

Matter of New York City Asbestos Litig.

2010 NY Slip Op 33941(U)

February 17, 2010

Supreme Court, New York County

Docket Number: 190009/2009

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART IV

Index Number : 190009/2009

BATISTA, RAFAEL

vs

A. O. SMITH

Sequence Number : 001

CONSOLIDATE/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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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.

Dated: 2/17/2010

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: CIVIL TERM: PART 12

-----X
In Re NEW YORK CITY ASBESTOS LITIGATION:

**JOINDER &
SCHEDULING
DECISION AND ORDER**

RAFAEL BATISTA	Index No. 190009/2009	Mot. Seq. No. 001
DONALD J. CHRISTIE	Index No. 190113/2009	Mot. Seq. No. 007
JOHN CONNOLLY	Index No. 190161/2009	Mot. Seq. No. 010
SIDNEY GOLDSTEIN	Index No. 190164/2009	Mot. Seq. No. 009
JOSEPH M. LINK	Index No. 190121/2008	Mot. Seq. No. 012
RICHARD R. PARSONS	Index No. 190026/2009	Mot. Seq. No. 006
DANIEL SIMON	Index No. 190010/2009	Mot. Seq. No. 009
JAMES J. YOUNG, Jr.	Index No. 190139/2009	Mot. Seq. No. 005

-----X

PAUL G. FEINMAN, J.:

Plaintiffs move for a joint trial of eight matters, all of which are asbestos-related *in extremis* personal injury actions. Various defendants have submitted opposition papers. For the reasons that follow, five of the mesothelioma cases shall be jointly tried, to be followed by a joint trial of the two lung cancer cases. The Links matter is stayed until a substitution is made of the personal representative for the now-deceased plaintiff.

The Individual Plaintiffs

1. Rafael Batista

Rafael Batista is 65 years old and suffers from mesothelioma. He was allegedly exposed to asbestos from 1973 until 1981 primarily while installing drywall in residential apartments (190009/2009: Dymond Aff. ¶ 7; Ex. F).

2. Donald J. Christie

After being diagnosed with mesothelioma, Donald Christie died at the age of 78.

Allegedly, he was exposed to asbestos while serving in the US Navy in the 1950s as a pipefitter (190009/2009: Dymond Aff. ¶ 8; Ex. G).

3. John Connolly

John Connolly is 58 years old and alleges that his lung cancer resulted from his exposure to asbestos while he served in the US Navy as a Boatswain's Mate in the 1970s (190009/2009: Dymond Aff. ¶ 9; Ex. H).

4. Sidney Goldstein

Sidney Goldstein is 86 years old and suffers from mesothelioma. He alleges that he was exposed to asbestos in various capacities as a home renovator and while working in the engine and boiler rooms of commercial ships (190009/2009: Dymond Aff. ¶ 10; Ex. I).

5. Joseph M. Link

Joseph Link died from mesothelioma at the age of 79 (190009/2009: Dymond Aff. ¶ 11; Ex. J). Allegedly, he was exposed to asbestos from 1947 until 1993 while working as an electrician as well as other trades at various plants and factories (190009/2009: Dymond Aff. ¶ 11; Exs. J-K)

6. Richard R. Parsons

Richard Parsons died from mesothelioma at the age of 78. Allegedly, he was exposed to asbestos during his service as a boilerman in the US Navy from 1948 until 1967. He performed similar duties during his employment at the Pfizer powerhouse from 1968 until 1973 (190009/2009: Dymond Aff. ¶ 12; Ex. L).

7. Daniel Simon

Daniel Simon is 84 years old and currently suffering from mesothelioma. He alleges that

he was exposed to asbestos during his service as an electrician in the US Navy from 1943 until 1946. He also alleges that he was exposed during his employment with various other employers from 1946 until his retirement in 1989 (190009/2009: Dymond Aff. ¶ 13; Ex. M).

