

Barnes v A.O. Smith Water Prods. Co.

2008 NY Slip Op 31026(U)

April 7, 2008

Supreme Court, New York County

Docket Number: 0103121/2007

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN
Justice

PART 1

LEROY ANDERSON BARNES

INDEX NO. 103121/07

MOTION DATE _____

- v -

A. O. SMITH WATER PRODUCTS

MOTION SEQ. NO. 6

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

various - 2-34

Replying Affidavits _____

35

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted in part
and denied in part in accordance with
the attached decision and order.

FILED

APR 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 7, 2008

Martin Shulman

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~ **J.S.C.**

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
In Re: NEW YORK CITY ASBESTOS LITIGATION

Index Nos.:103121/07, *et al.*

THE FOLLOWING PLAINTIFFS FROM THE
NOVEMBER 2007 NYCAL *IN EXTREMIS*
CLUSTERS

Decision and Order

LEROY A. BARNES,	Index No. 103121/07
IOANNIS BOUGADIS,	Index No. 117628/07
MICHAEL BOYLE,	Index No. 102884/07
CIRO ENEA,	Index No. 107288/07
ANTHONY GALLO,	Index No. 100479/07
JAVAID IQBAL,	Index No. 107223/07
SELMA MONTROSS,	Index No. 103122/07
MARY PALMIERI,	Index No. 103553/07
ROBERT F. PERDICARO	Index No. 106604/07
FILIPPO PRIOLO	Index No. 107504/07
PAUL SCHNABEL	Index No. 106560/07

Plaintiffs,

-against-

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

Defendants.
-----X

FILED

APR 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman:

The eleven captioned matters, part of a November 2007 *in extremis* cluster of asbestos cases involving the following plaintiffs: Leroy A. Barnes ("*Barnes*"), Ioannis Bougadis ("*Bougadis*"), Michael Boyle ("*Boyle*"), Ciro Enea ("*Enea*"), Anthony Gallo ("*Gallo*"), Javaid Iqbal ("*Iqbal*"), Selma Montross ("*Montross*"), Mary Palmieri ("*Palmieri*"), Robert F. Perdicaro ("*Perdicaro*"), Filippo Priolo ("*Priolo*") and Paul Schnabel ("*Schnabel*") (collectively, "Plaintiffs") have been referred to this Court for trial.

Five of the eleven Plaintiffs are deceased. Pursuant to CPLR §602(a), Plaintiffs' counsel moves by Order to Show Cause ("OSC") to consolidate these eleven personal injury/wrongful death actions for joint trial claiming the existence of common questions of law and fact: (1) ten Plaintiffs contracted mesothelioma ("Meso. Plaintiffs") allegedly from asbestos exposure, whereas remaining plaintiff *Perdicaro*, claiming a minimal and remote smoking history, contracted lung cancer ("LC Plaintiff") allegedly from asbestos exposure; (2) since diagnosis and causation from asbestos-containing product/material ("ACPs") exposure is undisputed, the proffered medical testimony will be the same for the Meso. Plaintiffs and any additional testimony needed for the LC Plaintiff will not cause jury confusion as to differences in pathology or etiology of these diseases; (3) Plaintiffs had similar exposures (e.g, eight plaintiffs [*Bougadis, Boyle, Iqbal, Montross, Palmieri, Perdicaro, Priolo and Schnabel*] were exposed to ACPs used in construction and home renovation and three Plaintiffs [*Gallo, Barnes and Enea*] were exposed to ACPs in boilers, pumps and valves); (4) Plaintiffs share the same counsel; (5) at least seventeen defendants are common to eight cases, a number of defendants are common to each case (many defendants use the same attorneys and every defendant shares similar defenses [e.g., substantial factor, etc.]); (6) Expert witnesses for both Plaintiffs and defendants are "substantially similar in each case . . ." (Dymond Aff. in Support of Consolidation Motion at ¶ 5); and (7) because commonalities such as the existence of bankrupt, absentee tortfeasors will arguably overlap in all of these actions, defendants will more likely than not establish these tortfeasors' liability to mitigate their own liability under CPLR Article 16.

Alternatively, Plaintiffs request a joint trial of eight Plaintiffs exposed to ACPs used in construction and home renovation (e.g., joint compound, sheetrock, ceiling tile and/or floor tile, etc.) followed by a joint trial of three Plaintiffs exposed to ACPs in boilers, pumps and valves.

In opposition to the consolidation motion, certain of the approximately seventy named defendants take great pains to point out alleged factual differences unique to almost all Plaintiffs, while citing to the same case law for the proposition that joint trials of Plaintiffs would be inappropriate. In addition, a number of defendants submitted attorney affirmations adopting the facts and legal arguments of their co-defendants in opposition to Plaintiffs' OSC seeking joint trials.

