

<b>Matter of Dankenbrink</b>
2006 NY Slip Op 30836(U)
June 5, 2006
Supreme Court, New York County
Docket Number: 104216/2004
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

104216/2004

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In Re: NEW YORK CITY ASBESTOS LITIGATION :  
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- In re: Andrew Dankenbrink - Index No. 104216/04 :
- In re: Frank Cettina - Index No. 104947/04 :
- In re: George Goldstein - Index No. 106178/04 :
- In re: Richard F. Gualdoni - Index No. 106296/04 :
- In re: Gerard Rosato - Index No. 111735/04 :
- In re: Jesse Levine - Index No. 113396/04 :
- In re: Stanley Singer - Index No. 111837/04 :
- In re: Edward Decibus - Index No. 115494/04 :
- In re: Donald F. Pieper - Index No. 116451/04 :
- In re: William A. Eichner - Index No. 106095/04 :

**Decision and Order**

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**Hon. Martin Shulman:**

The ten captioned matters, part of a November 2004/May 2005 *in extremis* cluster of asbestos cases (collectively, "Plaintiffs"), have been referred to this court for trial. Five out of the ten Plaintiffs are deceased.

Plaintiffs' counsel initially moved pursuant to CPLR §602(a) to consolidate nine out of the ten personal injury/wrongful death actions involving plaintiffs Andrew Dankenbrink ("Dankenbrink"), Frank Cettina ("Cettina"), George Goldstein ("Goldstein"), Richard F. Gualdoni ("Gualdoni"), Gerard Rosato ("Rosato"), Jesse Levine ("Levine"), Stanley Singer ("Singer"), Edward Decibus ("Decibus") and Donald F. Pieper ("Pieper") for joint trial claiming the existence of common questions of law and fact (*i.e.*, eight out of these nine plaintiffs allegedly contracted mesothelioma from asbestos exposure [one still surviving plaintiff, Decibus, allegedly has lung cancer]; plaintiffs had similar occupations, times of exposure and types of work-sites; all nine Plaintiffs were/are terminally ill; and there are common defendants in most of the cases and/or overlapping non-party, bankrupt tortfeasors in all of the cases; medical and State-of-the-Art

testimony will overlap in all nine cases; and Plaintiffs are all represented by the same law firm).

Thereafter, Plaintiffs amended their earlier motion to obtain an order consolidating the action involving William A. Eichner ("Eichner") with the other nine cases in the cluster and utilizing the reverse bifurcation method so that the jury will first decide the question of damages prior to deciding liability. Plaintiff's counsel urged reverse bifurcation as it will purportedly streamline the cases, clarify the issues, conserve judicial resources and foster settlements (Plaintiffs' Counsel's Aff. in support of [Amended] Motion for Trial by Reverse Bifurcation at ¶¶ 9 and 12).

Concerning the initial nine cases, Plaintiffs' counsel seeks consolidation for a joint trial. Defendants<sup>1</sup> submitted opposition papers commonly contending the following differences which purportedly predominate over the common factors: (1) Plaintiffs did not share a common work site or even a common type of work site; (2) all ten Plaintiffs did not share a common occupation (*i.e.*, Dankenbrink - seaman/boatswains mate, Cettina - residential contractor, Goldstein - demolition worker, Gualdoni - machinist mate, Rosato - powerhouse and construction site laborer, Levine - welder, Singer - civilian shipfitter, Decibus - gunnery specialist and helper/driver for insulation

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<sup>1</sup> The court received opposition papers from: Foster Wheeler, LLC ("Foster Wheeler"), defendant in the Decibus, Goldstein, Gualdoni, Pieper, Rosato and Singer actions; from FMC Corporation, individually and as successor via acquisition of Chicago Pump Company ("FMC"), defendant in the Gualdoni action; Buffalo Pumps, Inc. ("Buffalo"), defendant in the Levine action; Goulds Pumps, Inc. ("Goulds"), defendant in the Dankenbrink, Decibus, Goldstein, Gualdoni, Pieper and Rosato actions; Burnham, LLC ("Burnham"), defendant in the Cettina action; Robert A. Keasbey Co. ("Keasbey"), defendant in the Rosato action; Warren Pumps, Inc. ("Warren"), defendant in the Singer and Decibus actions; and Turner Construction Company ("Turner"), defendant in the Goldstein action.

