

Assenzio v A.O. Smith Water Prods.

2013 NY Slip Op 30801(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 190008/12

Judge: Joan A. Madden

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

PRESENT: MADON
Justice

PART 11

SAVIO ASSENZO
- v -

A.O. SMITH WATER PRODUCTS
CO.

INDEX NO. 190008/12
MOTION DATE _____
MOTION SEQ. NO. 9
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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed memorandum decision and order.

FILED

APR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 17, 2013

[Signature]
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):

IN RE: NEW YORK CITY ASBESTOS LITIGATION

-----X
This Document relates to:

SANTO ASSENZIO and ANATOLIA ASSENZIO, et al.,

Plaintiffs,

- against -

A.O. SMITH WATER PRODUCTS, et al.,

Defendants.
-----X

Hon. Madden, J.

In this motion, Weitz & Luxenberg, counsel for plaintiffs, seeks to consolidate for joint trial the following 15 cases from the October 2012 In Extremis Calendar,¹ which actions were transferred to this court for trial by jury:

SANTOS ASSENZIO	Index No. 19008/12
ROBERT BRUNCK	Index No. 190026/12
JOHN CISLER	Index No. 190044/12
RUDOLPH HAVALKA	Index No. 190140/12
STEVEN LANCELOT	Index No. 190193/12
PAUL LEVY	Index No. 190200/12
LEONID LIBERMAN	Index No. 190057/12
WILLIAM LINDSAY	Index No. 190074/12
TIMOTHY MEYER	Index No. 190094/12
ISAURO PANTOJA	Index No. 190173/12
ROBERT RITUCCI	Index No. 190124/12
CESAR SERNA	Index No. 190183/12
JOHN TURBIDY	Index No. 190205/12
WALTER VARA	Index No. 190512/11
RAYMOND VINCENT	Index No. 190184/12

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¹Although the October 2012 In Extremis Cluster consisted of 16 cases, plaintiff does not seek consolidation of John Logan (Index No. 190203-12), in light of a pending forum objection as to this action which needs to be resolved.

In the alternative, Weitz & Luxemburg seeks to consolidate the cases into two trial groups; the first group consisting of 12 cases in which plaintiffs allege exposure to asbestos caused them to develop mesothelioma, and the second group consisting of three cases in which plaintiffs allege such exposure caused them to develop lung cancer. Pursuant to controlling NYCAL protocol, defendants designated a lead counsel to submit joint opposition and various defendants have submitted supplemental papers opposing the motion.

The motion is made pursuant to CPLR 602(a) on the grounds that common issues of law and fact exist warranting a joint trial. Defendants oppose consolidation arguing, inter alia, that differences predominate over common factors and a jury will be unable to fairly assess the issues and evidence as to the individual defendants when the differences are considered in the context of the particulars of the individual actions, together with the number of plaintiffs and defendants. In support of this argument, defendants point to decisions in other jurisdictions which have denied consolidation and further argue that consolidation of such a large number of dissimilar asbestos cases deprives defendants of their due process and equal protection rights under the federal and state constitutions.

Pursuant to CPLR 602(a), the Court has discretion to order joint trials where common questions of law and fact exist. In asbestos litigation, it has been stated that “[t]he joint trial format has the potential to reduce the cost of litigation, make more economical use of the trial court's time and speed the disposition of cases (see *Matter of City of Rochester*, 57 A.D.2d 700, 701) as well as to encourage settlements (see in *Re: Joint E&S District Asbestos 20 Litigation [Findley v. Blinken]*, 129 Bankr 710, 815).” *In re New York City Asbestos Litigation Brooklyn Naval Shipyard Cases*, 188 A.D. 2d 214, 224 (1st Dept. 1983). However, actions should not be

joined for trial where joinder would prejudice or deny a party a fair trial (see e.g. Johnson v. Celetex Corp., 899 F.2d 1281(2d Cir.1990), cert denied, 498 U.S. 920(1990), or where individual issues predominate (see e.g. Bender v. Underwood, 93 A.D.2d 747, 748(1st Dept. 1983). In determining whether sufficient commonality exists for consolidation, courts have considered the following factors: whether the parties are represented by the same counsel, the status of discovery, whether within the cluster there exists commonality of work sites, occupations, times of exposure and types of disease, and whether the individual plaintiffs are living or deceased. Malcolm v. National Gypsum company, 995 F.2d 346, 351, 352 (2d Cir. 1993) *quoting Johnson v. Celetex Corp.*, 899 F.2d 1281, 1285 (2d Cir.1990). No one factor is dispositive and the weight given to any factor varies depending upon the particulars of a given cluster.

