[* 1]

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

PRESENT: HON. JOAN B. LOBIS *Justice* PART 6

IN RE: NEW YORK CITY ASBESTOS LITIGATION

CAROLINE FELLER BAUER, et al,

Plaintiffs,

- against -

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

Defendants.

INDEX NO. 115756/07, et al

MOTION DATE 7/16/08

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 115 were read on this motion for joint trial.

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause – Affidavits – Exhibits	1-17
Answering Affidavits – Exhibits	18-114
Replying Affidavits	115

Cross-Motion: [ ] Yes [X] No

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

Dated: 8/21/08

JOAN B. LOBIS, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

IN RE: NEW YORK CITY
ASBESTOS LITIGATION

----------X

CAROLINE FELLER BAUER, et al.,

Plaintiffs,

Index No. 115756/07, et al.

-against-

Decision and Order

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

Defendants.

----------X

JOAN B. LOBIS, J.S.C.:

This application for a joint trial, pursuant to C.P.L.R. § 602(a), is brought on behalf of nine of the ten plaintiffs in the May 2008 in extremis cluster in the above-captioned asbestos litigation.[1] Plaintiffs assert that these cases have sufficient similarities to warrant a joint trial, since the experts and the issues are substantially the same for each case. In addition, all of the plaintiffs are represented by the same counsel. Defendants oppose the motion.

Plaintiffs propose two different options for consolidation. Their first proposal is to try seven of the cases together; these are the cases brought on behalf of seven plaintiffs (Early, Garland, Peterson, Toner, Turco, Wilson, and Zajack) who allege exposure to asbestos from boilers. Thereafter,

---

[1] The ten plaintiffs in the May 2008 in extremis cluster are all represented by the same law firm. The plaintiffs are: Caroline Feller Bauer, Index No. 115756/07; Paul Costello, Index No. 115431/07; Joseph Curto, Index No. 115123/07; Paul Early, Index No. 111203/07; Joel Garland, Index No. 111905/07; Clifford Peterson, Index No. 115038/07; Michael Toner, Index No. 115430/07; Anthony Turco, Index Nol. 112391/07; Allan Edward Wilson, Index No. 115557/07; and, Andrew Zajack, Index No. 111904/07. Consolidation is not sought on behalf of the claim brought by Paul Costello, since this is a lung cancer case; plaintiffs' counsel acknowledges that this case does not share substantial similarity with the other cases in the group in terms of exposure.

plaintiffs propose trying the Curto and Bauer cases jointly. As an alternative proposal, plaintiffs suggest that the three cases alleging exposure as a result of plaintiffs' service in the United States Navy (Early, Peterson, Wilson) be tried together, followed by a joint trial of the Toner and Zajack cases, followed by a joint trial of the residential renovation cases (Bauer, Curto, Garland and Turco).

Trial courts have discretion under § 602(a) to determine whether it is appropriate to order consolidation and/or a joint trial of actions involving common questions of law or fact. Progressive Ins. Co. v. Vasquez, 10 A.D.3d 518, 519 (1st Dep't 2004). Unless the parties opposing the application for a joint trial demonstrate that a joint trial will prejudice a substantial right, if there are common questions of law or fact, the interests of judicial economy favor a joint trial. Id.

Other justices of this court have ordered joint trials in the asbestos litigation matters. See, In re New York City Asbestos Litigation (Brooklyn Naval Shipyard Cases), 188 A.D.2d 214, 225 (1st Dep't 1993) (affirming Justice Freedman as to the joint trial; modifying in part on other grounds) ("the joint trial format has the potential to reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases as well as to encourage settlements."), aff'd on op below, 82 N.Y.2d 821 (1993); In re New York City Asbestos Litigation, 11 Misc. 3d 1063(A) (Table), 2006 WL 657171 (Sup. Ct. N.Y. Co. 2006) (Shulman, J.); New York City Asbestos Litigation v. A.O. Smith Water Products, 9 Misc. 3d 1109(A) (Table), 2005 WL 2254089 (Sup. Ct. N.Y. Co. 2005) (York, J.); see also, Barnes v. A.O. Smith Water Products, Index No. 103121/07 (Sup. Ct. N.Y. Co. Apr. 7, 2008) (Shulman, J.) (denying request to consolidate all eleven cases in the cluster or, alternatively, having a joint trial of eight and then three of the cases; the court instead determined that

it would join five of the cases for trial and join two additional cases for trial, while having four separate trials of the remaining plaintiffs).[2]

