

Matter of New York City Asbestos Litig.

2010 NY Slip Op 31476(U)

June 10, 2010

Sup Ct, NY County

Docket Number: 105736/99

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

Freedom of Access to Clinic Entrances v. National Alliance

- v -

A.C.T. & S. Inc.

INDEX NO. 105736/899
MOTION DATE _____
MOTION SEQ. NO. 001
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 <i>A-Q</i>	<u>1</u>
Answering Affidavits -- Exhibits _____	_____
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
JUN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUN 10 2010

[Signature]
MARTIN SHULMAN
J.S.C. *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,

Index Nos.: 105736/99, et al.

SAMUEL COLE (Index No. 107729/00)
ARTHUR DIETZ (Index No. 107736/99)
THOMAS DOSCH (Index No. 102479/00)
FRANCIS PEARCE (Index No. 107198/99)

DECISION AND ORDER

Plaintiffs,

-against-

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

Defendants.
-----X

FILED
JUN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Martin Shulman, J.:

The four captioned asbestos cases involving the following plaintiffs: Samuel Cole ("Cole"), Arthur Dietz ("Dietz"), Thomas Dosch ("Dosch") and Francis Pearce ("Pearce")(collectively, "Plaintiffs"), have been transferred to this court pursuant to the NYCAL Amended Case Management Order for trial. Three of the four Plaintiffs are deceased.

Pursuant to CPLR §602(a), Plaintiffs' counsel moves by order to show cause ("OSC") to consolidate the one personal injury action and three wrongful death actions for joint trial claiming the existence of common questions of law and fact.¹ No opposition to the OSC has been filed.

In support of Plaintiffs' OSC, counsel's supporting affirmation advances what appear to be obvious commonalities, i.e., Weitz and Luxenberg jointly represent

¹ On the return date of the consolidation OSC, Plaintiffs' counsel advised that the Cole and Dosch actions have settled and that only one defendant, Fulton Boilerworks, Inc., remains in the Dietz action and another co-defendant Mario and DiBono remains in the Pearce action.

Plaintiffs and decedent Dietz succumbed to mesothelioma, whereas decedent Pearce succumbed to colon cancer. Among other common issues/factors which Plaintiffs claim predominate over individual ones are: Plaintiffs, while admittedly not exposed at one common work site, were exposed to the same type of asbestos containing insulation or other materials ("ACM") in the Navy and/or Navy shipyards, comparable commercial work sites and residential work sites; Plaintiffs were engaged in similar occupations in the construction trades and were exposed to ACM as end-users/bystanders; while Dietz had ACM exposures in the 1940s, nonetheless, both Plaintiffs had such exposures from the 1950s through the 1970s; their respective exposure histories 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, each respective defendant will seek to prove liability of 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 these two decedents' cases will not prejudice any defendant; and finally, these cases are ready for trial.

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]).

In exercising discretion to consolidate these two 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). After a review of the OSC and supporting papers, this court finds that commonalities between Plaintiffs predominate over any perceived individual factors.² Accordingly, it is hereby

ORDERED that Plaintiffs' OSC is granted to the extent that the Dietz and Pearce actions are consolidated for a joint trial.

The parties are directed to appear on July 26, 2010 at 9:30 a.m. at 60 Centre Street, New York, New York, at the Central Jury Room 452 for jury selection and the ensuing trial forthwith.

² Notably, Plaintiffs do not share a common disease (Dietz suffered from mesothelioma and Pearce suffered from colon cancer). However, the etiology of their respective cancers is a common one due to their exposure to ACM.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
June 10, 2010



HON. MARTIN SHULMAN, J.S.C.

FILED
JUN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE