

Matter of New York City Asbestos Litig.

2009 NY Slip Op 32104(U)

September 9, 2009

Supreme Court, New York County

Docket Number: 190102/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
FEINMAN
Justice

PART 12

KENNETH BALLARD
- v -

ANCHOR PACIFIC COMPANY

INDEX NO. 190102/08
MOTION DATE 8/22/09
MOTION SEQ. NO. 3
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 ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/09 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST
PRE-TRIAL CONFERENCE 9/24/09 10 a.m.
JURY SELECTION 10/5/09 9:30 a.m.

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 12

-----X
IN RE NEW YORK CITY ASBESTOS LITIGATION
-----X

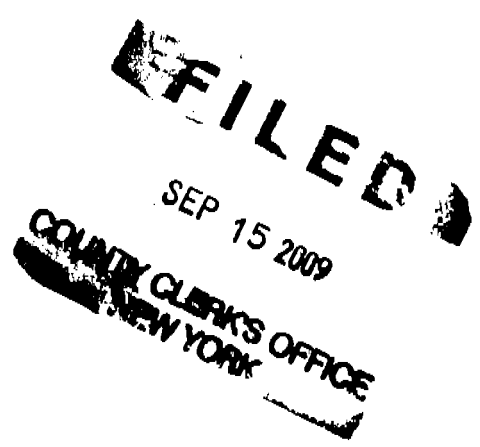
KENNETH BALLARD
HERBERT COHEN
IAN INNES
SPYRIDON KASSIMIS
ROBERT KILLENBERGER
FRANK KOFLER
ROBERT KRIZEK
CHRISTIAN MAHLSTEDT
TULLIO MEDAGLIA
JOSEPH MISTRETTA
JAMES RELYEA
JOSEPH WOODS

Plaintiffs,

-against-

ANCHOR PACKING COMPANY, et al.,
-----X

Index Number
190102/2008-003
190007/2008
190083/2008
111282/2008
190061/2008
190014/2008
190046/2008
190027/2008
190030/2008
190047/2008
190132/2008
190005/2008



Mot. Seq. No. 003
Submission Date 8/22/09

DECISION AND ORDER

PAUL G. FEINMAN, J.:

By order dated June 17, 2009, this "cluster" of twelve personal injury and wrongful death cases were referred to this Court by the Hon. Sherry Klein Heitler for trial by jury. Plaintiffs, who are all represented by the same counsel, move by order to show cause to join the twelve individual actions for a single trial. The defendants have submitted voluminous papers arguing for various reasons that these cases should be tried separately.¹ Oral argument was held on August 21, 2009 at

¹The court notes that in the *Ballard* action, plaintiffs have discontinued as against Buffalo Pumps, Inc., by stipulation signed on June 8, 2009. If not already done, plaintiffs' counsel is directed to serve a copy of the stipulation on the Clerk of the Court (60 Centre Street, Basement) and the Trial Support Office (60 Centre Street, Room 158).

which time the court indicated that the parties should expect to commence jury selection on October 5, 2009, but that it was unlikely that *all* twelve actions would proceed simultaneously. For the reasons which follow, these twelve cases shall be tried in two groups: those nine plaintiffs who have contracted mesothelioma, and those three plaintiffs who have contracted lung cancer. The larger group will be tried first.

The Individual Plaintiffs

1. Kenneth Ballard

Mr. Kenneth Ballard is a 68-year-old man currently suffering from lung cancer. Mr. Ballard's alleged exposure to asbestos derives from his time spent in the US Navy serving aboard the USS Lake Champlain between 1957 and 1962. Mr. Ballard served as a fireman and boilerman and was allegedly exposed to asbestos from the ship boilers, turbines, pipecovering, pumps, gaskets, packing, and valves.

2. Herbert Cohen

Mr. Herbert Cohen is a 78-year-old man currently suffering from mesothelioma. Mr. Cohen's exposure to asbestos allegedly derives from his career as an electrician. He worked from 1955 through to the 1980s in apartment buildings in the New York metropolitan area and at large construction sites. He was allegedly exposed to asbestos through his installation and removal of electrical materials as well as through contact with others performing joint compound work insulating pumps, generators, and boilers.

