

Matter of New York City Asbestos Litig.
2009 NY Slip Op 30726(U)
March 31, 2009
Supreme Court, New York County
Docket Number: 110114/99
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

James Brunne
A.C. & A, Inc.

INDEX NO. 110114/899
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-L</u>	<u>1</u>
Answering Affidavits — Exhibits	<u>2,3,4,5,6,7,8,9,10</u>
Replying Affidavits	

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
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 31, 2009

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,

JAMES BROWNE (Index No. 110114/99)
ALBERT BUSHCI (Index No. 120817/99)
JOSEPH COZZOCREA (Index No. 122155/98)
EUGENE DALTON (Index No. 106052/99)
FREDERICK DE PRISCO (Index No. 115489/99)
WILLIAM FLYNN (Index No. 103852/99)
JOHN MARTIN (Index No. 112147/98)
THOMAS MAURO (Index No. 120645/99)
WILLIAM MCNAMARA (Index No. 111190/99)
ANTHONY TROIANO (Index No. 100051/00)
RAYMOND WALSH (Index No. 103273/99)
JACOB ZEITLER (Index No. 122141/00)
Plaintiffs,

Index Nos.: 110114/99, *et al.*

DECISION AND ORDER

-against-

A.C. & S., INC., *ET AL.*,

Defendants.
-----X

FILED

APR 02 2009

COUNTY CLERK
NEW YORK

Hon. Martin Shulman, J.:

The twelve captioned asbestos cases involving the following plaintiffs: James Browne ("Browne"), Albert Bushci ("Bushci"), Joseph Cozzocrea ("Cozzocrea"), Eugene Dalton ("Dalton"), Frederick De Prisco ("De Prisco"), William Flynn ("Flynn"), John Martin ("Martin"), Thomas Mauro ("Mauro"), William McNamara ("McNamara"), Anthony Troiano ("Troiano"), Raymond Walsh ("Walsh") and Jacob Zeitler ("Zeitler") (collectively, "Plaintiffs") have been transferred to this court pursuant to the NYCAL Amended Case Management Order for trial. Seven of the twelve plaintiffs are deceased.

Pursuant to CPLR §602(a), Plaintiffs' counsel moves by order to show cause to consolidate these five personal injury actions and four wrongful death actions for joint trial claiming the existence of common questions of law and fact ("Consolidation OSC").¹

Co-defendants, Goulds Pumps ("Goulds"), Burnham, LLC ("Burnham"), Crane Co. ("Crane"), Kentile, Inc. ("Kentile"), Courter & Company ("Courter"), Peerless Industries, Inc. ("Peerless"), Treadwell Corporation ("Treadwell")², Goodyear Tire and Rubber Company and Goodyear Canada, Inc. ("Goodyear") (collectively, "Defendants"³), oppose the Consolidation OSC, each contending that these cases' dissimilarities outweigh their commonalities.

In support of Plaintiffs' Consolidation OSC, counsel's supporting affirmation advances what appear to be obvious commonalities, i.e., Weitz and Luxenberg jointly represent Plaintiffs and nine of Plaintiffs were/are alleged to have been afflicted with asbestos-induced lung cancer and one of Plaintiffs succumbed to mesothelioma. Among other common issues/factors which Plaintiffs claim predominate over individual ones are (Comerford Aff. in Support of Consolidation OSC at ¶¶ 5 and 20-28): Plaintiffs, while

¹ The Martin action is no longer being included among the captioned actions for consolidation, the De Prisco action has settled and the only remaining defendant in Walsh was dismissed from this action.

² For the sake of brevity, Courter, Treadwell and Peerless have adopted the respective facts and legal arguments of co-defendant Kentile's opposition to Plaintiffs' Consolidation OSC.

³ As of March 20, 2009, among the Defendants opposing consolidation of these nine actions for joint trial: Goulds continues to be a named defendant in the Browne, Cozzocrea, Flynn and Mauro actions; Kentile continues to be a named defendant in the Flynn and Zeitler actions; Peerless continues to be a named defendant in the McNamara and Zeitler actions; Courter continues to be a named defendant only in the Flynn action; Crane continues to be a named defendant in the Buschi and Mauro actions; Goodyear continues to be a named defendant only in the McNamara action; Burnham continues to be a named defendant only in the Troiano action; and Treadwell continues to be a named defendant only in the Flynn action.