8. James J. Young, Jr.

James J. Young, Jr. is 68 years old and suffering from lung cancer. He alleges that he was exposed to asbestos in the 1950s while working as a mechanic's helper. Young served as a fireman and engineman in the US Navy from 1958 until 1970. Subsequently, he repaired commercial HVAC units and renovated homes where he was also allegedly exposed to asbestos (190009/2009: Dymond Aff. ¶ 14; Ex. N).

Analysis

I. Joseph M. Link

Defendant Cooper contends that this court is without jurisdiction to proceed in the matter bearing index number 190009/2008 because plaintiff Joseph Link's death after the commencement of this suit divests this court of jurisdiction until a personal representative is appointed (190009/2008: Cooper Memo of Law, at 4-6). Plaintiffs' submissions fail to address this contention, let alone rebut it. CPLR 1015 (a) requires that upon the death of a party, "the court shall order a substitution of the proper parties." Notwithstanding the fact that the co-plaintiff is decedent Joseph Link's wife, Yvone Link (190121/2009: Compl. ¶ 206), "the record in the present case is barren of any evidence permitting this court to ascertain [Joseph Link's] administrator" (*Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st Dept 1985]; see *Tag 380, LLC v Estate of Ronson*, 2010 NY Slip Op 00366, *2, ___ AD3d ___ [1st Dept 2010]). The court recognizes that "where the decedent's co-plaintiff is the

surviving spouse, with a clear identity of interest,” any measures that would otherwise be void under CPLR 1015 (a) can be subsequently cured (*Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]). However, CPLR 1021 requires that when “the event requiring substitution occurs before final judgment” such substitution must be “made within a reasonable time [or] the action may be dismissed as to the party for whom substitution should have been made.”

Moreover, as a derivative claim, plaintiff Yvone Link’s claim for loss of consortium necessarily stands or falls with Joseph Link’s claims (*see Paterno v CYC, LLC*, 46 AD3d 788, 789 [2d Dept 2007]; *Camadeo v Leeds*, 290 AD2d 355, 356 [1st Dept 2002]; *Caridi v Durst*, 228 AD2d 396, 397 [1st Dept 1996]). Accordingly, this matter is deemed stayed until such time that plaintiff’s personal representative is substituted for the decedent either by stipulation or by motion. In the event that a substitution is not made in a reasonable time, defendants may move to dismiss pursuant to CPLR 1021.

II. Joinder

CPLR 602 (a) vests this court with the discretion to order a joint trial “[w]hen actions involv[e] a common question of law or fact” (*see Walls v Prestige Mgt., Inc.*, 59 AD3d 311, 311 [1st Dept 2009]). The movant bears the initial burden of demonstrating the commonality of issues; the burden then shifts to the opponent to demonstrate prejudice or the possibility of jury confusion (*see Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006]; *Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983 mem]). The chief policy considerations behind consolidation or joinder are efficiency and the conservation of judicial resources (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 73-74 [1st Dept 2002]; *Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1st Dept 1993], *affd* 82 NY2d 821 [1993]).

This court is accorded “great deference” in determining whether consolidation or joinder is warranted (*Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, AD3d 518, 519 [1st Dept 2004]).

To make this determination in the context of asbestos related personal injury actions, the court considers these factors: “(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs [a]re living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged” (*Malcolm v National Gypsum Co.*, 995 F 2d 346, 351 [2d Cir 1993] [quotations and citations omitted]).

Here, the various defendants have submitted numerous papers in opposition to plaintiffs’ motions. Collectively, defendants’ submissions allege, in a conclusory fashion, that they oppose consolidation because they would suffer prejudice and jury confusion would arise. Specifically, they focus on the fact that plaintiffs’ were exposed by different means, at different locations, and at different times (190009/2009: Goulds Memo of Law, at 4-8).