For the reasons delineated below, I grant the motion to consolidate to the extent of directing consolidation of these 15 cases into three trial groups which shall be designated Trial Groups 1, 2, and 3, with the Leonid Liberman (Liberman) and Walter Vara (Vara) cases to be tried separately. Trial Group 1 consists of Santos Assenzio (Assenzio), Robert Brunck (Brunck), Paul Levy (Levy), Ceasar Serna (Serna) and Raymond Vincent (Vincent). Trial Group 2 consists of John Cisler (Cisler), Rudolph Havelka (Havelka), William Lindsay (Lindsay), and Isauro Pantoja (Pantoja). Trial Group 3 consists of Steven Lancelot (Lancelot), Timothy Meyer (Meyer) and John Turbridy (Turbridy).

With respect to the alleged due process and equal protections violations, defendants argue that such violations derive from the multiplicity and lack of commonality of parties, work sites and products. In support of this argument, defendants contend that if these 15 cases are consolidated for trial, defendants will be prejudiced since the number of parties, different work

sites and products, and different proof necessarily arising therefrom, will result in juror confusion and an inability of the jurors to evaluate the evidence as to individual parties. Defendants also argue that presentation of evidence in 15 cases from numerous, separate plaintiffs will improperly bolster each individual plaintiff's claims. To the extent defendants' due process and equal protection argument relates to consolidation of 15 cases, alleged violations based on the sheer number of cases have been addressed with the division of this cluster into three trial groups and two separate trials. To the extent defendants' argument remains viable notwithstanding this division, I conclude that given the constellation of cases and issues presented in each trial group as discussed in the analysis of the Malcolm factors, and with the use of trial management techniques discussed below, due process and equal protection concerns are adequately safeguarded.

At the outset I note that historically, in New York County, NYCAL cases have been consolidated for trial. *see e.g., In re New York Asbestos Litigation*, 23 Misc.3d 1109(A) (Sup Ct, NY Co, 2009, Shulman, J); *Ballard v Ballard Packing Co.* (Index No. 190102 Sup Ct, NY Co, Sept 9, 2009, Feinman, J); *Amato v A.O. Smith Water Products Co.* (Index No. 190391/09, Sup Ct, NY Co, January 27, 2011, Gische, J). As to the commonality of work sites and occupations, and multiplicity of products, I reject defendants' argument that exact commonality of work sites and occupation is necessary for consolidation and that consolidation should be denied based on the multiplicity of products. Such a strict construction would undermine the purpose of consolidation; that is, to conserve judicial resources and litigation expenses and to foster settlements. With use of intelligent management techniques including juror notebooks, explanatory and limiting instructions, and individualized verdict sheets and jury instructions in the final charge, the jury should be able to differentiate and evaluate the evidence as to each defendant

[* 6]

and plaintiff so as to prevent bolstering or other prejudice to defendants. Moreover, with respect to certain evidence that is common to all plaintiffs in the individual trial groups, specifically, the medical evidence and the state of the art evidence, consolidating cases serves the purposes of conserving judicial resources and reducing litigation expenses.

Within each trial group, the above conclusions are supported by the anticipated evidence which overlaps as to the manner of exposure, types of products and equipment, and types of work sites, so that there is sufficient commonality as to these factors to warrant consolidation. As to plaintiffs in all trial groups, plaintiffs allege exposure while engaged in, or in the vicinity of, construction or maintenance related work at commercial and/or residential work sites. Specifically, in Trial Group 1, two plaintiffs, Assenzio and Levy, allege exposure while working as plumbers, two plaintiffs, Brunck and Vincent, as steamfitters, while the remaining plaintiff, Serna, worked as a painter and laborer. As to the types of products, all five plaintiffs allege exposure from insulation and gaskets, four plaintiffs, Assenzio, Brunck, Levy and Vincent, allege exposure from pumps, valves, and gaskets, and three plaintiffs, Brunck, Levy and Vincent allege exposure from pipe covering. Defendants argue that the cases involving plaintiffs, Assenzio and Levy should not be consolidated as they allege exposure while working at the Brooklyn Navy Yard, and thus, issues of the military contractor defense are raised and are unique to these cases. While legal, and, under certain circumstances, factual issues, are implicated in and distinct to this defense, as legal issues are resolved by the court, and where, as here, the manner of exposure and the types of products involved are common to other plaintiffs in this trial group, this defense does not bar consolidation.

