

Matter of New York City Asbestos Litig.
2011 NY Slip Op 31210(U)
May 2, 2011
Supreme Court, New York County
Docket Number: 114483/02
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE
PRESENT: _____
J.S.C. Justice

PART 10

Re: VITO CONTI

INDEX NO. 114483/02

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

A.C.S. -> INC., ET AL.

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Practical conference set for 5/23/11 @ 9:30am

Dated: 5/2/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Trial Term 10

-----X
IN RE NEW YORK CITY ASBESTOS LITIGATION
December 2010
-----X

Decision/Order

Vito Conti
John Fowler
David Giancarlo
Terry Kessler
Harold McGinn
Joseph McInerney
Michael Melnyk
Gino Romano

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Index #: 114483/02
Index #: 119393/00
Index #: 100725/01
Index #: 101892/01
Index #: 110438/01
Index #: 122053/00
Index #: 118374/00
Index #: 115836/00

Hon. Judith J. Gische:

Pursuant to CPLR 2219(a) the following numbered papers were considered by the Court on this motion for a joint trial:

PAPERS	NUMBERED
OSC, DH affirm., exhibits.....	1
ERIC affirm. in Opp.....	2

Upon the foregoing papers the decision and order of the court is as follows:

By order of the Administrative Judge, dated December 22, 2010, the above noted eight (8) cases were referred to this court for trial, along with twenty-three (23) other cases. (Collectively "December 2010 FIFO cluster"). Three of the December 2010 FIFO cluster have already been finally resolved. All of the cases in the cluster claim personal injuries and some claim wrongful death, as a result of each plaintiffs' exposure to asbestos. Plaintiffs now seek to have these identified 8 cases jointly tried.

The defendants affected by this motion filed joint opposition.¹

CPLR §602 permits the court, within its discretion, to join cases for trial when there are common questions of law and fact. Not all of the facts or issues need to be identical, but there must be some identity of issues, such that the salutary goal of judicial economy is served. Cummin v. Cummin, 56 AD3d 400 (1st dept. 2008); Bradford v. John A. Coleman, 110 AD2d 965 (3rd dept. 1985). Once the requirement of commonality has been satisfied, the opponent needs to demonstrate that a joint trial will unduly prejudice a substantial right. Geneva Temps, Inc. v. New World Communities, 24 AD3d 332 (1st dept. 2005).

In the case of asbestos litigation, joint trials of more than one plaintiff at a time have been routinely permitted. see e.g.: In re New York Asbestos Litigation, 23 Misc3d 1109(A) (NY Co. Sup Ct. 2009; Shulman, J); New York City Asbestos Litigation v. A.O. Smith Water Products, 9 Misc3d 1109(A) (NY Co. Sup. Ct. 2005, York, J.); Ballard v. Anchor Packing Company, (index # 190102/08; NY Co. Sup. Ct., order dated Sept. 9, 2009, Feinman, J.); Ames v. A.O. Smith Water Products, et. al., (index #107574, NY Co. Sup Ct. Order dated March 16, 2009, Friedman, J.); Bauer v. A.O. Smith Water Products, (index #115756/07, NY Co. Sup. Ct., order dated August 21, 2008; Lobis, J.); Matter of New York Asbestos Litigation, 173 Misc2d 121 (NY Co. Sup. Ct., 1997, Lehner, J.). The joint trial format reduces the costs of litigation, make more economical use of the trial court's time, speeds the disposition of cases and encourages

¹Although not named in each of the 8 cases, the defendants involved in this motion are: Crane Co., DB Riley, Foster Wheeler, Goulds, JH France, Niagra Insulations, Owen-Illinois, Inc., Westinghouse, Kentile, Oakfabco, Weil-McLain, and Peerless.

settlements. In re New York City Asbestos Litigation (Brooklyn Naval Shipyard Cases), 188 AD2d 214 (1st Dep't 1993) *aff'd* 82 NY2d 821 (1993).

In deciding what cases should be joined for trial, the courts have looked to the factors enunciated in the seminal case of Malcolm v. National Gypsum Co., 995 F2d 346 (2nd Cir. 1993), where the Second Circuit Court of Appeals delineated specific factors that are relevant in determining whether to jointly try cases based upon asbestos exposure. The factors include: [1] common work site; [2] similar occupation; [3] similar time of exposure; [4] type of disease; [5] whether plaintiff's 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. None of these factors is dispositive on its own, but each serves as a guideline in assisting the court in deciding whether to combine all, some or none of the cases for trial. Malcolm v. National Gypsum Co., 995 F2d at 350. Moreover, these guideline are not exclusive of other considerations that might be relevant to any particular motion for a joint trial.

Applying these legal standards to the facts at bar, the court holds:

All of the plaintiffs are represented by the same law firm. That fact, standing alone, is not a sufficient basis for joint trials.

Insofar as discovery is concerned, defendants claim in opposition to a joint trial that additional discovery is required, based upon witness lists they recently received. At the time this motion was made, defendants represented to the court that they needed an additional 60 to 90 days to complete such additional discovery. Since no trial date will be set before the 90 day period elapses, any discovery issues present among these 8 cases, neither cut against nor weighs in favor of a joint trial.

In this case, all of the plaintiffs have/had either lung cancer or mesothelioma. The courts have recognized that each disease requires different medical testimony. One plaintiff with lung cancer is a smoker, which will require additional scientific and medical testimony. In re New York city Asbestos Litigation (index # 104216/04, NY Co Sup. Ct., Order dated June 5, 2006, Shulman, J.). Notwithstanding that different and possibly additional medical testimony will be required, many joint trials have still included plaintiffs with both diseases (see: Carroll v. A.W. Chesterton Company [index # 190295/09; NY Co. Sup. Ct., order dated August 25, 2010, Friedman, J.]). All of the 8 plaintiffs will still require common expert testimony on the toxicity of asbestos.

