

Matter of New York City Asbestos Litig.

2010 NY Slip Op 30945(U)

April 19, 2010

Supreme Court, New York County

Docket Number: 190053/09

Judge: Martin Shulman

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

PRESENT: Shulman
Justice

PART 1

Bombace, Concetta

INDEX NO. 190053/09

- v -

MOTION DATE _____

A.O. Smith Water

MOTION SEQ. NO. 07

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause — Affidavits — Exhibits <u>A-Q</u>	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2, 3, 4, 5, 6</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 orders.

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 19 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):

[*3]

The remaining co-defendants, Foster Wheeler, LLC ("Foster Wheeler") and Goodyear Tire and Rubber Company and Goodyear Canada, Inc. ("Goodyear") (collectively, "Defendants"²), oppose the Motion, each contending that these cases' dissimilarities outweigh their commonalities.

In support of Plaintiffs' Motion, counsel's supporting affirmation discusses obvious commonalities, i.e., Weitz & Luxenberg jointly represent Plaintiffs and Plaintiffs were/are alleged to have been afflicted with lung cancer, two of whom succumbed to this 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; Plaintiffs were engaged in similar work tasks and were exposed to ACM as end-users/bystanders; Plaintiffs' respective ACM exposures occurred during the 1940s - 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; these remaining co-defendants 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

² Goodyear is a solely named defendant in the Bombace action and Foster Wheeler is a solely named defendant in the Donahue action. Parenthetically, certain co-defendants who did not file any opposition to the Motion continue to be named defendants in the remaining three actions: Crosby Valve Inc. and Slant/Fin Corporation continue to be named defendants in the Bombace action; Burnham, LLC and Kaiser Gypsum Company, Inc. continue to be named defendants in the Cataldo action and National Grid Generation, L.L.C. (Keys Generation, LLC, f/k/a Long Island Power Authority) and Tishman Realty and Construction Co., Inc. continue to be named defendants in the Donahue action.

via documentary and testimonial evidence will provide for considerable overlap; consolidating one decedent's case with the two living plaintiffs' cases for trial will not be prejudicial since Plaintiffs were all diagnosed with terminal lung cancer 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 the U.S. Navy, commercial and residential sites and powerhouses; (2) Plaintiffs did not uniformly share common occupations but were in fact rather diverse (i.e., Bombace *inter alia* was a sheet metal worker, Cataldo was a plumber and Donahue *inter alia* was a steam fitter, mechanic and welder)(see Tevis Opp Aff. on behalf of Goodyear at ¶ 8); (3) not only did Plaintiffs not uniformly experience common exposures to over thirty different asbestos containing products, but they also did not share the same manner of exposure (i.e., some Plaintiffs were exposed as end-users of ACM whereas others were exposed as bystanders); (4) Bombace's service in the U.S. Navy and his claimed exposure to ACM during that service requires this decedent's action be tried separately; (5) Bombace's and Donahue's exposure to ACM at various powerhouses similarly requires that their respective cases be tried separately from the Cataldo action; (6) Defendants in cases involving the personal injury claims of the two living plaintiffs will be prejudiced by Bombace's wrongful death claims; and (7) 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

* 5]

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 three 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 I to 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, 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 at various work sites which exposed them to ACM during overlapping periods of time from the 1940's to the 1980's. Against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to Plaintiffs. 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). Finally, 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 these circumstances.

Historically, to avoid jury confusion because of potential defenses to be raised, this court has severed actions of plaintiffs with work histories involving exposure to ACM at

powerhouses and during stints in the U.S. Navy and/or on ships at sea. To persuade this court to reconsider its position regarding these factors, Plaintiff's supporting affirmation *inter alia* attached a copy of *Ballard v. Anchor Packing Company*, n.o.r., Index No. 109102/08 issued September 9, 2009 (Sup. Ct., N.Y. Co., Feinman, J.)(Exhibit C to Motion), a decision and order which determined a strikingly similar motion to consolidate twelve personal injury/wrongful death actions for a joint trial. In *Ballard, supra*, when Justice Feinman *inter alia* consolidated nine mesothelioma cases for a joint trial, the court apparently did not find these factors so dissimilar as to warrant severing the actions of plaintiffs exposed to ACM in powerhouses, the U.S. Navy and/or at sea from the actions of plaintiffs exposed to ACM at other work sites and granting the former separate trials. However, what is significant is the fact that defendants, after filing a notice of appeal of the *Ballard* consolidation decision, immediately moved before the Appellate Division, First Department to stay the trial of those nine actions raising the very same arguments being raised here. Notably, the stay application was denied (*see Matter of New York City Asbestos Litigation*, Motion No. M-4237, 2009 N.Y. Slip Op. 85378[U] [1st Dept.]) (Exhibit D to Motion). *See also, Ames v. A.O. Smith Water Products, Co.*, n.o.r., Index No. 107574/08 issued March 19, 2009 (Sup. Ct., N.Y. Co., Friedman, J.)(in its bench decision spread on the record, the court advanced an identical *ratio decidendi*)(Exhibit E to Motion), *stay den.*, (*see Matter of New York City Asbestos Litig. - A.O. Smith Water Products, Co., Inc., Robert A. Keasbey, Co.*, Motion No. M-1491A, 2009 N.Y. Slip Op. 70086[U] [1st Dept.]) (Exhibit F to Motion). Notwithstanding this court's views to the contrary, the foregoing decisions now make it clear that the Appellate Division found

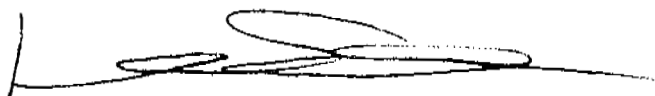
defendants' perceived prejudices and concerns about jury confusion wanting.

Accordingly, Plaintiffs' Motion to consolidate these remaining three actions for a joint trial is granted in its entirety.

The remaining parties in the Bombace, Cataldo and Donahue actions are directed to proceed to jury selection at 60 Centre Street, New York, New York on Wednesday, April 28, 2010 at 9:30 am.

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
April 19, 2010



HON. MARTIN SHULMAN, J.S.C.

FILED
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