and was allegedly exposed to asbestos while working with or around others working with boilers, pumps, turbines, valves, blankets, block, cement insulation, gaskets, insulation, and pipe-covering. Defendants remaining in his action are Byron Jackson, Crane, Foster Wheeler, Goulds, IMO, ITT, Neles-Jamesbury, Inc., Velan Valves Corp., and Westinghouse. (Comerford Aff.).

8. Paul Miller

Miller was diagnosed with lung cancer on November 14, 2007 and is now 84 years old. From 1950 to 1983, he worked as a pipefitter at Bethlehem Steel, and was allegedly exposed to asbestos from working on steam lines, removing asbestos-containing pumps, valves, insulation, cement, and gaskets, and from nearby coke ovens, open hearths, and blast furnaces. He also worked near boilermakers installing gaskets and insulation, bricklayers re-bricking ladles, and electricians working on motors, generators, and turbines. Defendants remaining in his action are

Crane, DB Riley, Foster Wheeler, Goodyear, Goulds, Owens-Illinois, Treadwell, and Westinghouse. (Comerford Aff.).

Defendants observe that Miller was diagnosed with prostate cancer in 1996 and bladder cancer in 2008, and that he smoked up to a pack and a half of cigarettes for approximately 50 years, and that his wife smoked during their marriage for approximately 37 years. (Mundo Aff.).

9. Edward Morgan

On May 20, 2009, Morgan was diagnosed with lung cancer; he is now 55 years old. From 1974 to 1993, he worked as a laborer, millwright, and carpenter at various worksites, including SUNY Institute of Technology, Fitzpatrick powerhouse, commercial buildings, manufacturing plants, train stations, and residential homes. He was allegedly exposed to asbestos while working on new construction and renovation projects by putting up and tearing down walls, tearing out and installing floor tile, ripping out asbestos-wrapped piping and ductwork, and working around other trades, including electricians, pipefitters, and plumbers. Morgan was also allegedly exposed to asbestos-containing sheetrock, wallboard, millboard, plaster, pipe-covering, cement, joint compound, insulation, gaskets, firebrick, ceiling and floor tiles, and asbestos contained in boilers, generators, pumps, turbines, and valves. Defendants remaining in his action are Azrock, Foster Wheeler, Goulds, Owens-Illinois, Westinghouse, and Weil-McLain. (Comerford Aff.).

Defendants observe that most of Morgan's exposure to asbestos occurred when he observed others work, and that his health history includes having been diagnosed with pneumonia eight times and chronic obstructive pulmonary disease, as well as having smoked between one and two packs of cigarettes a day for 33 years. (Mundo Aff.).

10. Richard Nash

Nash passed away from lung cancer on April 10, 2009 at the age of 84. From 1940 to 1943 and in 1946, he worked as a plumber and was allegedly exposed to asbestos while repairing and installing piping around furnaces, including mixing asbestos joint cement, pipe-covering, and gasket repair. From 1951 to 1979, he worked as carpenter and plumber on new construction and renovations at various worksites, including high schools, colleges, housing projects, hospitals, shopping malls, and commercial manufacturing plants, and was allegedly exposed to asbestos while working around other trades working on pumps, turbines, and valves. Defendants remaining in his action are Crane, Goulds, Owens-Illinois, and Westinghouse. (Comerford Aff.).

Defendants argue that Nash's exposure to asbestos was mainly as a bystander, and that he smoked one pack of cigarettes per day for 29 years. (Mundo Aff.).

11. Dennis Padula

Padula died at the age of 64 from lung cancer on January 31, 2015. From 1959 to 1996, he worked as a roofer for Continental Roofing at several commercial and residential locations in and around Utica, New York. He was allegedly exposed to asbestos from unrolling, cutting, and nailing roofing felt; from roofing cement when he cleaned application trowels, from roofing caulking compound, and from insulation and piping during boiler installation and removal. Defendants remaining in his action are A.O. Smith, Bird, DAP, Foster Wheeler, Goulds, Karnack, Owens-Illinois, Peerless, and Westinghouse. (Comerford Aff.).