3. Ian Innes

Mr. Ian Innes is a 68 year old man currently suffering from lung cancer. He was allegedly exposed to asbestos from a lifetime working in the marine industry. Throughout his working

career, spanning from 1957 through the 1990s, Mr. Innes worked on gas engines, diesel engines, transmissions, and pumps. He was allegedly exposed to asbestos from exhaust wrappings on the diesel engine exhausts, asbestos manifold and lead gaskets on gas and some diesel engines, asbestos gaskets used in connection with water pumps, internal friction components used in connection with marine engines, and via the replacement of brakes on his cars and numerous bulldozers.

4. Spyridon Kassimis

Mr. Spyridon Kassimis recently died from mesothelioma at the age of 63. Kassimis' exposure to asbestos allegedly came from his career as a commercial painter. Between 1969 through to the 1980s, he was allegedly exposed to asbestos from working around other tradesmen, such as tapers applying spackling and joint compound, and floor tilers, pipe fitters, boiler workers, and electrician.

5. Robert Killenberger

Mr. Robert Killenberger recently died from mesothelioma at the age of 65. Mr. Killenberger was allegedly exposed to asbestos primarily from the variety of jobs he performed while working for two employers between 1958 and 1988 as an Usher's Captain at Radio City Music Hall and as a Con Edison utility worker. He was allegedly exposed to asbestos via general construction at Con Edison's headquarters, from turbines and boilers being cleaned and repaired by others and from asbestos gaskets that lined gas meters. He also was regularly around boiler installation, removal, and replacement while installing gas meters.

6. Frank Kofler

Mr. Frank Kofler recently died from mesothelioma at the age of 69. Mr. Kofler's exposure

to asbestos was allegedly from multiple sources starting in the 1950s through to the 1980s through his work involving renovation, brake work, and pump refurbishment and repair, and installation and removal of electrical materials, and through others in the same area performing joint compound work, insulating pumps, generators, and boilers.

7. Robert Krizek

Mr. Robert Krizek is a 74-year-old man currently suffering from mesothelioma. Mr. Krizek's alleged exposure to asbestos derives primarily from his employ as a salesman and yardman at Bayside Woodworking and Lumber Yard between 1966 and the mid-1990s. In addition, Krizek was allegedly exposed to asbestos during home improvement in the 1950s and mid-1960s.

8. Christian Mahlstedt

Mr. Christian Mahlsteadt is a 66-year-old man currently suffering from mesothelioma. Mr. Mahlsteadt's alleged exposure to asbestos derives primarily from his time spent working on various fishing vessels and passenger boats. Mr. Mahlstedt worked as a deckhand on vessels in the late 1950s during high school and as a commercial fisherman on his own vessels between 1965 and 1980. Mr. Mahlstedt began a business insuring various fishing and passenger vessels requiring him to inspect vessels before insuring them. His inspections required him to go into engine spaces and help boat owners with various repairs to ensure the ships were satisfactorily insurable. He was also allegedly exposed during the mid-1960s and mid 1970s while insulating his house and from replacing floor tiles.

9. Tullio Medaglia

Mr. Tullio Medaglia is a 63-year-old man currently suffering from mesothelioma. His

alleged exposure to asbestos occurred during his five-year career as a steam hole mechanic for Con Edison between 1967 and 1972. He was exposed to asbestos through the removal and reapplication of insulation, gaskets, and packing on valves.

10. Joseph Mistretta

Joseph Mistretta is a 71-year-old man currently suffering from lung cancer. Mr. Mistretta's alleged exposure to asbestos derives primarily from his exposure to boilers, valves, insulation, and cement over a 40-year period between the 1960s and his retirement in 2008, while employed as a helper, plumber's apprentice, and maintenance man.

11. James Relyea

Mr. James Relyea is a 63-year-old man currently suffering from mesothelioma. Mr. Relyea's exposure to asbestos allegedly derives from his employment as a lifelong roofer, working from 1963 through 1992 at various sites in and around the New York City metropolitan area. He was allegedly exposed to asbestos from roofing felts, base sheets, roofing cements, caulking, asbestos cement-covered metal sheeting, and asbestos blankets and asbestos gloves.

12. Joseph Woods

Mr. Joseph Woods is a 69-year-old man currently suffering from mesothelioma. Mr. Woods' asbestos exposure allegedly occurred during his lifelong employment Con Edison between 1964 and 1997. He worked with and was allegedly exposed to asbestos throughout his career from the products that were utilized in the powerhouse setting, including but not limited to boilers, cement, floor tiles, gaskets, insulation, pumps, turbines, and valves.