admittedly not exposed at one common work site, were exposed to the same type of asbestos containing insulation or other materials⁴ ("ACM") at powerhouses, comparable commercial work sites⁵ and residential work sites; Plaintiffs were engaged in similar occupations in the construction trades⁶ and were exposed to ACM as end-users/bystanders; four of Plaintiffs had ACM exposures in the 1940s, three of Plaintiffs had such exposures during the 1950s, nine Plaintiffs were exposed to ACM during the 1960s, six of Plaintiffs were exposed in the 1970s and four of Plaintiffs had exposures in the 1980s which allow for their respective exposure histories to temporally overlap and, in turn, will result in the same state-of-the-art, medical and expert evidentiary overlap at a joint trial; at trial, every defendant will seek to prove liability of one or more of their co-defendants, any settling tortfeasor and one or more absentee bankrupt tortfeasors to mitigate their own liability under CPLR Article 16 and this proof via documentary and testimonial evidence will provide for considerable overlap; consolidating the four decedents' cases with the remaining living Plaintiffs' cases for trial will not be prejudicial since Plaintiffs were all diagnosed with malignancies and the average juror is aware that living plaintiffs' disease

⁴ Among the Plaintiffs, three were exposed to tile, seven worked near or on boilers, seven worked on or around pipe insulation, five worked with pumps or valves, four were exposed to gaskets containing ACM and two worked on or around ACM insulated turbines (Comerford Aff. in Support of Consolidation OSC at ¶24).

⁵ Cozzocrea was the only Plaintiff to suffer ACM exposure at the Brooklyn Navy Yard and Zeitler experienced ACM exposure as a sailor on naval ships (Comerford Aff. in Support of Consolidation OSC at ¶22).

⁶ As summarized in Plaintiffs' counsel's supporting affirmation, Browne was a surveyor/inspector, Buschi was a mechanic, Mauro was a boiler room operator/supervisor, Cozzocrea was a shipwright, Dalton was a plumber, Flynn was an iron worker, McNamara was a roofer, Troiano was a plumber/general contractor and Zeitler was a sailor/painter (see Comerford Aff. in Support of Consolidation OSC at ¶¶ 7-18 and 24).

"in most instances will lead to death . . ." (*Comerford Aff. in Support of Consolidation OSC* at ¶ 27); and finally, these cases are ready for trial.

In opposition, Defendants uniformly and severally highlighted certain differences they claim predominate over the common factors: (1) Plaintiffs did not uniformly share common work sites which ranged from commercial and residential sites to shipyards and powerhouses; (2) Plaintiffs did not uniformly share common occupations but were in fact rather diverse (i.e., surveyor/inspector, mechanic, painter, boiler room operator, shipwright, iron worker, roofer and plumber/general contractor, etc.); (3) Plaintiffs did not uniformly experience common exposures; namely, some of Plaintiffs were exposed as end-users of ACM whereas others were exposed as bystanders; (4) as gleaned from Plaintiffs' respective interrogatories and deposition testimonies (see illustratively, *Angiolillo Opp. Aff. [Burnham]* at ¶¶ 6-17), none of them share the same time period of exposure (*viz.* Browne: 1952-1978; Buschi: 1955-1960; Cozzocrea: 1956-1964; Dalton: late 1940s and 1958-1980; Flynn: mid 1950s - early 1970s; Mauro: 1964-1985; McNamara: 1961-1970 and 1970-1998; Troiano: mid-1940s to mid-1970s; Zeitler: 1968-2000); and the anticipated state-of-the-art testimony will have to span sixty years and for each discrete time period which will foster jury confusion if Plaintiffs' actions were jointly tried; (5) Defendants in cases involving the personal injury claims of the five living Plaintiffs will be prejudiced by the four other wrongful death claims; and (6) none of Defendants is common to all ten cases.

Goodyear advances additional factors for severing the McNamara action from the cluster for a separate trial, *viz.*, "McNamara's lung cancer is in remission (and appears cured) and his prognosis is significantly different . . .", whereas the other three living Plaintiffs' lung cancer "diseases are still active . . ." (*Goodyear's Memorandum of Law in*

Opposition to Consolidation OSC at p. 6). Crane, although not a party in Dalton, points out that this court has issued a prior order⁷ directing that Dalton, the only non-smoker in the cluster, must have his case tried separately. Burnham, although not a party in Cozzocrea, contends that this case must be tried separately to avoid jury confusion and prejudice to Defendants, because this decedent Plaintiff's disease (i.e., disputed mesothelioma) is different from lung cancer and will require different medical evidence of etiology and pathology.

