

Matter of New York City Asbestos Litig.
2008 NY Slip Op 31444(U)
May 20, 2008
Supreme Court, New York County
Docket Number: 0103651/1999
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

John Hinde

INDEX NO.

103651/99

MOTION DATE

- v -

MOTION SEQ. NO.

006

A.C. + S., Inc.

MOTION CAL. NO.

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

PAPERS NUMBERED

1
2-5

Cross-Motion: Yes No

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

FILED
MAY 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 21 2008

Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: 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: PART 1

-----X
In re: NEW YORK CITY ASBESTOS LITIGATION, :

- X
- JOHN HINDLE : Index No: 103651/99
- DANIEL DEVINE : Index No: 114032/99
- ALFRED FORSTER : Index No: 103904/99
- PETER RUOCCO : Index No: 103766/99
- LAWRENCE SHIVERS : Index No: 114031/99

-----X
Hon. Martin Shulman:

The five captioned matters, part of a February 2006 FIFO trial cluster of nine asbestos cases involving the following plaintiffs: John Hindle ("*Hindle*"), Daniel Devine ("*Devine*"), Alfred Forster ("*Forster*"), Peter Ruocco ("*Ruocco*") and Lawrence Shivers ("*Shivers*")(collectively, "Plaintiffs"), have been referred to this Court for trial. Two of the Plaintiffs are deceased.

Pursuant to CPLR §602(a), Plaintiffs' counsel moves to consolidate these five personal injury/wrongful death actions for joint trial claiming the existence of common questions of law and fact: (1) each plaintiff contracted asbestosis 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 each plaintiff; (3) Plaintiffs had similar work environments, occupations and time periods of exposures as well as exposures from similar ACPs (e.g., Westinghouse turbines, compressors, switchgear and electrical boards); (4) Plaintiffs share the same counsel; (5) at least six defendants are common to each case, a

number of defendants are common to each case (many defendants use the same attorneys and every defendant shares similar defenses [e.g., chrysotile defense, dose threshold defense, encapsulation defense, etc.]); (6) respective expert witnesses will be common for both Plaintiffs and defendants; and (7) discovery has been completed rendering these cases ready for trial.

Defendants, Carrier Corporation ("Carrier"), Cleaver Brooks, Inc. ("C-B"), John Crane, Inc. ("John Crane") and ECR International f/k/a Utica Boilers, Inc. ("Utica") (collectively, "Defendants"), four out of the approximately twenty-five defendants (see Exhibit E to Motion), submitted papers in opposition to the consolidation motion.¹ Carrier and John Crane essentially adopted the facts and legal arguments of their co-defendants in opposition to Plaintiffs' motion seeking joint trials.

Generally, defendants highlighted certain differences which purportedly predominate over the common factors: (1) Plaintiffs admittedly did not uniformly share common work sites which ranged from commercial and residential sites to schools, shipyards, naval ships and powerhouses; (2) Plaintiffs did not uniformly share common occupations but were in fact rather diverse (i.e., carpenter, electrician, roofer, chimney cleaner, engineer, welder and sheet metal worker, etc.); (3) Plaintiffs did not uniformly experience common exposures; namely, some of Plaintiffs were exposed as end-users of ACPs whereas others were exposed as bystanders; (4) Plaintiffs *Devine, Hindle* and *Shivers* allegedly suffered exposure from the 1940's to the 1990's, *Ruocco* allegedly suffered exposure from 1951 to 1987 and Forster allegedly suffered exposure from

¹ Defendants General Electric Company and Dana Corporation withdrew their respective opposition to Plaintiffs' consolidation motion for a joint trial.

1936 to 1982; and (5) Defendants in cases involving decedent Plaintiffs will be prejudiced by evidence of pain and suffering living Plaintiffs plan to present and, conversely, Defendants in cases involving the personal injury claims of living Plaintiffs will be prejudiced by wrongful death claims of deceased Plaintiffs.

John Crane further alleged it is solely a defendant in the *Forster* matter and claims that it has yet to receive "outstanding medical records and critical diagnosing materials . . ." (Fluitt Opp. Aff. at ¶ 8) and will be prejudiced if it is forced to go to trial.

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' consolidation motion, 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, Plaintiffs share a common disease, asbestosis. Third, with the alleged exception of John Crane, no other Defendant alleges any claim of outstanding discovery to warrant denying the consolidation. Fourth, the *Malcolm* factors do not compel Plaintiffs to share a common (i.e., identical) work site, occupation or time period of exposure. Thus, this Court finds there are similarities in the manner in which Plaintiffs performed different tasks which exposed them to ACPs during overlapping periods of time from the 1930's to the 1990's. Finally, against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to all Plaintiffs.

Defendants did raise a concern about consolidating cases involving living and

deceased Plaintiffs for joint trials. It is noted that in earlier decisions, this court did consolidate cases involving living and deceased plaintiffs for joint trials finding no prejudice against defendants because the former were terminally ill and would unfortunately suffer the same fate as the latter from asbestos causing disease.

It is also true that without any additional information as to the living Plaintiffs' current medical condition, this court at this juncture cannot discern whether they presently experience such severe pulmonary function to be at risk of dying. Therefore, if the *Forster and Shivers* cases were to be consolidated with the other three cases, it is possible that the jury could attribute the fate of these two deceased Plaintiffs to the three living Plaintiffs and that *inter alia* would be prejudicial to Defendants in the living Plaintiffs' cases. Conversely, the same jury could find the living Plaintiffs' present symptoms and pain and suffering to have been "indicative of the deceased plaintiffs' conditions and pain and suffering, prior to death . . . [and such a finding] has the potential to exponentially and unjustly inflate any damages awarded." (Bracketed matter added)

(C-B's Memorandum of Law at p. 10).

Accordingly, the motion is granted, in part, to consolidate the *Devine, Hindle* and *Ruocco* cases for joint trials.² However, the *Forster* and *Shivers* cases shall be jointly

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 three Plaintiffs.

tried afterwards.

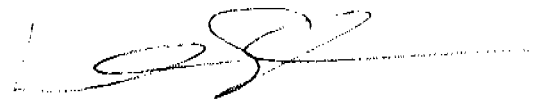
This Court recognizes that the alleged periods and nature of asbestos exposure among all Plaintiffs do not present precise commonalities; still, there exist sufficient similarities to support their respective joint trials.

To the extent certain discovery remains extant as to John Crane in the *Forster* case, the foregoing ruling seemingly moots this concern.

Accordingly, Plaintiffs' motion is granted in part. The parties in *Devine, Hindle and Ruocco* are directed to appear at a pre-trial conference in Part 1, Room 1127B at 111 Centre Street, New York, New York, 10013 on June 16, 2008 at 9:30 a.m.

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
May 20, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
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NEW YORK