Analysis

This court has discretion, pursuant to CPLR 602, to join for trial actions "involving a

common question of law or fact.” The joint trial format furthers the interests of judicial economy. (*Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821[1993]). Further, joint trial 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.” (*Matter of New York City Asbestos Litigation*, 188 AD 2d at 225).

Any interests that joinder would serve must clearly yield where it would prejudice or deny a fair trial to any party. (See *Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir], *cert denied sub nom Celotex Corp. v Johnson*, 498 US 920 [1990]). Joint trial should be denied where “(1) individual issues predominate over common issues in the cases sought to be joined, or (2) the party opposing the joint trial demonstrates substantial prejudice.” (*Ballard v Armstrong World Industries*, 191 Misc. 2d 625, 627-28 [Sup Ct Monroe Co 2002]). Further, “[i]t is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process” of joinder. (*Malcolm v National Gypsum Co.*, 995 F 2d 346, 354 [2d Cir. 1993]). Factors to be considered in determining whether joinder is appropriate in the circumstances involving work place injuries include: “(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.’ ” (*Malcolm v National Gypsum Co.*, 995 F 2d 346, 351 [2d Cir. 1993], quoting, *In re All Asbestos Cases Pending in the United States District Court for the District of Maryland*, US Dist Ct, Dist of Maryland, Dec 16, 1983, en banc, slip op at 3). None of these factors is dispositive on its own; the list was established as “a guideline in determining whether to consolidate asbestos exposure cases.” (*Malcolm v National Gypsum Co.*, 995 F 2d at 350).

Here, there are numerous defendants, and numerous papers submitted in opposition to the motion for joinder. In general, they argue if the matters are joined, there will be individual facts and circumstances that will be overlooked, as well as prejudice that will occur. They point in particular to the facts that plaintiffs did not work in the same job location or do the same kind of work at the same time, that the types of products to which plaintiffs were exposed differed, that some plaintiffs are deceased and that not all plaintiffs contracted the same disease.

As *Malcolm* held, no one factor is dispositive; thus, the mere fact that the plaintiffs never shared a common worksite with each other is not itself a bar to joinder. This is because although no common occupations or common work-sites existed, all of the plaintiffs were engaged in occupations related to maintenance, inspection and repair. (See *Jamie Ames, et al*, Sup Ct, New York County, March 19, 2009, Friedman, J., Index No. 1007574/08; included in OSC, Comerford Aff, Exhibit B, p 4:12-20). Neither is it a bar to joinder that the plaintiffs were exposed to different types of asbestos products, or that there were overlapping exposures, nor is it significant that some of the defendants are named by many of the plaintiffs and some by only one. (*Jamie Ames, supra*). Of more importance is that all plaintiffs were exposed to asbestos in the "traditional" way, that is, by working directly with the material for years. (*Id.*).

Plaintiffs Ballard, Innes, and Mistretta have lung cancer. Plaintiffs Cohen, Kassimis, Killenberger, Kofler, Krizek, Mahlstedt, Medaglia, Relyea, and Woods have, or had, mesothelioma. All but one plaintiff was exposed during the 1960s and 70s, the exception being Mr. Ballard who claims exposure from 1957-1962. However, all plaintiffs were exposed for a period of time at some point between the 1950s and the 1980s. Even though there are somewhat different time frames, this need not affect the jury's ability to distinguish "state of the art" evidence. There are significant

issues in common as to the toxicity of asbestos fibers, and the “state of the art” of the industry’s knowledge of the dangers of asbestos through the years of plaintiffs’ exposures. The issues as to the etiology of each disease, mesothelioma or lung cancer, are also in common to all, and many of the same experts will be called to testify concerning the various plaintiffs. (See *Consorti v Armstrong World Indus., Inc.*, 72 F3d 1003, 1009 [2d Cir 1995], *vacated on other grounds* 518 US 1031 [1996]).

Although Kassimis, Killenberger and Kofler are deceased whereas the other plaintiffs remain living, this does not factor heavily into the joinder issue, as most people commonly understand these diseases ultimately may lead to death. Coupled with the long-term nature of the alleged exposures, whether the plaintiff is alive or deceased makes very little difference. Further, the cases are scheduled to go to trial in October and discovery is complete. As all plaintiffs have the same representation, there clearly exists no individual issues that predominate over the common issues, except in the case of the type of disease, and therefore joinder of these cases for trial in two groups appears proper. (See *Bender v Underwood*, 93 AD2d 747 [1st Dept 1983]).

