

**Bischofsberger v Ploeckelmann**

2012 NY Slip Op 32414(U)

September 19, 2012

Supreme Court, New York County

Docket Number: 107352/2005

Judge: Judith J. Gische

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

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

PART 10

Index Number : 107352/2005  
BISCHOFBERGER, JOANNE

INDEX NO. \_\_\_\_\_

vs  
A.O. SMITH WATER PRODUCTS

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

CONSOLIDATION/JOINT TRIAL \_\_\_\_\_

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

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is

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

## FILED

SEP 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 9/19/12

JSG  
**HON. JUDITH J. GISCHE**, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS 10**

-----X  
Joanne Bischofsberger, Carolanne Chamberlain and Suzanne V. Paddock, as co-executrixes of Estate of Diana Mary Verde and Anthony Verde,

Plaintiffs,

Marilyn Ploeckelmann, individually and as Administratrix of the Estate of Sydney Ploeckelmann,

Plaintiffs,

-against-

AO Smith Water Products, et. al.,

Defendants.  
-----X

**DECISION/ORDER**  
Index # 107352/2005  
Index # 114369/2004

Motion Seq. No.: 001

**FILED**

**SEP 20 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**HON. GISCHE, J:**

Pursuant to CPLR 2219(a) the following papers were considered by the court on this motion:

<b>PAPERS</b>	<b>NUMBERED</b>
Notice of Motion, SAD affirm, exhibits.....	1

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

Plaintiffs in each of the two above referenced actions move to consolidate them for trial. The defendants remaining in both actions have submitted a joint memorandum of law in opposition. Both the action on behalf of Diana Verde ("Verde action") and the action on behalf of Sydney Ploeckelmann ("Ploeckelmann action") involve claims that as a result of exposure to asbestos, each of the named decedents contracted Mesothelioma. The two cases form a "cluster" of cases that were referred to this court

by order of Hon. Sherry Klein Heitler dated June 11, 2012.

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 (1<sup>st</sup> dept. 2008); Bradford v. John A. Coleman, 110 AD2d 965 (3<sup>rd</sup> 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 (1<sup>st</sup> 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.). This court has itself, on prior occasions, 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 plaintiffs 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:

**common work site/ similar occupation**

This court frequently considers these two factors simultaneously, because they 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 NEW YORK CITY ASBESTOS LITIGATION, In Extremis April 2011 / FIFO August 2009 (index # 190323/10, NY Co. Sup Ct., order dated September 7, 2011, Gische, J.); 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...").

Sidney Ploeckelmann was a Refrigeration and Engine Machinist who was exposed to asbestos while serving in the Navy during 1952 and 1954. There are currently 2 remaining defendants in his case. One defendant, Goulds Pumps Inc., is common to both cases before the court on this motion..

Diana Verde was exposed to asbestos from laundering her husband's work clothes between 1965 and 1990. Her husband was a mechanic at Con Edison during that period of time. There are currently 5 defendants remaining in this case. As previously stated, only one defendant is common to both the Ploeckelmann and Verde cases.

#### **similar time of exposure**

The dates of exposure in Sidney Ploeckelmann's case were 1952 through 1954. The dates of exposure in Diana Verde's case were 1965 through 1990.

#### **type of disease**

Both Sidney Ploeckelmann and Diana Verdi contracted mesothelioma. Sidney Ploeckelmann suffered pleural mesothelioma, while Diana Verdi suffered with peritoneal mesothelioma. These are the same disease, albeit they present in different parts of the body. Defendants claim that they will present a defense, that peritoneal cancer in women is not caused by asbestos exposure.

**whether plaintiffs are living or deceased**

Both of the parties who sustained injury are now deceased.

**status of discovery in each case**

In both cases, discovery has been completed and they are trial ready.

**whether all plaintiffs are represented by the same counsel.**

The plaintiffs in both cases are represented by the same counsel.

The court holds that there are not enough similarities in the two cases that would involve shared testimony which would warrant a joint trial in the first instance. There would certainly be some shared testimony. There would be some overlapping testimony on general science related to asbestos, on some state of the art testimony and on the character and cause of mesothelioma. The testimony in the main, however, would be unique to each particular case.

Although plaintiffs argue that Sidney Ploeckelmann and Diana Verdi's husband were exposed to similar products, these were products that were largely manufactured and or distributed by different defendants. There is only one common defendant among the seven remaining defendants. The Sidney Ploeckelmann case not only involves significantly different dates of exposure, but because he was in the Navy at the time of the claimed exposure, there are unique facts related to state of the art and defenses

that are not in any way relevant to the Diana Verdi case. The type of exposure is not the same and the duty, depending on what was known or knowable, may be very different in each case.

Plaintiffs argue that the risk of confusion, which is commonly a consideration in determining whether to consolidate cases, is not present because there are only two cases. Confusion, however pertains to the issue of prejudice. Before the court even reaches that issue, the proponent of consolidation must make a showing that there is a benefit in terms of judicial economy. At bar the issues that would require overlapping testimony are spare and general to almost all asbestos exposure cases, such that there is no basis to favor consolidation in the first instance. Thus, the absence of confusion is not a consideration.

**Conclusion**

In accordance herewith t is hereby:

ORDERED that the motion for a consolidated trial is denied; and it is further

ORDERED that the Diana Verdi case will be tried first; and it is further

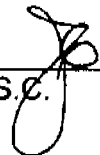
ORDERED that the Sidney Ploeckelmann case will tried immediately thereafter;

and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY  
September 19, 2012

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.

**FILED**

**SEP 20 2012**