Defendants assert that Padula is the only roofer in proposed group two, that he served in the US Navy between 1967 and 1969, and that although he denies having worked on a Navy vessel, he was exposed to Agent Orange during the Vietnam War and was treated for that

vessel, he was exposed to Agent Orange during the Vietnam War and was treated for that exposure for 30 years. (Mundo Aff.).

12. Romeo Pettinelli

On November 5, 1996, Pettinelli died from lung cancer at the age of 68. From 1948 to 1987, he worked as a carpenter and performed renovation work on residential and commercial properties, including housing apartments, shopping malls, schools, and manufacturing mills. He was allegedly exposed to asbestos contained in drywall, joint compound, floor tiles, and boilers, and his work with pumps and boilers allegedly exposed him to insulation, piping, gaskets, and asbestos board. Pettinelli also swept up asbestos after completing his work. Defendants remaining in his action are Cleaver Brooks, Foster Wheeler, Goodyear, Goulds, and Weil-McLain. (Comerford Aff.).

13. John Ward

Ward died of mesothelioma on February 1, 2004 at the age of 78. From 1946 to 1989, he worked as a steamfitter at various metropolitan New York worksites including the Astoria, Hudson, 74th Street, Ravenswood, and Shoreham powerhouses, the Pfizer building, Mount Sinai Hospital, the Port Authority, and JFK Airport. He was allegedly exposed to asbestos from insulation and piping during installation of boilers, installation and removal of gaskets on pumps and valves, and pipe-covering. Defendants remaining in his action are A.O. Smith, Foster Wheeler, and Westinghouse. (Comerford Aff.).

III. ANALYSIS

A. Judicial economy

Plaintiffs argue that consolidating these cases will save time and lead to more efficient

and speedier dispositions as the same state of the art evidence and medical evidence will be offered at each trial. (Comerford Aff.).

Defendants assert that the more plaintiffs in a trial group, the more defendants, and the correspondingly longer time needed for jury selection and trial. And, when a multi-plaintiff trial is scheduled, jurors are asked to serve weeks if not months. Thus, they maintain, finding jurors who will commit to a lengthy trial prolongs jury selection, as does the necessity of selecting extra alternates against the possibility that one or more jurors will be released before the trial concludes. Defendants also observe that jurors who are students or professionals and/or hold managerial or supervisory positions may be unable to serve for a long period, yielding a less diverse pool. (Mundo Aff.).

In denying plaintiffs' claim that consolidation results in speedier dispositions, defendants offer statistics reflecting that of the most recent 19 asbestos trials in New York County, those with only one plaintiff lasted up to three weeks each, whereas those with more lasted as long as 18 weeks. Defendants also argue that longer trials involving more than one plaintiff almost always lead to large plaintiff verdicts, while trials with one plaintiff often lead to defense verdicts or smaller plaintiff verdicts. Their statistics show that of the nine trials in New York County with one plaintiff, six resulted in defense verdicts, and the other three in verdicts of \$2.5 million, \$3.8 million, and \$7 million. In contrast, of the ten trials conducted with more than one plaintiff, only one had a defense verdict, and the remaining aggregate verdicts ranged from \$7.3 million to \$190 million, or between \$2.43 million at the lowest and \$38 million at the highest per plaintiff, representing an average of approximately \$9 million per plaintiff. (*Id.*).

Defendants also observe that the large verdicts are often reduced by the trial or appellate

courts, illustrating a disconnect between juror verdicts in those cases and the sustained verdicts. They thus argue that there is no great efficiency in trying consolidated cases as final judgments must often await appellate scrutiny and decision. (*Id.*).

In juxtaposition to the alleged New York County consolidation trend (*see In re New York City Asbestos Litigation*, 188 AD2d 214 [1st Dept 1993], *affd* 82 NY2d 821 [joint trials may potentially reduce cost of litigation, promote judicial economy, speed disposition of cases, and encourage settlements]; *Matter of New York City Asbestos Litigation [Dummit]*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U] [Sup Ct, New York County 2012] [in New York County, asbestos cases have historically been consolidated for trial]), other state courts have recently decided to prohibit the consolidation of asbestos trials absent the consent of all parties. (Ohio R Civ P 41[A][2]; Tex Civ Prac & Rem Code Ann § 90.009; Kan Stat Ann § 60-4902[j]; GA Code Ann § 51-14-10; Mich Admin Order No. 2006-6).