Similarly, the First Department has upheld orders for a joint trial in the DES products liability litigation (In re New York County DES Litigation, 277 A.D.2d 158 [1st Dep't 2000]) and repetitive stress injury litigation (Aikman v. Atex, Inc., 224 A.D.2d 180 [1st Dep't 1996]). In Aikman, the First Department endorsed the factors set forth by the United States Court of Appeals for the Second Circuit in Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir.), cert. denied, 498 U.S. 920 (1990), and Malcolm v. National Gypsum Co., 995 F.2d 346, 350-51 (2d Cir. 1993); these factors were outlined originally by a court in Maryland when considering whether to consolidate certain asbestos cases. The criteria to be considered are: "(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. . . ." Malcolm, supra, 995 F.2d at 350-51, quoting In re All Asbestos Cases Pending in the United States District Court for the District of Maryland, slip op. at 3 (D. Md. Dec. 16, 1983) (en banc).

The 2006 reported decision of Justice Shulman to proceed with a joint trial of six asbestos exposure cases before him is instructive. Justice Shulman was presented with an application for a joint trial of nine asbestos cases. Justice Shulman's decision notes that four of the nine plaintiffs

---

[2] According to defendant Borg-Warner Corporation, who provided a copy of this unreported decision to the court, upon defendants' appeal of the decision, the parties ultimately agreed that only three of the five actions should be tried together, and the other two matters were also tried individually. Borg-Warner further asserts that the other cases were all tried individually.

were deceased; eight of the nine plaintiffs contracted mesothelioma from asbestos exposure; one plaintiff had stage IV lung cancer; and, plaintiffs had similar occupations, times of exposure, and types of worksites. Plaintiffs were all represented by the same law firm and there were common defendants in some of the cases. The defendants argued that a joint trial was not appropriate because plaintiffs did not share a common work site or even type of work site; all nine plaintiffs did not share a common occupation; plaintiffs' alleged asbestos exposure occurred over a fifty year period, with none being exposed during an identically discrete time period; it was inappropriate to join a lung cancer case with the mesothelioma cases; defendants would be prejudiced by trying cases involving deceased plaintiffs with the living plaintiffs; discovery was outstanding; and, there was no common product that was alleged to cause the asbestos exposure.

Justice Shulman found that certain commonalities existed and defendants' contention that the differences in the cases predominate over the commonalities was insufficient to defeat the application for a joint trial. For example, Justice Shulman found that the fact that some of the plaintiffs were deceased was not deemed to prejudice defendants as to the living plaintiffs, since all are terminally ill and will suffer the same fate eventually. 2006 WL 657171 at *2. The court determined that it was appropriate to join six of the nine cases for a joint trial. Notably, the court determined not to join one of the cases, in which exposure was alleged to have occurred in the 1940s, since no other plaintiff shared this period of exposure. Similarly, the court elected not to join another case in which it was alleged the decedent-plaintiff was exposed through secondary exposure. Finally, the court declined to join a plaintiff who alleged that his exposure occurred as a merchant marine; no other plaintiff alleged asbestos exposure as an employee aboard a commercial vessel.

Here, in response to the application for a joint trial, defendants argue that any form of joint trial would be unduly prejudicial to them and unduly burdensome. None of the defendants suggest any alternative grouping, contending that all ten cases must be tried separately. To do so would create a tremendous burden for this court, and would severely delay and prejudice the plaintiffs. Ten separate trials is antithetical to the entire manner in which the asbestos litigation before this court has been managed.