companies, and Pieper - seaman; (3) Plaintiffs' alleged asbestos exposure occurred over a period spanning fifty years (1940's -1990's) but none were exposed during an identically discrete time period (*i.e.*, Dankenbrink [1939-45], Levine [1942-43, 1946], Singer [1943-45], Decibus [1943-46 and early 1970's], Cettina [1930's to 1988], Rosato [1950's to 1970's], Goldstein [late 1950's to late 1980's], Pieper [late 1950's to 1990's] and Gualdoni [1956-59]) (*see* Foster Wheeler/FMC Opp. Aff. at ¶¶10 and 15-23); (4) because Decibus, an admitted lifetime smoker with a pack history of up to 120 years (*see* Foster Wheeler/FMC Opp. Aff. at ¶ 22 and Warren Memorandum of Law at p. 5), was the only plaintiff to contract lung cancer, joining his case with the other nine cases will unduly lengthen the trial as the pathology and etiology of lung cancer and mesothelioma are substantively different; (5) defendants in cases involving decedent Plaintiffs will be prejudiced by evidence of pain and suffering presented from the living Plaintiffs; and (6) there are no asbestos containing products which Plaintiffs claim exposure to that are common to all nine Plaintiffs and there is no commonality in the manner of Plaintiffs' alleged asbestos exposure.

In addition to asserting the foregoing, Keasbey raises two additional, albeit critical reasons why it will suffer severe prejudice if Keasbey is forced to defend the Rosato action in a joint trial with the other Plaintiffs. One reason is that the only work-site at which Plaintiffs' counsel concedes Rosato allegedly suffered from exposure to Keasbey's purported use of asbestos containing products was at the Ravenswood Powerhouse (*see* Fenton Supp. Aff. at 4) and none of the other Plaintiffs alleges exposure during the construction of a powerhouse. The second reason for severance of the Rosato action, Keasbey's counsel argues, is grounded on this defendant's claim

that Rosato's medical evidence will be fundamentally different from the other nine defendants because Rosato's cause of death was due to "acute cardio-respiratory failure [due to] metastatic cancer of [the] prostate" (see Keasbey Opp. Aff. at ¶¶ 13-16 and Exhibits E-G attached thereto), and not mesothelioma as Plaintiffs' counsel alleges.

Defendants Alcoa Steamship Company, Inc. ("Alcoa"), Farrell Lines Incorporated ("Farrell") and Marine Transport Lines ("MTL") (collectively the "shipowner defendants") also oppose Plaintiffs' counsel's amended motion to request consolidation of the Eichner action with the other nine actions. The shipowner defendants contend that since 1946, Eichner served as a merchant seaman for over 40 years and was allegedly exposed to asbestos containing equipment and products as a bystander on ships at sea (see Plaintiffs' Counsel's Aff. in support of Motion for Joint Trial at ¶¶ 7-15 and Shipowner Defendants' Memorandum of Law at p. 2). Based thereon, the shipowner defendants contend the federal maritime law must be applied to the factually disputed issues of liability and damages warranting severance of this action from the other actions for a separate trial.

Foster Wheeler/FMC and Keasbey also oppose Plaintiff's "Informal Letter Request for Reverse Bifurcation." Contrarily, Foster Wheeler/FMC's counsel argues that reverse bifurcation would lengthen the trial process, needlessly duplicate the trial testimony, inevitably require some "liability" or causation testimony from experts to generally explain the development of Plaintiffs' asbestos-related diseases and will not foster settlements (viz., "Given the no, or at worst low, fault defendants who remain in these cases [e.g., Foster Wheeler/FMC, etc.], reverse bifurcation will not foster settlement and will lead to longer trials and waste judicial resources. . . The mere

award of damages, which is all that a reverse bifurcated [trial] would bring, carries little meaning because it cannot be apportioned reasonably among a pool of remaining [purported no, or low fault] defendants when the 'shares' (of the award) to be absorbed by non-party or bankrupt tortfeasors have not [yet] been set by the jury." (bracketed matter added) (Foster Wheeler/FMC Opp. Aff. to Request for Reverse Bifurcation at ¶¶ 16 and 19).

### **Discussion**

Interestingly, six out of the eight remaining defendants opposing Plaintiffs' consolidation motion appear to be manufacturers of pumps and/or turbines which either allegedly did not contain asbestos containing components or contained asbestos containing components manufactured by others which defendants claim were not friable and posed no danger to Plaintiffs (and arguably based upon a prima facie showing of product identification) when the pumps and/or turbines were initially manufactured and/or in operation. These defendants clearly distinguish themselves from the actual manufacturers of asbestos containing products (*e.g.*, cement, pipe covering, blankets, gaskets, etc.).