While defendants correctly contend that plaintiffs’ occupations and various job titles differ, seven of the eight plaintiffs’ injuries resulted from “insulation exposure from boilers, valves, pumps, and other insulated equipment; six of the eight [p]laintiffs have gasket and packing exposure from the repair of equipment; and five of the eight [p]laintiffs have pump and valve exposure” (190009/2009: Dymond Aff. ¶ 20). Even if no common occupations or work-sites existed, every plaintiff was engaged in an occupation related to maintenance, inspection and/or repair and was “exposed to asbestos in the ‘traditional’ way, that is, by working directly with the material for years” (*Matter of Ballard*, Index No. 190102/2008, Dec. and Ord. dated

9/10/2009 [Feinman, J.]; *see Matter of Landry*, Index No. 111058/2003, Dec. and Ord. dated 1/21/2010 [Feinman, J.]). Thus, “a joint trial will avoid unnecessary duplication of proceedings, [and] save unnecessary costs” (*Cummin v Cummin*, 56 AD3d 400, 400 [1st Dept 2008]).

Next, defendants argue that distinguishing the state of the art testimony as it evolved over the span of over 50 years—from 1943 as alleged by Simon to 1999 as alleged by Goldstein—would confuse the jury. While the dates of plaintiffs’ first alleged exposures do vary, this alone is not sufficient to warrant denial of the motion to join the actions for trial. Nor does it necessarily follow, as defendants would have the court believe, that this would lead to jury confusion. Expert evidence of the evolution of the state of the art may, in fact, clarify the jury’s understanding of the cause of plaintiffs’ injuries and their understanding of the various defendants’ responsibilities, or lack thereof. Further, given the fact that jurors must be presumed capable of distinguishing between concurrent causes of an illness or the aggravation of a pre-existing condition, as the pattern jury instructions assume, the court will not presume that jurors would be unable to distinguish between the state of the art testimony related to the different illnesses at different time periods.

Additionally, defendants argue against joinder because plaintiffs Christie, Connolly, Parsons, Simon, and Young claim exposure during their service in the US Navy and the defendants in those action may be entitled to certain Federal government contractor defenses that would not be applicable to the defendants in the Batista and Goldstein cases (190009/2009: Graffeo Aff. ¶ 8; 190161/2009: Vega Aff. ¶¶ 10-13; 160164/2009: O’Rourke Aff. ¶ 8) (*see Boyle v United Technologies Corp.*, 487 US 500, 512 [1988]). The court recognizes the import of this contention, but finds that this single issue does not predominate over the common issues such

that granting consolidation would constitute an abuse of discretion and “defendants have failed to demonstrate that consolidation will prejudice a substantial right” (*Walls v Prestige Mgt., Inc.*, 59 AD3d at 311; see *Bender v Underwood*, 93 AD2d 747, 747 [1st Dept 1983]; *Matter of New York City Asbestos Litig.*, 2009 NY Slip Op 50072[U], *4 [Sup Ct, NY County 2009, Schulman, JJ]).

Neither is the fact that only five of the plaintiffs are living determinative. As *Malcom* held, no one factor is dispositive and it is commonly understood that the alleged diseases ultimately lead to death and, coupled with the long-term nature of the alleged exposures, whether the plaintiffs are alive is of little import (see *Matter of New York City Asbestos Litig.*, 9 Misc 3d 1109[A] at *1). Contrary to defendants’ contention, the court does not find that consolidation would confuse the jury because the “some plaintiffs are living while others are deceased” (190009/2009: Waller Aff. in Opp. ¶ 3)

However, the court is concerned with the fourth *Malcolm* factor because the plaintiffs’ exposure to asbestos has allegedly caused different diseases. Two plaintiffs, Connolly and Young, have lung cancer and the remainder have mesothelioma, which means that the pathology of the two diseases may be substantively different and will require “distinct testimony” (*Malcolm*, 995 F2d at 352). Thus, the court will, in the interest of justice, direct that the plaintiffs should be split into two groups for trial (see *Leroy A. Barnes*, Index No. 103121/2009 [Sup Ct, NY County 2008, Shulman, J.]). 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 a reasonable solution for dividing this cluster. The cases shall be tried in two groups, commencing with the five mesothelioma cases, and followed by the two lung cancer cases, which will maximize expedient

resolution of these matters while minimizing the potential prejudice to the parties (*see Matter of New York City Asbestos Litig.*, 9 Misc 3d 1109[A], *2 [Sup Ct, NY County 2005] [“the experts’ testimony needed to describe the state-of-the-art during plaintiffs’ exposures can be greatly diminished by having that testimony accomplished in one trial than by having it repeated over and over in multiple trials”]).