And, while judicial economy and efficiency should be considered in determining whether to consolidate, they “must yield to a paramount concern for a fair and impartial trial.” (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). “The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff’s - and defendant’s - cause not be lost in the shadow of a towering mass litigation.” (*In re Brooklyn Navy Yard Asbestos Litig.*, 971 F2d 831 [2d Cir 1992]; *see also Malcolm*, 995 F2d at 350 [“benefits of efficiency can never be purchased at the cost of fairness”]). Asbestos matters ought not be consolidated for trial “simply because doing so has been the routine, nor should the terms ‘efficiency’ and ‘judicial economy’ be used to justify consolidation where experience has shown that [it] generally does not advance these lofty goals.”

(*In re New York City Asbestos Litig. [Bova]*, 2014 WL 4446457, 2014 NY Slip Op 32336[U] [Sup Ct, New York County 2014]).

However, consolidating cases that are somewhat diverse does not “suggest the prejudice of defendant’s right to a fair trial.” (*In the Matter of New York City Asbestos Litigation [Baruch]*, 111 AD3d 574 [1st Dept 2013]). Moreover, state of the art evidence differs according to the pertinent occupation or industry, and may differ according to the product. (*See Curry v Am. Standard*, 2010 WL 6501559 [SD NY 2010] [differences in degree and duration of plaintiffs’ asbestos exposure would likely require presentation of different complex state-of-art evidence in each case, further mitigating against potential efficiency of consolidation]). And, while medical evidence may be duplicative, it takes less trial time than that spent on each plaintiff’s medical history. Thus, the length of the trial often depends on the plaintiffs’ occupations and medical histories.

Accordingly, in exercising my discretion in deciding whether to consolidate these cases, I duly consider judicial economy and efficiency.

B. Group one - Brady, Carey, Falkenmeyer, Frick, McCormick, Miceli, Miller, Ward

Oakfabco, a defendant in the Brady and Frick actions, argues that these plaintiffs do not share a common disease, occupation, worksite, or time period, that the fact that some of the plaintiffs smoked cigarettes for many years will be central to the defenses in those cases but not the others, and that the joinder of plaintiffs who are deceased with those who are living is prejudicial. (Affirmation of Mark K. Hsu, Esq., dated June 8, 2015).

Velan objects to having to participate in a lengthy trial when it is a defendant in only Miceli’s action, and observes that Miceli was not exposed to many products to which the other

plaintiffs were exposed, did not work in the same geographical area as the other plaintiffs, and did not have a similar job title or type of exposure. (Affirmation of Timothy Coughlan, Esq., dated June 8, 2015).

Neles-Jamesbury asserts that Miceli's history has no commonality with that of the other defendants, and that as he is deceased, there is no urgency that requires that his case be tried jointly with the others. It also observes that he and one other plaintiff had mesothelioma, while the other six plaintiffs suffered from lung cancer, and that different medical testimony will thus be necessary if the cases are consolidated. (Affirmation of Thuy T. Bui, Esq., dated June 8, 2015).

Cleaver Brooks argues that the *Malcolm* factors do not apply here, as 38 defendants remain in the actions, the exposure periods range from the 1940s to the 1990s, and the plaintiffs held a variety of occupations, had different claimed exposures, and had no common worksites. It also contends that the exposure period is significant because guidelines promulgated by the Occupational Health and Safety Act (OSHA) will be at issue in certain cases but not others, and those that involve pre-OSHA exposure will be prejudiced by the trial presentation of OSHA guidelines. It also asserts that discovery is not complete in the Frick action as it has filed a third-party action against Frick's employer and is awaiting its answer in order to conduct discovery. (Affirmation of Shawnette A. Fluitt, Esq., dated June 8, 2015).