Generally, defendants highlight certain differences which purportedly predominate over the common factors: (1) Plaintiffs did not uniformly share common work sites¹ or common occupations; (2) while acknowledging that five Plaintiffs allegedly suffered exposure during the 1960's and four Plaintiffs allegedly suffered exposure in the 1970's, Plaintiffs' alleged asbestos exposures collectively occurred over a broad period of sixty years (1930's -1990's); (3) because LC Plaintiff contracted lung cancer, joining his case with any other case will unduly lengthen the trial as the pathology and etiology of lung cancer and mesothelioma are substantively different; (4) defendants in cases involving decedent Plaintiffs will be prejudiced by evidence of pain

¹ One defendant, Bondex International, Inc., noted that "[a]s a group, the eleven (11) plaintiffs had more than fifty (50) different job sites, including naval ships, naval yards, restaurants, laundromats, apartment buildings, powerhouses, dry cleaners and residences." (Bromberg Opp. Aff. at ¶ 17).

and suffering living Plaintiffs plan to present; and (5) there is outstanding discovery which will be impeded if the joint trials were to go forward.

Some of the defendants allege additional factual differences among Plaintiffs as well as discrete defense burdens warranting separate trials of each plaintiff:

- *Perdicaro*, who spent the bulk of his professional career working as a designer for Consolidated Edison in various powerhouses (1956-1993), admittedly smoked either one-half to two packs a day of unfiltered Chesterfields and filtered Marlboros over a twenty year period (Exhibit C to Fenton Opp. Aff.);
- *Montross*, in addition to suffering particular asbestos exposures from construction and home renovation materials, brakes and work clothes of family members, was exposed as a consumer to asbestos-containing filters smoking Kent cigarettes in the 1950's;
- The City of New York and the New York City Housing Authority, as the only premises owners-defendants in this cluster, are solely named as defendants in the *Iqbal* case and will suffer prejudice if forced to jointly try *Iqbal* with other Plaintiffs as well as with numerous defendant-manufacturers, defendant-contractors and defendant-distributors of ACPs; and
- *Palmieri* was diagnosed with well-differentiated papillary mesothelioma, i.e., a sub-species of cancer of the mesothelial cells of the peritoneum which is distinguishable from pleural mesothelioma and the pathology and etiology between these two cancers are substantively different (i.e., defendant, Kentile Floors, Inc. ["Kentile"], contends that in many cases, peritoneal mesothelioma in women is not causally linked to asbestos exposure).

Notably, defendants did not object to a joint trial of decedents, *Barnes* and *Gallo*, both of whom worked on ships in the Brooklyn Navy Yard, the former during the period 1937-1942 and 1942-1946 and the latter during the period 1942-1943.

Discussion

This Decision and Order recites the boilerplate discussion of the controlling statute and case law. 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 (1st Dept., 1984). Joint trials will also foster judicial economy, quicken the disposition of cases (*City of Rochester v. Levin*, 57 A.D.2d 700, 395 N.Y.S.2d 773 [4th Dept., 1977]) and potentially encourage settlements (*In re New York City Asbestos Litigation [Brooklyn Naval Shipyard Cases]*, 188 A.D.2d 214, 225, 593 N.Y.S.2d 43, 50 [1st Dept., 1993]), *aff'd* 82 N.Y.2d 821, 605 N.Y.S.2d 3 (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 [1st Dept., 1983]) and one or more of the defendants, then joint trials would be ill-advised.

In determining the merits of Plaintiffs' OSC, certain suggested factors delineated in *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351 (2nd Cir., 1993) should be considered such as: "(1) common worksite; (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."

Notwithstanding defendants' contrary view and consistent with earlier rulings (i.e., *In re New York City Asbestos Litigation [Altholz, et seq.]*, 11 Misc.3d 1063(A), 816 N.Y.S.2d 698 [Sup. Ct., N.Y. Co., 2006]) ("Altholz Order"), this Court finds that certain commonalities do exist and certain issues defendants collectively claim predominate over the commonalities will not defeat Plaintiffs' application for joint trials generally. First, Plaintiffs are represented by the same law firm. Second, while five Plaintiffs have died from asbestos causing disease, their deaths will not prejudice the jury against defendants, *vis-a-vis*, living Plaintiffs as the latter are all terminally ill and will unfortunately suffer the same fate. Third, this Court is not convinced that extensive discovery still remains to warrant denying the OSC entirely. To the extent certain discovery remains extant as to any of the parties, this Court will be responsive to any reasonable request and will either briefly delay the trial or tailor the trial sessions to avoid any prejudice or due process concerns. Fourth, the *Malcolm* factors do not compel Plaintiffs to share a common (i.e., identical) occupation or common time period of exposure. Thus, this Court finds there are similarities in the manner in which Plaintiffs performed different tasks (work related or home renovation) which exposed them to ACPs during overlapping periods of time from the 1930's to the 1990's. Fifth, against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to Plaintiffs. Finally, consideration can be had of other commonalities such as the existence of bankrupt, absentee tortfeasors which will arguably overlap in all of these actions and defendants' anticipated strategy to establish these tortfeasors' liability and mitigate their own liability under CPLR Article

16. *Tancredi v. A.C.&S., Inc. (In re New York City Asbestos Litigation)*, 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dept., 2004).