Finally, because “consolidation [and joinder] is favored by the courts” (*Humiston v Grose*, 144 AD2d 907, 908 [1st Dept 1988; *see generally* Siegel, NY Prac § 128, at 221 [4th ed]), and because of the relatively few plaintiffs (*see e.g.*, *New York Cent. Mut. Ins. v McGee*, 25 Misc 3d 1232[A], *5 [Sup Ct, NY County 2009]), all of whom share the same counsel (*see Matter of New York City Asbestos Litig.*, 22 Misc 3d 1109 [A], *6 [2009]), the risk of jury confusion is avoidable by “intelligent management devices” such as special verdict forms, explanations during the trial as to the limited use of evidence, and the encouragement of note-taking by the jurors (*see Consorti v Armstrong World Indus., Inc.*, 72 F3d 1003, 1008 [2d Cir 1995], *vacated on other grounds* 518 US 1031 [1996]; *Zalduondo v City of New York*, 141 AD2d 816, 818 [2d Dept 1988]). The court draws counsel’s attention to the publication, *Jury Trial Innovations in New York State: A Practical Guide for Trial Judges*, which describes 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 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 use 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.

After consultation with the Administrative Judge, who is also responsible for overseeing the distribution of the asbestos litigation in New York County, the court is advancing the jury selection date for these *in extremis* cases is advanced from April 8, 2010 to March 8, 2010 at 9:30 A.M. in Part 12. The March 9, 2010 conference regarding in limine motions is advanced to March 2, 2010 at 9:30 A.M. It is therefore

ORDERED that plaintiffs' motion for a joint trial of these matters is granted to the following extent:

(1) *James J. Young, Jr. v A.O. Smith Water Products* (Index No. 190139/2009), and *John Connolly v 3M Company* (Index No. 190161/2009) are joined for trial as "the lung cancer group";

(2) *Batista v A.O. Smith Water Products*, (Index No. 190009/2009), *Donald J. Christie v A.O. Smith Water Products* (Index No. 190113/2009), *Sidney Goldstein v A.O. Smith Water Products* (Index No. 190164/2009), *Richard R. Parsons v A.O. Smith Water Products* (Index No. 190026/2009), and *Simon v A.O. Smith Water Products* (Index No. 190010/2009) are joined for trial as the "the mesothelioma group;" and it is further

ORDERED that *Joseph M. Link v 84 Lumbar Company* (Index No. 190121/2008) is stayed until such time that plaintiff's personal representative is substituted for the deceased

Joseph M.Link without prejudice to a motion to dismiss if such substitution is not made within a reasonable period of time; and it is further

ORDERED that the mesothelioma group will proceed to jury selection on Monday, March 8, 2010 at 9:30 A.M. in Part 12, 60 Centre Street, New York, New York 10007 with a final pre-trial conference on Tuesday, March 2, 2010 at 10:00 A.M.; and it is further

ORDERED that the lung cancer group will proceed to jury selection or 72 hours after either a verdict or settlement of all of the cases in the mesothelioma group of cases. Plaintiffs' counsel shall apprise defense counsel for the lung cancer group when the mesothelioma group is submitted to the jury, or the last case settled; and it is further

ORDERED that any party may submit a letter, not to exceed five pages, outlining any in limine motions it believes need to be decided prior to jury selection for the mesothelioma group by the court by February 25, 2010. Any reply letter is limited to two pages and is due by March 1, 2010 at 5:00 P.M. The court will rule, as necessary, at the March 2, 2010 conference. If further briefing is needed, the court will so advise the parties; and it is further

ORDERED that a schedule for in limine motions for the lung cancer group will be set in a future order; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order upon all defendants, the widow of Joseph Links, the Clerk of Trial Support (Room 158), and the Clerk of Part 30, who shall forward the trial cards for all of these matters, including Links, to the Clerk of Part 12.

This is the decision and order of the court.

Dated: February 17, 2010
New York, New York



J.S.C.