1. Brady

Brady is the only plaintiff with exposure related to his service with the Navy, and the only one who was exposed on ships and at shipyards. His Navy exposure may raise issues that are not relevant in the non-Navy cases. (See *In re New York City Asbestos Litig. [Carlucci]*, 2013 WL

5761459, 2013 NY Slip Op 32548[U] [Sup Ct, New York County] [consolidating for trial plaintiffs that had common worksite on Navy ships]; *In re New York City Asbestos Litig. [Horn]*, 2010 WL 3613150, 2010 NY Slip Op 32462[U] [Sup Ct, New York County] [same]; *In re New York City Asbestos Litig. [Capozio]*, 22 Misc 3d 1190[A], 2009 NY Slip Op 50072 [Sup Ct, New York County 2009] [separating plaintiff from others based on Navy employment as federal law may be implicated]; *In re New York City Asbestos Litig. [Bauer]*, 2008 WL 3996269, 2008 NY Slip Op 32349[U] [Sup Ct, New York County 2008] [same]; *In re New York City Asbestos Litig. [Altholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375 [Sup Ct, New York County 2006] [if federal maritime law at issue, may confuse jury to sort of varying elements of liability and damage under negligence and products liability standards and those under federal maritime law]; *In the Matter of Seventh Jud. Dist. Asbestos Litig. [Ballard]*, 191 Misc 2d 625 [Sup Ct, Monroe County] [separating from joint trial two plaintiffs who were exposed to asbestos while in Navy]).

His employment as a superintendent is unique, and he was also the only one exposed to asbestos-containing evaporators, jackets, and lagging.

2. Miller

Miller worked at only one location, Bethlehem Steel, for his entire career as a pipefitter, and is the only plaintiff in this group that is still alive. He was uniquely exposed to asbestos through work on steam lines, and by exposure through others working with or near brick ladles, coke ovens, open hearths, and blast furnaces. Of the remaining eight defendants in his action, three are in no other actions in this group.

3. McCormick

McCormick also only worked for one employer and at one location, Alcoa Reynolds

Metal, for his entire career. He worked in various capacities for Alcoa, including as helper, furnace worker, melter, and truck driver, and was the only one exposed to aprons, spats, and cloth plugs and by virtue of cleaning or sweeping up material containing asbestos.

4. Miceli and Ward

Miceli and Ward are the only two plaintiffs who developed mesothelioma in this group. (See *In re New York City Asbestos Litig. [Adler]*, 2012 WL 326720, 2012 NY Slip Op 32097[U] [Sup Ct, New York County] [separating for trial plaintiffs with lung cancer from those with mesothelioma as pathology of lung cancer different than mesothelioma]; *In re New York City Asbestos Litig. [Batista]*, 2010 WL 9583637 [Sup Ct, New York County 2010] [declining to consolidate mesothelioma and lung cancer actions as pathology of two diseases may be substantively different and will require distinct testimony]). There is also no indication that either of them smoked cigarettes.

Miceli and Ward were exposed during the same time period, the 1950s to the 1980s, and both worked at powerhouses. Given these similarities, any state of the art evidence they offer will overlap. (See *eg In re New York City Asbestos Litigation [Capozio]*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50072[U] [Sup Ct, New York County 2009] [almost all plaintiffs performed similar tasks in construction trades which exposed them to asbestos during overlapping periods between 1940s and 1990s; state of art and other expert testimony also would be substantially common]).

Of the 10 asbestos-containing items to which they were allegedly exposed, they have six in common, and are the only two plaintiffs in this group that were exposed to pipe-covering. And, of the three remaining defendants in Ward's action, two of the three are also defendants in

Miceli's action.

5. Carey, Falkenmeyer, and Frick

These three plaintiffs were exposed during the same time period, the 1960s to the 1990s, and are two of the three plaintiffs in this group who were exposed during the 1990s. They did similar work, Carey as a steamfitter, Falkenmeyer as wire lather, asbestos worker, and truck driver/dispatcher, and McCormick as helper, furnace worker, and truck driver. They all died of lung cancer, and had extensive smoking histories. They were commonly exposed to asbestos-containing boilers and insulation;

All three defendants remaining in Carey's action are also defendants in either the Falkenmeyer or Frick actions. Falkenmeyer and Frick have three defendants in common, leaving only three of the nine defendants having to defend themselves in only one of the three actions.

C. Group two - Castorina, Morgan, Nash, Padula, and Pettinelli

Azrock contends that the Morgan action should be tried separately as he worked in the Utica, New York area while the other plaintiffs worked in New York City, that discovery in the action is incomplete, and that as Azrock's product at issue, floor tile, was encapsulated, it is unlike other products as federal regulations specifically deal with encapsulation. (Affirmation of Suzanne M. Halbardier, Esq., dated June 8, 2015).