In any event, there is a common thread running through these self-perceived no or low fault, viable defendants' opposition papers which strongly suggests that they will not be easily encouraged to settle with Plaintiffs, even with seven figure damage awards in reverse bifurcation trials. It is not unreasonable to assume these defendants will be uniformly finger pointing at the non-party bankrupt tortfeasors who either mined, manufactured or used asbestos containing products to obtain defense verdicts or minimize their percentage of liability. Thus, this court concludes that among this group

of defendants, reverse bifurcation will serve no useful purpose and waste the court's and parties' valuable time and resources. Accordingly, the branch of Plaintiffs' motion for an order to proceed to trial using the reverse bifurcation method is denied.

In a recent decision, *Altholz, et al. v. American Standard, Inc., et al. (In re N.Y. City Asbestos Litigation)*, 11 Misc.3d 1063(A), 2006 WL 657171, 2006 N.Y. Slip Op. 50375 (U) (the "Altholz Order") (Exhibit A to Shipowner Defendants' Opp. Aff.), this court cited to the controlling case law addressing the merits of consolidation of separate actions for a joint trial:

CPLR §602(a) permits a court to consolidate two or more actions for joint trials if they involve common questions of law or fact. "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts. . ." *Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824, 474 N.Y.S.2d 673 (1<sup>st</sup> Dept., 1984). Joint trials will also foster judicial economy, quicken the disposition of cases (*Matter of City of Rochester v. Levin*, 57 A.D.2d 700, 395 N.Y.S.2d 773 [4<sup>th</sup> Dept., 1977]) and potentially encourage settlements (*Matter of New York City Asbestos Litigation [Brooklyn Naval Shipyard Cases]*, 188 A.D.2d 214, 225, 593 N.Y.S.2d 43, 50 [1<sup>st</sup> Dept., 1993]). On the other hand, "where individual issues predominate, concerning particular circumstances applicable to each plaintiff. . ." (*Bender v. Underwood*, 93 A.D.2d 747, 748, 461 N.Y.S.2d 301, 302 [1<sup>st</sup> Dept., 1983]) and one or more of the defendants, then joint trials would be ill-advised.<sup>2</sup>

After a careful review of the parties' respective supporting papers and legal arguments, this court discerns the following commonalities among the ten Plaintiffs

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<sup>2</sup> This court will also consider the eight oft-repeated factors noted in *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2<sup>nd</sup> Cir., 1993) such as: "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether Plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether all Plaintiffs are represented by the same counsel; and (8) type of cancer alleged."

which negate defendants' collective opposition to joint trials generally in this cluster of cases.

Preliminarily, the same law firm does represent all ten Plaintiffs. While five of the Plaintiffs have died from asbestos causing disease, defendants will not be prejudiced by any perceived, underlying sympathy factor, *vis-a-vis*, the living Plaintiffs as the latter unfortunately are all terminally ill. Indisputably, eight out of ten Plaintiffs suffered from mesothelioma, a signature asbestos-related disease. None of the defendants convincingly raised any outstanding discovery problems and/or due process concerns which cannot otherwise be resolved with this court's assistance during the progress of a joint trial. As this court noted in the *Altholz Order*, the *Malcolm* factors do not compel Plaintiffs to share an identically *common* occupation (*e.g.*, insulation workers), common work-site (*e.g.*, Brooklyn Navy Yard) or *common* time of exposure (*e.g.*, 1940-50). Thus, this Court finds there are similarities in the manner in which a number of Plaintiffs performed different tasks which exposed them to asbestos containing material or products during overlapping periods of time from the 1940's to the 1990's so that the state of the art testimony and other expert testimony in a general way will be substantially common to all, whether Plaintiffs are living or deceased. This court has also considered other commonalities such as the existence of non-party tortfeasors (bankrupt or otherwise) and/or defendants who have settled before trial which will arguably overlap in these actions and remaining defendants' anticipated trial strategy "to establish these tortfeasors' liability and mitigate their own liability under CPLR Article

16. *Tancredi v. A.C.&S., Inc. (In re N.Y. City Asbestos Litigation)*, 6 A.D.3d 352, 775 N.Y.S.2d 520 (1<sup>st</sup> Dept., 2004).” *See Altholz Order, supra*.