Discussion

CPLR §602(a) permits a court to consolidate two or more actions for joint trials if they involve common questions of law and 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.], *aff'd* 82 N.Y.2d 821, 605 N.Y.S.2d 3 [1993]). Fairness compels the court to consider joint trials ill-advised "where individual issues predominate, concerning particular

⁷ See *In re New York City Asbestos Litigation [Capozio, et seq.]*, 22 Misc.3d 1109(A), 2009 Slip OP 50072U, LEXIS 91 (Sup. Ct., N.Y. Co.) ("Capozio Decision" annexed as Exhibit A to Digiglio Opp. Aff.).

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.

In exercising discretion to consolidate these nine actions, the court should consider certain suggested factors in determining whether joint trials here are appropriate, to wit: "(1) common work site; (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." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2nd Cir., 1993).

Notwithstanding Defendants' contrary view and consistent with this court's earlier decision (i.e., *In re New York City Asbestos Litigation [Alholz, et seq.]*, 11 Misc.3d 1063(A), 816 N.Y.S.2d 698 [Sup. Ct., N.Y. Co., 2006])(Exhibit D to Comerford Aff. in Support of Consolidation OSC), 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, except for Cozzocrea, Plaintiffs share a common disease, lung cancer. Third, this court has previously held that except under unique circumstances, the *Malcolm* factors generally 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 almost all of Plaintiffs performed their respective tasks in the construction trades, in the powerhouses and shipyards which exposed them to ACM during overlapping periods of time from the 1940's to the 1980's. Finally, against this backdrop, the state of the art

testimony and other expert testimony in a general way will be substantially common to Plaintiffs.

However, the Zeitler case must be tried separately from the other Plaintiffs because a certain individual factor attributable to this case clearly predominates over the foregoing commonalities, namely, because of Zeitler's stint as a U.S. naval officer on vessels at sea, federal law may be implicated and it 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. . ." (see *Altholz, supra*, 11 Misc.3d 1063(A), 816 N.Y.S.2d 698 [*4] [Sup. Ct., N.Y. Co., 2006]) if Zeitler was consolidated with the other cases.

Further, as noted in the Capozio Decision, Dalton, the only non-smoking lung cancer case in this cluster, must be tried separately.

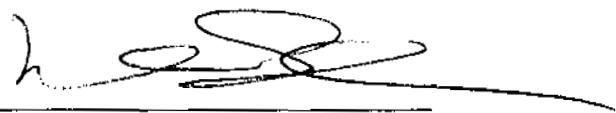
This court has previously ruled that living plaintiffs suffering a fatal disease can have their personal injury cases tried jointly with wrongful death cases, ruling that defendants would not be prejudiced by such joint trials under certain circumstances. However, although the remaining Plaintiffs share a smoking lung cancer factor, consolidating the Browne, Buschi, Cozzocrea and Mauro cases with the living Plaintiffs' cases will prejudice Defendants "because of the possibility that a jury will attribute the fate of the[se] [four decedents] to the living plaintiffs . . . especially where it appears that the living plaintiffs [e.g., McNamara] are long term cancer survivors who are not at risk of immediately dying of their cancer" (Capazio Decision, *supra*, 22 Misc.3d 1109[A], 2009 Slip OP 50072U, LEXIS 91 [***12-13][Sup. Ct., N.Y. Co.]).

Accordingly, the OSC is granted, in part, to consolidate the Flynn, McNamara and Troiano actions for a joint trial. The Browne, Buschi, Cozzocrea⁸ and Mauro actions will be jointly tried thereafter, and the Dalton and Zeitler actions shall be tried separately, albeit all in due course.

The remaining parties in all nine cases are directed to appear at a pre-trial conference in Part 1, Room 1127B at 111 Centre Street, New York, New York, 10013 on April 17, 2009 at 9:30 a.m. to coordinate the calendaring of these trials and resolve any other outstanding issues of concern.

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
March 31, 2009



HON. MARTIN SHULMAN, J.S.C.

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⁸ Much was made of the fact that Plaintiffs' expert has posthumously diagnosed Cozzocrea as having contracted mesothelioma, a signature ACM producing disease not otherwise caused by smoking. Whereas, the treating physicians' medical records concluded this decedent plaintiff had adenocarcinoma (lung cancer) possibly contracted from smoking. On this record before the court, the commonalities predominate warranting consolidating this action with the other three wrongful death actions for joint trials.