Bird argues that Padula does not have enough in common with the other plaintiffs, as he worked as a roofer while the other four worked as carpenters, and as he was the only one exposed to roofing products. (Affirmation of Joshua A. Greeley, Esq., dated June 8, 2015).

1. Morgan

Morgan is the only living plaintiff in this group, and while he worked as a carpenter like

some of the other plaintiffs in this group, he also worked as a laborer and millwright, during which time he was the only one exposed to asbestos-containing products and parts such as ductwork, sheetrock, wallboard, millboard, plaster, firebrick, and generators.

2. Castorina

While Castorina also worked as a carpenter, he additionally worked during the construction of the World Trade Center, where he was uniquely exposed to asbestos-containing spray. He also has 14 defendants remaining in his action, of which five are in none of the other actions; no other plaintiff in this group has more than six defendants in his action.

3. Padula

Padula is the only plaintiff who worked as a roofer in this group, while the other four worked as carpenters. He was the only one exposed to roofing felt, cement, and caulking compound. He was also the only plaintiff exposed to and treated for exposure to Agent Orange. Three of the defendants remaining in his action are in none of the other actions.

3. Nash and Pettinelli

Nash and Pettinelli are the only plaintiffs in this group who were exposed in the 1940s, and their exposure overlaps from the 1940s to the 1970s. Nash and Pettinelli were both carpenters. They worked in similar places, such as residential and commercial construction projects, schools, hospitals, and plants. They were both exposed to asbestos-containing piping, gaskets, and pumps. Both have Goulds as a defendant in their actions.

IV. CONCLUSION

For the cases that I consolidated for trial, there exist common issues that predominate over individual issues, and defendants have not established that any undue prejudice will result,

or that their fourteenth amendment right to due process will be violated. (*See Baruch*, 111 AD3d 574 [consolidation properly granted; differences in plaintiffs' cases did not outweigh substantial overlap of factual and legal issues or suggest prejudice of defendant's right to fair trial]).

However, as to the other cases, plaintiffs have failed to establish that they shared a common occupation, worksite, or exposure, or that joining these cases for trial would result in judicial economy or greater efficiency. (*See Curry v Am. Standard*, 2010 WL 6501559 [SD NY 2010] [differences in degree and duration of plaintiffs' asbestos exposure would likely require presentation of different complex state-of-art evidence in each case, further mitigating against potential efficiency of consolidation]). Accordingly, it is hereby

ORDERED, that plaintiffs' motion to consolidate is granted to the following extent:

(1) Group One:

- (a) Paul Miller, Index No. 190174/09, shall be tried separately and first as he is alive;
- (b) George Brady, Index No. 190115/08, shall be tried separately;
- (c) Donald E. McCormick, Sr., Index No. 190195/09, shall be tried separately;
- (d) Bart M. Miceli, Index No. 100057/99, and John J. Ward, Index No. 118998/02, shall be consolidated for a joint trial; and
- (e) John Carey, Index No. 126304/93, William Falkenmeyer, Index No. 190116/10, and Charles W. Frick, Index No. 190120/08, shall be consolidated for a joint trial;

(2) Group Two:

- (a) Edward John Morgan, Index No. 123392/1997, shall be tried separately and first as he is alive;
- (b) Robert Castorina, Index No. 123077/01, shall be tried separately;
- (c) Dennis F. Padula, Index No. 101177/99, shall be tried separately; and
- (d) Richard L. Nash, Index No. 116095/02, and Romeo A. Pettinelli, Index No. 118400/98, shall be consolidated for a joint trial;

It is further

ORDERED, that each trial after Miller's trial shall commence subject to court availability on at least five days' notice following the completion of the trials ahead of it; it is further

ORDERED, that the parties shall appear for a final pretrial conference on September 16, 2015, at 12 pm, in room 279, 80 Centre Street, New York, New York; and it is further

ORDERED, that the parties are directed to schedule a settlement conference with the Special Master to take place before the conference.

ENTER:



Barbara Jaffe, JSC

DATED: August 3, 2015
New York, New York

FILED

AUG 04 2015

**COUNTY CLERK'S OFFICE
NEW YORK**