The common thread in defendants' papers is that if these cases are jointly tried in any configuration, the jury will be confused by the expert testimony, the dissimilar worksites, the different claimed exposures, and the different time periods of exposure. As Justice Shulman noted, it is not insurmountable to try a number of these cases simultaneously. By allowing jurors to take notes and through the use of specific instructions and other innovations, the jury should be able to sort through the various groupings of cases and keep the facts of each case straight. Defendants' argument that it is not appropriate to try cases of living and deceased plaintiffs together was also flatly rejected by both Justices Shulman and York, given the fact that here, unlike in Malcolm, all of these plaintiffs suffer from the same fatal disease. Some defendants argue that since they are named in only one case, they would be prejudiced by having all of the cases tried together. In contrast, defendants that are named in eight of the nine cases seeking a joint trial also object to any form of a joint trial.[3]

---

[3] Cleaver-Brooks is named as a defendant in all but the Curto case; Warren Pumps, Inc. is named as a defendant in all but the Early case; and, Weil-McLain is named as a defendant in all but the Wilson case. All three of these defendants are represented by the same law firm. In addition, ITT Corporation is named as a defendant in all but the Bauer case.

For the reasons set forth below, under the circumstances presented here, this court determines that the commonalities in these cases predominate over any differences in these cases and, applying the factors in Malcolm, it is appropriate to order joint trials.

The Early, Peterson, and Wilson cases all involve naval exposure. Rear Admiral Paul Early, who is 83 years old, served on numerous ships and in the Pentagon between 1943 and 1976; he was exposed to asbestos from boilers, turbines, pumps, valves, gaskets, packing, insulation, air conditioners, refrigerators, condensers and steam traps. Cliff Peterson, who died at the age of 74 as a result of mesothelioma, worked as an Electrician's Mate from 1953-55 while he was in the Navy. While aboard ship, he dismantled the motors containing asbestos gaskets and pumps which were insulated with asbestos. He also worked in the boiler rooms. Allan Wilson died at the age of 57 as a result of mesothelioma; he died before his deposition could be taken. Mr. Wilson served as an Auxiliary machinist in the Navy from 1972-76, during which time he performed maintenance on various types of equipment and worked in the boiler room. With the exception of Mr. Peterson, who also alleges other exposure,[4] these three plaintiffs are the only ones who have substantial exposure as a result of their employment in the Navy.[5]

---

[4] According to his deposition, Peterson also performed some home renovation. He acknowledged assisting his father in renovating his home in the 1950s and also stated that he was exposed to joint compound while performing painting work with his brother during the summers between 1972-92; he believed that this material contained asbestos.

[5] Anthony Turco, who is discussed infra, also served in the naval reserves beginning in September 1953. His exposure while on ship was for a very limited amount of time. He testified at his deposition that he joined a surface outfit and served for approximately one year. He was assigned to the U.S.S. Osberg for training, but became seasick all the time; he only served on the ship for two weeks. He believed he was exposed to asbestos in the boiler room. He was then transferred to the construction battalion, where he performed construction on roads and buildings; he served in this capacity for approximately eight years.

In analyzing the Malcolm factors as they apply to these cases, a joint trial is appropriate. All three plaintiffs worked on ships, they had similar time periods of exposure, they have the same disease, and they are represented by the same counsel. The fact that Mr. Wilson is deceased is not an overriding factor here, as set forth above. There are also a number of common defendants in these three cases, including defendants who are named in all three cases, and the periods of exposure overlap.

The differences that defendants raise are insufficient to overcome the efficacy of a joint trial as to these three plaintiffs; defendants have not shown that a joint trial will prejudice a substantial right. Contrary to the contention of defendant Alfa Laval Inc., defendants are not unduly prejudiced by the fact that Rear Admiral Early had a lengthy naval career, compared to the other two defendants. If proper protections are in place, the jury is unlikely to be confused by the fact that there were a large number and variety of ships involved. Defendant York International Corporation ("York"), which has moved for summary judgment in six of the seven cases in which it is named, objects to a joint trial, assuming its motion is granted, because then it will be left as a defendant only in the Early case. Square D Company is a defendant in the Peterson case only. The fact that a party may be a defendant in only one of the three cases is also not a reason to have separate trials. Similarly, Kinney Vacuum Company, Hale Products, Inc., BW/IP Inc., Hoke, Inc., and Viking Pump, Inc., are named as defendants in the Early case but not in the other two.[6] Buffalo Pumps, Inc., is named in the Early and

---

transferred to the construction battalion, where he performed construction on roads and buildings; he served in this capacity for approximately eight years.