This motion and set of opposition papers while not raising novel issues, is the first of its type to come before this Court and the Court has exercised its discretion in manner designed to balance the competing needs of plaintiffs and defendants given the Court’s current understanding of the issues which arise in asbestos litigation. However, nothing herein should be deemed dispositive for any future asbestos cluster which may be assigned to the court.

The Court further notes that any jury confusion and prejudice can be avoided by the use of “intelligent management devices,” including the encouragement of note-taking by jurors, explanations during the trial as to the limited use of evidence, and special verdict forms. (See

Consorti v Armstrong World Indus., Inc., 72 F3d 1003, 1008 [2d Cir 1995], *vacated on other grounds* 518 US 1031 [1996]). The Court draws counsel's attention to the publication, *Jury Trial Innovations in New York State: A Practical Guide for Trial Judges*, which is a description of jury trial innovations recommended by the working group of judges who piloted various jury innovations in jury trials and documented them in *The Final Report of the Committees of the Jury Trial Project*. *The Final Report*, as well as the subsequent bench book for trial judges to use when implementing the recommended innovations is available at www.nyjuryinnovations.org. Counsel should specifically familiarize themselves with the procedures described for implementing the innovations in the pamphlet for trial judges. In this trial, to aid juror comprehension and minimize any prejudice arising from the potential confusion of evidence, the Court will utilize all four of the recommendations of the Jury Trial Project described in the bench guide: voir dire openings of five minutes duration; juror note-taking; written juror questions; and a written copy of the Court's final jury charge being provided to the jurors pursuant to 22 NYCRR 220.11.

In analyzing the *Malcolm* factors as they apply to this case, the Court is most concerned with the fourth factor, that is that the plaintiffs do not all have the same disease as a result of asbestos exposure. That some of the plaintiffs have lung cancer, and some have or had mesothelioma, means that the pathology of the two diseases may be "substantively different," and that is why in the interest of justice, the Court will direct that plaintiffs should be split into two groups for trial. (See *Leroy A. Barnes, et al*, Sup Ct, New York County, April 7, 2008, Shulman, J., Index No. 103121/07; included in Antoniou Aff in Opp., Exhibit A, p 3). Therefore, while testimony as to the effects of the asbestos itself may be taken at the same time, the differences in evidence and medical testimony that will be required with the two diseases makes separation into

two groups – one for each disease — a reasonable solution for dividing this cluster. Accordingly, the twelve cases shall be tried in two groups, commencing with the nine mesothelioma cases, and followed by the three lung cancer cases.

Finally the Court reminds counsel that at the August 20, 2009 oral argument of this motion, the Court set September 10, 2009 as the deadline for filing *in limine* motions and that said motions must be electronically filed. It is therefore

ORDERED that the plaintiffs' motion for a joint trial of these matters is granted to the extent of (1) joining the Ballard (Index No. 190102/2008), Innes (Index No. 190083/2008), and Mistretta (Index No. 190047/2008) cases for trial as "the lung cancer group" and (2) joining the Cohen (Index No. 190007/2008), Kassimis (Index No. 111282/2008), Killenberger (Index No. 190061/2008), Kofler (Index No. 190014/2008), Krizek (Index No. 190046/2008), Mahlstedt (Index No. 190027/208), Medaglia (Index No. 190030/2008), Relyea (Index No. 109132/2008), and Woods (Index No. 190005/2008) cases for trial as "the mesothelioma group;" and it is further

ORDERED that jury selection in the mesothelioma group shall commence on October 5, 2009 at 9:30 a.m.; and it is further

ORDERED that jury selection in the lung cancer group shall commence at 9:30 a.m. on the first Monday which is not more than two weeks after the completion of the mesothelioma group; and it is further

ORDERED that all parties in both groups shall appear for the previously scheduled pre-trial conference on September 24, 2009 at 10:00 a.m.; and it is further

ORDERED that oral argument on any *in limine* motion filed by September 10, 2009 (per the August 20, 2009 conference), will be heard on September 24, 2009; and it is further

ORDERED that oral argument on any *in limine* motion filed after September 10, 2009 will be heard *after* the completion of jury selection and prior to the opening statements to the final petit jury; and it is further

ORDERED that all motions *in limine* must be electronically filed, with no courtesy copies required. Counsel are reminded that a consent to electronic filing must be filed each action that has been joined, not just in the lead action; and it is further

ORDERED that the plaintiffs' counsel shall serve a copy of this decision and order on the Trial Support Clerk who shall join these matters for trial in the above-referenced two groups.

Dated: September 9, 2009
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

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