

Matter of New York City Asbestos Litig.

2011 NY Slip Op 32741(U)

September 7, 2011

Supreme Court, New York County

Docket Number: 190323/10

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10
190323/10

China + others

INDEX NO. _____

MOTION DATE _____

In re: Asbestos Litigation -v-

MOTION SEQ. NO. 05

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 _____

PAPERS NUMBERED

1

2

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

SEP 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/7/11

JUDITH J. GISCHE
HON. 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: Trial Term 10

-----X
IN RE NEW YORK CITY ASBESTOS LITIGATION
In Extremis April 2011 / FIFOS August 2009
-----X

Decision/Order

Manuel Chinaea
Harold Hunt
Morris Keenan
Donald Sisson
Bernice Seiff
Nicodermo Scalia
Andreas Kalleberg
Marion Butckovitz

FILED

SEP 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Index #: 190323/10
Index #: 190356/10
Index #: 190322/10
Index #: 190302/10
Index #: 190350/10
Index #: 101347/02
Index #: 119370/02
Index #: 101785/02

-----X

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, JH affirm., exhibit.....	1
NW affirm. in Opp., exhibits.....	2
RAN affirm. in Opp, exhibit.....	3

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

By order of the Administrative Judge, dated May 4, 2011, the above noted eight (8) cases were referred to this court for trial, along with two (2) other cases. (Collectively "cluster"). All of the plaintiffs in the cluster are claiming personal injuries and some claim wrongful death, as a result of each plaintiffs' exposure to asbestos. At the time this motion was submitted to the court, plaintiffs represented that there were

only nine (9) cases remaining in the cluster to be resolved. By this motion plaintiffs seek to have the cases jointly tried in two groups of four as follows: Chinaea, Hunt, Keenan and Sisson tried jointly ("proposed group 1") and Butckovitz, Kalleberg, Scali and Seiff tried jointly ("proposed group 2")¹. The defendants have filed joint opposition. Although defendant Keystone Shipping originally filed individual opposition, it withdrew its opposition by letter dated August 3, 2011 and the case against it has been discontinued.

DISCUSSION

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,

¹By transfer order dated May 4, 2011 Justice Klein-Heitler directed that Seiff be tried last. In opposition to the this motion, however, defendants propose that Seiff be tried separately and before the Butckovitz, Kalleberg and Scali matters. Thus, the court finds that defendants have implicitly waived any right to have Seiff tried last.

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.). This court itself, on prior occasions, has permitted the grouping of cases, within a particular cluster, for joint trial. (In re: NYC Asbestos Litigation, 2011 WL 1826854 [Order dated January 27, 2011]; In re: NYC Asbestos Litigation, index # 114483/02 and others, [Order dated May 2, 2011]).

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 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; and [7] whether all plaintiffs are represented by the same counsel. 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 as follows:

proposed group 1

common work site and/or similar occupation

It is conceded that the plaintiffs in proposed group 1 did not work at any of 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...").

The plaintiffs in proposed group 1 all claim significant maritime exposure. Three served in the United States Navy and one was a Merchant Marine. There will, consequently, be overlapping testimony on maritime exposures to asbestos.

similar time of exposure

While all the plaintiffs in proposed group 1 were not exposed to asbestos during identical times, they were exposed during overlapping times. All four claim exposure in the 1950s. Three of them claim exposure during the 1960s. One plaintiff claims exposure during the 1940s and one claims exposure during the 1970s. The state of the art testimony will be substantially the same for all of them in the 1950s and for three of them in the 1960s.

type of disease

All of the plaintiffs in proposed group 1 contracted mesothelioma. This will entail overlapping medical and scientific testimony in each case about the relationship between mesothelioma and asbestos.

whether plaintiff's are living or deceased

Two of the plaintiffs are still living (Chinea and Hunt) while two of the plaintiffs are deceased (Keenan and Sisson). Relying on the reasoning in Malcolm v. National Gypsum Co, supra, defendants argue that the presence of wrongful death claims and personal injury claims in one trial may present the jury with a powerful demonstration of the fate that awaits those claimants still living. Since Malcolm was decided, however, the experience of the courts in asbestos litigation has led to the conclusion that this factor is not as important as it was originally thought to be. Thus, many cases now routinely combine for trial cases with living and deceased plaintiffs. Matter of New York City Asbestos Litigation, 9 Misc.3d 1109(A)(NY Co. Feinman., J.); In re NYC Asbestos Litigation, 2008 WL 3996269 [nor] (Lobis, J. August 21, 2008). The poor prognosis of plaintiffs with mesothelioma are facts that are routinely presented in asbestos trials,

regardless of whether any particularly named plaintiff is alive at the time of trial or not.