[6] Kinney Vacuum Company, Hale Products, Inc., and Viking Pump, Inc., are, however, represented by the same law firm.

Wilson cases, but makes the same argument, in addition to contending that the differences in the state of the art testimony is striking. Gardner Denver argues that its pumps have been identified only in the Wilson case, although it is a named defendant in six other cases. Defendants argue that they should not be forced to expend unnecessary resources and time to be present for testimony presented in cases unrelated to the case in which that particular defendant is named. Defendants may elect not to be present during the parts of the case that only concern the parties in the case in which they are not named, and, through proper jury instructions and the use of other juror innovations, their lack of liability in one case should not impact their possible liability in the case in which that defendant is named. Precautions can be taken so that a party that is not a defendant in all of the jointly-tried cases does not suffer prejudice as a result of the joint trial.

The Toner and Zajack cases also share enough similarities to be tried jointly. Michael Toner, who is 58 years old, has mesothelioma. He claims that he was exposed to asbestos while working as an assistant to an automobile mechanic in the 1960s, and later when he worked as a utility man at the Flintkote plant in Ohio. He assisted in unloading products containing asbestos from railroad cars and in delivery to the factory. Andrew Zajack, who died at the age of 69 as a result of mesothelioma, was employed by Grumman Aircraft Corp. From 1965 through 1993, he worked as a millwright, maintaining machinery, including presses, ovens, boilers, pumps, and valves. He worked in the boiler room and assisted in dismantling the boiler room, which he testified took months to complete. Mr. Zajack, like Mr. Toner, also worked with automobiles; Mr. Zajack worked part-time at his brother-in-law's gas station in the 1960s and 1970s, where he performed brake work and was exposed to asbestos from brake pads. Both of these plaintiffs were exposed to asbestos through similar products through their employment, e.g., brakes, boilers, and insulation. Their exposure periods

overlap, plaintiffs are represented by the same counsel, and there are common defendants and attorneys in the two cases.

Defendants Norca Corporation and Kohler Co., who assert that they are only named in the Toner case, and defendants Ajax Electric Company ("Ajax") and Lindberg, who are named only in the Zajack case, contend that they will be unduly prejudiced by a lengthier trial if the cases are consolidated. Defendants make the identical argument set forth by defendants in the three naval exposure cases (see p. 8, supra) that they should not have to expend unnecessary additional resources and time to be present for testimony presented in cases unrelated to the case in which that particular defendant is named. This argument is rejected for the reasons set forth above. Ajax also argues that since it was only recently added as a defendant, it has not had an opportunity to depose plaintiff or retain experts; to the extent any discovery remains, Ajax should be able to undertake discovery, as this case will not be tried until the first set of cases have been tried, which should be time enough to complete discovery.

The Bauer, Curto, Garland, and Turco cases concern residential renovation and construction. Caroline Feller Bauer, who is 72 years old, alleges exposure from renovation work she and her husband performed on their Manhattan apartment and on various weekend and vacation homes in the 1960s and 1970s. Her alleged exposure is from products used in the residential renovation and construction industry. Joseph Curto died as a result of mesothelioma at the age of 72. He performed home renovation work with his father in the 1950s and at his and his brother-in-law's homes on Long Island in the 1960s. Mr. Curto also owned a home improvement company from 1972-74; he used