Accordingly, Plaintiffs’ motion is granted, in part, to join the Dankenbrink, Gualdoni, Singer, and Levine matters for joint trials. The commonalities among these four Plaintiffs are not precise but share sufficient similarities (engaged in work on/with ships and/or their construction, operations, maintenance and repairs during the 1940’s) to warrant their joint trial.

Thereafter, the Cettina and Goldstein matters will be jointly tried as these Plaintiffs allege a similar period of exposure and engaged in related occupations in construction/demolition in residential/commercial settings. In addition, both decedent Plaintiffs contracted mesothelioma as a result of their exposure to asbestos containing material at their respective job-sites.

On a superficial level, the Decibus action should be consolidated with the above-mentioned actions because this Plaintiff shares a work experience on/with ships as Dankenbrink, Levine, and Singer did during the 1940’s and allegedly like Gualdoni, exposure to asbestos containing products in the 1950’s. However, because Decibus alleges subsequent exposure to asbestos containing products during the 1970’s, a time period implicating markedly different State-of-the-Art testimony, a jury hearing such testimony could invariably become confused and impute such “knowledge” evidence which was not available prior, during and after World War II, prejudicing those defendants who must defend their actions spanning decades.

Moreover, while lung cancer and mesothelioma share a comparable etiology and pathology, nonetheless, it is expected that defendants in the Decibus action will advance alleged medical defenses such as his substantial smoking history and the absence of certain asbestos markers. Linking Decibus with the Dankenbrink, Levine, Singer and Gualdoni actions could prejudice defendants in the former's action because their medical defenses to lung cancer (*e.g.*, Whether Decibus' smoking or asbestos exposure was a substantial factor in causing his lung cancer?), even if proven, could easily be drowned out in the overwhelming wake of the medical evidence of mesothelioma these Plaintiffs contracted from their asbestos exposure. Therefore, the Decibus action will be tried separately.

The Rosato case should not be consolidated for a joint trial as well as the etiology and pathology for prostate cancer is markedly different from that of mesothelioma. Rosato's counsel makes no claim that Plaintiff's prostate cancer was caused by asbestos exposure. What is alleged is that Rosato contracted both mesothelioma and prostate cancer and the jury will have to decide which disease and its related sequelae predominated. Moreover, there is a material issue of fact as to whether Rosato actually contracted mesothelioma. Thus, this action must be tried separately.

Having reviewed Pieper's work history and deposition transcript (*see* "Chart A, Employer/Jobsite History" and Exhibits R and S to Foster Wheeler/FMC Opp. Aff.), it is apparent that Pieper's alleged exposure history includes his years of service as a seaman on the USS Tanner working with naval equipment allegedly containing

asbestos containing material (*see also* Plaintiffs' Aff. in Support of Motion for Joint Trial at ¶ 15). Similarly, Eichner alleged bystander asbestos exposure while in the employ of the shipowner defendants as a merchant marine aboard commercial seagoing vessels spanning a 40 year period. As previously ruled in the *Altholz* Order under similarly alleged facts, this court concludes that the federal maritime law is implicated in both the Pieper and Eichner actions and "could prove to be confusing for the jury to sort out the varying elements of liability and damages governed by New York's negligence and product liability laws and those under federal maritime law. . . the possibility for such confusion could greatly prejudice the [shipowner defendants and Pieper defendants] and therefore th[ese] case[s] should also be severed for [a] separate [joint] trial." (Bracketed matter added) (*Altholz* Order, *supra*).

As stated in each of its decisions disposing of consolidation motions, trying more than two actions "at the same time will be difficult, but not insurmountable. The use of suggested jury innovations such as juror note-taking and notebooks, extensive preliminary instructions, attorneys' interim commentary (short summations at different stages during the trial), juror questions, written copies of the special verdict sheets for jury use during summations and a written copy of the court's charge to the deliberating jury should avoid any confusion for the jury in sorting out the respective liabilities and damages attributable to. . . [the] Plaintiffs [involved]." (bracketed matter added). *Id.*

The parties are directed to appear on June 19, 2006 at 9:30 a.m. at Part 1, in Room 1127B, 111 Centre Street, New York, New York for jury selection and the ensuing joint trial of the Dankenbrink, Levine, Singer and Gauldoni actions forthwith.

This constitutes the Decision and Order of this court. Courtesy copies of same have been furnished to counsel for the parties.

Dated: New York, New York  
June 5, 2006



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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUN 16 2006  
COUNTY CLERK'S OFFICE  
NEW YORK