

Miranda v ABEX Corp.

2010 NY Slip Op 30171(U)

January 25, 2010

Supreme Court, New York County

Docket Number: 104346/08

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

Index Number : 104346/2008
MIRANDA, ERNESTO
VS.
ABEX
SEQUENCE NUMBER : 014
CONSOLIDATION/JOINT TRIAL

INDEX NO. 104346/08
MOTION DATE _____
MOTION SEQ. NO. 014
MOTION CAL. NO. _____

in this motion to/for _____

NOTICE OF MOTION/ ~~ORDER TO SHOW CAUSE~~ — Affidavits — exhibits A-J

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1
2, 3, 4, 5, 6, 7, 8,
9, 10 + 11

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
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 25, 2010

[Signature]
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

ERNESTO MIRANDA (Index No. 103346/08) :
ANTONIO DiBENEDETTO (Index No. 190087/08) :
LUTZ SOMMER (Index No. 104156/00) :
GORDON CHENEY (Index No. 190091/08) :

Plaintiffs,

-against-

ABEX CORPORATION, *et al.*,

Defendants.

-----X

INDEX NOS.: 103346/08 *et al.*

DECISION AND ORDER

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Martin Shulman, J.:

The four captioned matters, Ernesto Miranda ("Miranda"), Antonio DiBenedetto ("DiBenedetto"), Lutz Sommer ("Sommer") and Gordon Cheney ("Cheney") are part of sixteen August 2007 FIFO/May 2009 *in extremis* clusters of asbestos cases (collectively, "Plaintiffs") that have been referred to this court for trial.

Two out of the four named Plaintiffs are deceased. Pursuant to CPLR §602(a), Plaintiffs' counsel moves to consolidate these four personal injury/wrongful death actions for joint trial claiming the existence of common questions of law and fact ("Motion").

Co-defendants, General Electric Company ("GE") and G Aviation Systems, LLC ("GE Aviation"), Foster Wheeler Energy Corporation ("Foster Wheeler"), Goodyear Tire and Rubber Company ("Goodyear"), Georgia-Pacific, LLC ("G-P"), David Fabricators of

N.Y., Inc. ("David"¹), Kentile Floors, Inc. ("Kentile"), J.H. France Refractories Company ("JH France"), CBS Corporation ("CBS"), Falk Corporation ("Falk"), Gardner Denver, Inc. ("Gardner") and Felt Products Mfg. Co. ("Fel-Pro"²)(collectively, "Defendants"³) oppose the Motion, each contending that these cases' dissimilarities outweigh their commonalities.

In support of Plaintiffs' Motion, counsel's supporting memorandum of law discusses obvious commonalities, i.e., Levy Phillips & Konigsberg jointly represent Plaintiffs; Plaintiffs were/are alleged to have been afflicted with mesothelioma, two of whom succumbed to this always fatal disease. Among other common issues/factors which Plaintiffs claim predominate over individual ones are: Plaintiffs, while admittedly not exposed at one common work site, share common methods of exposure to the same type of asbestos containing insulation or other materials ("ACM") and similar work environments (e.g., both Miranda and Sommer were exposed to ACM through their work with brakes on automobiles, etc.); Plaintiffs were engaged in similar work tasks and were exposed to ACM as end-users/bystanders; Cheney experienced ACM exposures in the 1950s, DiBenedetto had such exposures during the 1950s -1980s,

¹ For the sake of brevity, David, JH France, Kentile, CBS and Falk have adopted the respective facts and legal arguments of co-defendant GE's opposition to Plaintiffs' consolidation motion.

² Fel-Pro was the predecessor to Federal Mogul Asbestos Personal Injury Trust, who is a named defendant only in the Sommer action.

³ As of November 19, 2009, among the Defendants opposing consolidation of these four actions for joint trial: Foster Wheeler, GE, GE Aviation, Goodyear, JH France and Kentile continue to be named defendants in the Miranda action; David, G-P, JH France and Kentile continue to be named defendants in the DiBenedetto action; and Foster Wheeler, Gardner, GE, G-P, JH France, Kentile and Falk continue to be named defendants in the Cheney action.

Miranda was exposed to ACM during the 1970s-1980s and Sommer experienced ACM exposure during the 1960s-1980s, all of 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 two decedents' cases with the two living plaintiffs' cases for trial will not be prejudicial since Plaintiffs were all diagnosed with mesothelioma and the living plaintiffs will suffer the same fate; 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 both in the United States and Europe to ships at sea and powerhouses; (2) Plaintiffs did not uniformly share common occupations but were in fact rather diverse (i.e., Miranda *inter alia* was a mechanic's helper, printer, photocopier, computer technician carpenter and "shade tree" automobile mechanic, DeBenedetto was a mason/construction worker and restaurant cook/owner, Sommer was a career automotive mechanic and Cheney was principally a U.S. Navy Machinist Mate)(see Tevis Opp Aff. on behalf of Goodyear at ¶ 5); (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) none of them share the same time period of exposure (*viz.* "Miranda, DiBenedetto and Sommer all allege exposures in the 1970s and 1980s, DeBenedetto is

the only plaintiff to allege exposure in the 1960s and Cheney is the only plaintiff to allege exposure in the 1950s . . ." (*Id.* at ¶ 11); and the anticipated state-of-the-art testimony will have to span forty 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 two living plaintiffs will be prejudiced by the other two wrongful death claims and (6) there is no defendant that is common to all Plaintiffs.

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 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 four 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 [Altholz, et seq.]*, 11 Misc.3d 1063(A), 816 N.Y.S.2d 698 [Sup. Ct., N.Y. Co., 2006])(Exhibit J to consol. motion), 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 fatal disease, mesothelioma. 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 at various work sites which exposed them to ACM during overlapping periods of time from the 1950'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 Cheney 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 Cheney's stint as a machinist mate 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 Cheney was consolidated with the other cases.

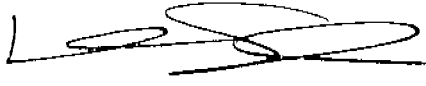
This court has previously ruled that living plaintiffs suffering a fatal disease can have their personal injury cases tried jointly with wrongful death cases, ruling that defendants would not be prejudiced by such joint trials under certain circumstances. Moreover, consideration can be had of other commonalities such as the existence of bankrupt, absentee tortfeasors which will arguably overlap in all of these actions and defendants' anticipated game plan to establish these tortfeasors' liability and mitigate their own liability under CPLR Article 16. See *Tancredi v. A.C.&S., Inc. (In re N.Y. City Abestos Litigation)*, 6 A.D.2d 352, 775 N.Y.S.2d 520 (1st Dept., 2004).

Accordingly, Plaintiffs' Motion is granted, in part, to consolidate the Miranda, DiBenedetto and Sommer actions for a joint trial. The Cheney action will be tried immediately thereafter.

The remaining parties in these four cases are directed to appear at a pre-trial conference in Part 1, Room 325 at 60 Centre Street, New York, New York 10007 on February 9, 2010 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
January 25, 2010



HON. MARTIN SHULMAN, J.S.C.

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