status of discovery in each case

When the cluster was assigned to the trial part, it was with the understanding that the cases were ready for trial. Therefore there are no discovery impediments.

whether all plaintiffs are represented by the same counsel

All of the plaintiffs in proposed group 1 are represented by the same law firm.

proposed group 2

common work site and/or similar occupation

None of the plaintiffs in proposed group 2 were exposed at a common work site nor are they engaged in similar occupations. They did, however, have similar exposures to asbestos containing products, in that they all claim exposure from construction and building products used in home building and renovation.

similar time of exposure

All four of the proposed group 2 plaintiffs are claiming exposure in the 1960s and 1970s. Two of them are also claiming exposure in the 1950's. The state of the art testimony will be substantially identical for all four of them in the 1960s and 1970s. It will be substantially identical for two of them concerning the state of the art in the 1950s.

type of disease

Three out of four of the plaintiffs in proposed group 2 have mesothelioma. Only one has lung cancer. The courts have recognized that each disease requires different 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.]).

whether plaintiffs are living or deceased

Only one of the plaintiffs (Seiff) in proposed group 2 is still living. Plaintiffs represented in a court conference on September 6, 2011, that Ms. Seiff's health is precarious. This factor, standing alone, does not warrant the denial of consolidation. (See: decision, *supra*).

status of discovery in each case

Discovery is complete in all of the proposed group 2 cases

whether all plaintiffs are represented by the same counsel

All of the plaintiffs in proposed group 2 are represented by the same law firm.

Additional Considerations

In opposition to the groupings, defendants argue that there are a great number of defendants in these cases and that the defendants do not substantially overlap within the proposed groups. In terms of the overall number of defendants, the court notes that since these motions have been brought, and at last report, the number of defendants remaining in all eight cases has been greatly reduced. It is the court's expectation, based upon its experience in this type of litigation, that by the time the case is actually tried, the overall number of defendants will be even further reduced. Thus, the number of defendants is not an impediment to grouping cases together for trial.

In terms of proposed group1, as of September 6, 2011, there were approximately 25 defendants still left. Of those four defendants were common to all four plaintiffs, three were common to three of the plaintiffs and four were common to

two of the plaintiffs.

In terms of proposed group 2, as of September 6, 2011, there were approximately 13 defendants still left. Of those, one was common to all four plaintiffs and three were common to two plaintiffs.

In balancing these considerations, the court finds that the plaintiffs identified in proposed group 1 should be consolidated for trial. There are sufficient commonalities in the diseases, type of exposure, timing of exposure and identity of defendants, that consolidation will provide an efficient method for resolution. Proposed group 1 is, therefore, converted into trial group 1, which shall be tried first among the cluster.

In connection with proposed group 2, the court recognizes that there are less commonalities than in trial group 1. Nevertheless, there are sufficient commonalities that predominate which would make it efficient to try these cases together. There are similar exposures to similar materials during similar time periods, all requiring overlapping testimony. There is commonality in the diseases. Proposed group 2 is, therefore, converted to trial group 2, which will be tried, after trial group 1 is completed, upon notice of no less than five business days.

The remaining case in the cluster, concerning plaintiff James B. Mims, will be tried after trial group 2 is completed, upon notice of no less than five business days.

Jury selection for trial group 1 is set to begin on October 3, 2011. Motions in limine are due October 3, 2011. For motions that are common to more than one defendant, a lead defendant council is to be selected to make the initial motion. Defendants who have particular positions, unique to them on such motions, will be entitled to supplement the motions on those unique issues only. Likewise any motion in

liminie made by plaintiffs shall be opposed by a lead defendants council in connection with arguments that are common to all defendants. Defendants who have particular positions, unique to them on such motions, will be entitled to supplement the opposition on those unique issues only.

Conclusion


In accordance herewith the motion for consolidated trials is granted. Trial group 1 shall begin jury selection on October 3, 2011. Motions in limine with respect to trial group 1 are due no later than October 3, 2011. Trial group 2 will be tried following trial group 1 upon five business day notification by the court. The case of James B. Mims will be tries following trial group 2 upon five business day notification by the court.

This constitutes the decision and order of the court.

Dated: New York, NY
September 7, 2011

SO ORDERED:

FILED

J.G. J.S.C. 

SEP 08 2011

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