In this case, all of the plaintiffs but Giancarlo have died. Defendants argue that joining one living plaintiff with seven others that have already died, is unduly prejudicial. Many cases have held, however, that the life status of a particular individual is not outcome determinative of whether to jointly try cases or not. Matter of New York City Asbestos Litigation, 2005 NY slip Op 51465[U](NY Co. Feinman., J.). The poor prognosis of plaintiffs with either lung cancer or mesothelioma are facts that are presented in asbestos trials, regardless fo whether particular named plaintiffs are alive at the time of trial or not.

All of the workers claim periods of exposure that overlap with one another. This factor militates in favor of combining the cases for trial. Many of the plaintiffs claim exposures that span over many decades. Thus, plaintiff Conti claims exposure from the 1940's through the 1980's. Plaintiff Fowler claims exposure from the 1950's though the 1980s. Plaintiff Romano claims exposure from the 1960's through the 1990s. Thus, common and overlapping state of the Art testimony will be necessary in all 8

cases. Any confusion that defendants claim will result in cases where a particular plaintiff claims a more limited exposure (e.g. McInerney only claims exposure in the 1950s) can be ameliorated by intelligent trial management devices, such as jury instructions and permitting note taking.

As concerns common work sites and similar occupations, it is conceded that the plaintiffs in this case did not all work at the same work sites and they all have disparate occupations. Such a finding, however, is not the end of the inquiry, because these factors really concern the type of asbestos exposure each plaintiff is claiming and whether there will be shared testimony about the airborne fibers to which plaintiffs were exposed. In re Asbestos Litigation, 1998 WL 230950 (SDNY 1998). Carroll v. A.W. Chesterton Company (index # 190295/09; NY Co. Sup. Ct., order dated August 25, 2010, Friedman, J.). ("The court recognizes that the plaintiffs ...did not share the same work site or same occupations . However, there are overlapping exposures, that is, exposures to various of the same asbestos-containing products as well as exposures that occurred in the same manner, that is , by working directly with asbestos containing materials and/or by means of by-stander exposure."); In re: New York City Asbestos Litigation (index # 102968/99, NY Co. Sup. Ct., order dated January 9, 2009. Shulman, J) ("...this court finds that there are similarities in the manner in which almost all of the Plaintiffs performed their respective tasks in the construction trades which exposed them to [asbestos containing material] during overlapping periods of time...").

Three of the workers (Fowler, Gaincarlo, Melnyk) claim exposure while working at Bethlehem Steel in Lakawana, New York. Many of the plaintiffs claim exposure to the same or similar products. All of the plaintiffs claim exposure to insulation and

valves. Seven of the plaintiffs claims exposure to boilers. Seven of the plaintiffs claim exposure to pumps. Six of the plaintiffs claim exposure to gaskets. Five of the plaintiffs claim exposure to firebrick. Five of the plaintiffs claim exposure to packing. Many of the plaintiffs have brought actions against the same defendants. Crane Co. and Foster Wheeler are common to all eight plaintiffs.² Gould is a common defendant in seven of the cases. Half of the remaining 14 defendants are parties in more than one of the eight cases. Consequently, testimony and evidence regarding these products ,and the types of asbestos exposure that could result from such products, will be identical or similar in each matter. (In re: New York City Asbestos Litigation [Batista], index #190009/09, NY Co. Sup. Ct. Order dated 2/19/10 [Feinman, J.]).

Overall the court finds that the factors weigh in favor of a joint trial of the eight identified cases. The motion is, therefore, granted.

Accordingly it is hereby:

ORDERED that

- | | |
|------------------|--------------------|
| Vito Conti | Index #: 114483/02 |
| John Fowler | Index #: 119393/00 |
| David Giancarlo | Index #: 100725/01 |
| Terry Kessler | Index #: 101892/01 |
| Harold McGinn | Index #: 110438/01 |
| Joseph McInerney | Index #: 122053/00 |
| Michael Melnyk | Index #: 118374/00 |
| Gino Romano | Index #: 115836/00 |

are hereby consolidated for joint trial, and it is further

²Plaintiff has identified Crane Co. As a defendant in all eight of the cases that are subject to this motion. Crane Co. states that it is not a defendant in the Romano case. Regardless of which version is accurate, the outcome of this motion would still be the same.

ORDERED that such consolidated cases are set for a pre trial conference on May 23, 2011 at 9:30 a.m., at which time, among other things, a firm trial date will be set, and it is further

ORDERED that such consolidated eight cases will be tried first among the 2010 December FIFO cluster and that, upon their completion, subject to 72 hour notice, each of the remaining 20 cases in the December 2010 FIFO cluster will be tired, in succession, in the following sequence:

- Bishop
- Blenkensopp
- DeGannes
- Donnelly
- Fernandez
- Hanmer
- Keith
- Kelly
- Kroger
- Ligammare
- Martin
- Miglozzi
- Nicastro
- Randazzo
- Rosati
- Schwartz
- Skelly
- Thomas
- Turner
- Wyant

and it is further

ORDERED that any requested relief not otherwise expressly granted in this motion is deemed denied and that this constitutes the decision and order of the court.

Dated: New York, NY
May 2, 2011

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED:


 HON. JUDITH J. GISCHE
 J.G. J.S.C. J.S.C.