asbestos-containing joint compound and floor tiles. In addition, he was exposed to asbestos fibers through his work as a printer and press operator, and earlier, while in high school, where he repaired automobiles, and smoked cigarettes that contained asbestos micronite filters. Joel Garland, who is 64 years old, has mesothelioma. He alleges exposure as a result of assisting his father, who was the caretaker for their apartment building, in performing repairs. He later worked as a painter and carpenter, where he was exposed to joint compound and insulation materials. His exposure is alleged to have occurred in the 1950s and 1960s. Anthony Turco, who is 72 years old, has mesothelioma. From 1955-74, he worked as a laborer for contractors. He alleges he was exposed to asbestos from various materials, including insulation and debris from boilers that were torn down. In 1975, he began working for the Town of Cortlandt and performed renovation work using materials containing asbestos. He also performed brake work on buses when mechanics were on vacation.

These four plaintiffs all assert that they were exposed to asbestos through exposure to sheetrock and joint compound. Some of them also claim to have been exposed through floor tiles. The time period and manner of exposure overlap substantially. There are common defendants and common attorneys representing the defendants. The fact that they did not have a common worksite or similar occupations, as some defendants point out, is not controlling, given the other factors that are similar. The fact that one of these plaintiffs is deceased is also not as prejudicial as defendants assert, given the fate the living plaintiffs have, as Justice Shulman and Justice York noted.

Defendant Borg-Warner claims it will be prejudiced since it is only named in the Curto and Turco cases;[7] defendants Bird Incorporated, Certainteed Corporation,[8] N. Dain's Sons Company, Inc., and Novartis Corporation are defendants in the Turco case only; defendants Montalvo Corporation, Gast Manufacturing, Inc., Heidelberg USA, Inc., Nexen Group, and Harris Corporation are defendants only in the Curto case.[9] Heidelberg argues that it will suffer a "spillover" effect of emotionally powerful testimony by the three living mesothelioma plaintiffs, when it is a defendant in the only case in which the plaintiff is deceased. All of these defendants also contend that they should not be forced to expend unnecessary resources and time to be present for testimony presented in cases unrelated to the case in which they are a defendant. As set forth above (p. 8, supra), these are not reasons to deny a joint trial. Bondex International, Inc., which is named in all four cases,[10] nevertheless claims that it will be prejudiced in combining these four cases in this manner, because it contends that the cases involve different types of exposure and otherwise are not sufficiently similar for a joint trial. Novartis contends that it will be prejudiced because it is the only premises defendant in Turco. The Malcolm factors do not require plaintiffs to share an identical manner of exposure. Since none of these defendants has shown that a joint trial will prejudice a substantial right, a joint trial of these four cases is appropriate.

---

[7] The August 1, 2008 chart annexed to plaintiffs' reply papers states that Borg-Warner is also a defendant in the Early and Zajack cases as well.

[8] The August 1, 2008 chart of parties in all of the cases in the cluster, which is annexed to plaintiffs' papers, sets forth that Certainteed is a defendant in the Bauer, Costello, Curto, Early, Garland, Peterson, Toner,and Zajack matters, in addition to Turco.

[9] Montalvo Corporation and Gast Manufacturing, Inc. are represented by the same law firm.

[10] Bondex asserts that it is a defendant in these four cases, and in Peterson; plaintiffs' chart also sets forth that Bondex is a defendant in the Zajack and Early matters as well.

Accordingly, for the reasons set forth above, plaintiffs' motion is granted to the extent that their alternative request for a joint trial is granted. The Early, Peterson, and Wilson cases will be tried together; this trial will be followed by a trial of the Toner and Zajack cases; this trial will be followed by a trial of the Bauer, Curto, Garland, and Turco cases together. The parties in the first joint trial are to appear for a pre-trial conference on Tuesday, October 21, at 9:30 a.m.; the parties in the second joint trial are to appear for a pre-trial conference on Tuesday, November 25, at 9:30 a.m.; the parties in the third joint trial are directed to appear for a pre-trial conference on Tuesday, December 9, at 9:30 a.m. It is hoped that jury selection will begin the day following the pre-trial conference in each respective trial group.

This constitutes the decision and order of the court.

Dated: August 21, 2008

JOAN B. LOBIS, J.S.C.