Accordingly, the OSC is granted, in part, to join *Bougadis, Boyle, Priolo, Schnabel* and *Palmieri* for joint trials.² This Court recognizes that the alleged periods and nature of asbestos exposure among these five Plaintiffs do not present precise commonalities; still, there exist sufficient similarities to support their joint trials (e.g., these Plaintiffs' alleged exposure to ACPs as end-users or bystanders in residential settings, in the trades, in automobiles and during overlapping periods of time, etc.).

It should be noted that in the Antonucci Opp. Aff. at ¶ 30, Kentile does not distinguish *Palmieri's* mesothelioma from the Meso. Plaintiffs, and Kentile's supporting memorandum of law candidly noted that peritoneal mesotheliomas allegedly differ from pleura mesotheliomas "in the dose and type of asbestos fiber that are capable of causing them . . ." (Kentile Memorandum of Law at pp. 15-16). Kentile further suggested that a "large percentage of these cancers, particularly in women, are not related to asbestos . . ." *Id.* Nonetheless, absent any scientific, factual basis, this Court is not convinced the pathology and etiology of these cancers will be markedly disparate as to confuse the jury warranting a separate trial of the *Palmieri* case.

² 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, are routinely implemented and should avoid any confusion for the jury in sorting out the respective liabilities and damages attributable to these five Plaintiffs.

This Court further determines that the *Montross* case should be tried separately, because she was the only Plaintiff, as a consumer, to have experienced exposure to asbestos-containing filters from smoking original Kents in the 1950's. This Court concurs with defendants, Lorillard Tobacco Company and Hollingsworth & Vose Company, that anticipated state of the art, expert and corporate witnesses on behalf of these defendants will be markedly different than those proffered in cases involving household or occupational asbestos exposures and joining *Montross* with any other Plaintiff would prejudice these defendants.

Plaintiffs see no reason not to jointly try lung cancer and mesothelioma cases. In this vein this Court acknowledges that its Altholz Order granted plaintiffs the right to consolidate five mesothelioma cases with a lung cancer case for joint trials because "these diseases do share a comparable etiology and pathology . . ." However, *Perdicaro* is a smoking lung cancer case and is allegedly different because of LC Plaintiff's alleged twenty year smoking history and absence of asbestosis. Among other evidence, it is reasonably anticipated that defendants will seek to prove their claim that LC Plaintiff's lung cancer is causally linked to smoking cigarettes, a factor not implicated with the lung cancer plaintiff in the Altholz Order. For this and other reasons (e.g., LC Plaintiff's substantial forty year work history as a Con Edison designer working in the varied powerhouses), the *Perdicaro* case must be tried separately as well.

This Court partially grants the branch of Plaintiffs' consolidation motion to jointly try the *Barnes* and *Gallo* cases. Certain additional commonalities clearly predominate. These two Plaintiffs are deceased and worked with boilers, pumps and valves in the

Brooklyn Navy Yard during the joint period 1937-1946. *Enea* shares two of these additional commonalities, namely, a decedent's asbestos exposure working with boilers, pumps and valves. However, *Enea's* exposure occurred in the 1980's while working at Columbia University owned buildings. Plaintiffs' counsel creatively suggests that *Enea's* work was "tantamount to serving on a land-based Naval Ship . . ." (Dymond Aff. in Support of Consolidation Motion at ¶ 35). Still, counsel cannot claim that the boilers, pumps and valves manufactured and installed in ships during WWII are similar to the boilers, pumps and valves manufactured and installed in New York City buildings more than forty years later. Stated differently, "there is no overlap or commonality of product exposure, work sites or time periods. . ." (Sinclair Opp. Aff. on behalf of A.O. Smith Water Products Co. at ¶ 14). *Enea's* case will also be tried separately.

Finally, the *Iqbal* case should also not be joined with any other Plaintiff for trial because among the approximately twenty-four defendants in this case (and for that matter among the more than seventy remaining defendants), defendant(s) New York City/New York City Housing Authority is the only premises owner. As this Court noted in the Altholz Order, "evidence of liability on the part of manufacturers, contractors and product distributors [in the other plaintiffs' cases] could easily 'splash' on th[ese] defendant[s] and unduly prejudice th[ese] defendant[s'] right to have a fair and impartial trial." (Bracketed matter added).

Accordingly, Plaintiffs' OSC is granted in part and denied in part as set forth herein. The parties in *Bougadis*, *Boyle*, *Priolo*, *Schnabel* and *Palmieri* shall proceed to

trial. The pre-trial conference scheduled for April 14, 2008 at 9:30 a.m. shall proceed as scheduled for all cases.

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

Dated: New York, New York
April 7, 2008


HON. MARTIN SHULMAN, J.S.C.

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