As to Serna, defendant A.O. Smith opposes the motion on the grounds that the Serna case,

and another case, Lieberman, should not be consolidated based on the time of alleged exposure and the possibility that they were exposed to asbestos in their native countries before their alleged exposure to asbestos while working in the United States. As to Serna, A. O. Smith fails to assert the nature of the work Serna performed nor the basis of its contention that Serna was exposed while working in Columbia, his native country. Thus, its argument is not supported by circumstances from which it can be inferred that Serna was exposed to asbestos in Columbia. Moreover, in the instant action, Serna alleges exposure beginning in the 1980's, a time period consistent with that alleged by Vincent in Trial Group 1. As to Lieberman, A. O. Smith contends that before coming to the United States in 1992, he worked as an electrician in the Ukraine in a highly industrialized region containing a shipyard and companies that produced various products including insulation. Here, Lieberman alleges exposure to asbestos while working as an electrician beginning in the 1990's. This period is outside those periods alleged by the other plaintiffs suffering from mesothelioma, and thus, the state of the art evidence applicable to Lieberman will be significantly different from that which is applicable to the other plaintiffs. Based on this distinction, and since there are circumstances alleged which may provide a basis for an inference that Lieberman was exposed to asbestos during his work as an electrician in the Ukraine, this case should be tried separately.

In Trial Group 2, two plaintiffs, Cisler, and Lindsay, allege exposure while working as electricians, one plaintiff, Ritucci, as a bricklayer; and two plaintiffs, Havelka and Pantoja, allege bystander exposure while working near construction. The types of products to which plaintiffs allege exposure are floor tiles (Cisler, Havelka, Lindsay, Pantoja and Ritucci), insulation (Cisler and Lindsay), joint compound (Havelka, Lindsay and Pantoja), boilers and pumps (Cisler, Levy,

Lindsay and Ritucci), and valves (Cisler, Levy, and Lindsay).

In Trial Group 3, plaintiffs Meyer and Turbridy allege exposure while working as plumbers, and all three plaintiffs allege exposure from boilers, pumps and valves; two plaintiffs, Meyer and Turbridy allege exposure from insulation and gaskets; and two plaintiffs, Lancelot and Meyer, allege exposure from floor tiles.

As to the remaining plaintiff, Vara, he alleges exposure as a child from the dusty clothing of his father who worked as a pipefitter in Brooklyn Navy Yard and later from working in the engine room during service in the Navy. Since his claim of exposure from his father's work clothing is unique and may present legal and factual issues distinct to this type of exposure, his case should be tried separately. see Bischofsberger v A. O. Smith Water Products, (Index No. 107352/05, Sup Ct, NY Co, September 19, 2012, Gische J).

With respect to the remaining Malcolm factors, all plaintiffs are represented by the same law firm, Weitz & Luxenberg and all 15 cases are trial ready. Plaintiffs in each trial group allege that exposure to asbestos caused them to develop the same disease, either mesothelioma or lung cancer. Thus, in Trial Groups 1 and 2, as all plaintiffs allege exposure to asbestos caused them to develop mesothelioma, the issue of toxicity of asbestos is common to all plaintiffs and, consequently, the medical evidence with respect to the ideology and pathology of mesothelioma will overlap as to all plaintiffs in this group. see Ballard v Anchor Packing Co., (Index No. 190102/08, Sup Ct NY Co, August 9, 2009, Feinman, J). Similarly, in Trial Group 3, all plaintiffs allege exposure to asbestos caused them to develop lung cancer, and the medical evidence will overlap as to this disease.

As to the Levy case in Trial Group 1, Goodyear argues it should not be consolidated for

trial as there is a dispute as to whether Mr. Levy suffers from mesothelioma. In support, Goodyear points to plaintiff's medical reports in which two of plaintiff's experts agree Mr Levy has mesothelioma of the pleura and a third opines he has either a malignant mesothelioma or a sarcomatoid lung carcinoma. Goodyear also points to defendants' medical report in which the doctor is of the opinion the Mr. Levy suffers from a primary carcinoma of the lung. However, such dispute is not a basis to deny consolidation, as this disagreement does not alter the fact that medical evidence as to the nature and progression of mesothelioma is essential for a jury determination of the disease from which Mr. Levy suffers.

There will also be overlap as to the state of the art evidence in each trial group. In all trial groups plaintiffs allege overlapping periods of exposure from the 1960s through the 1970s. As to this issue, and in particular as to defendants' arguments that the jury will be confused by consolidating cases involving pre and post OSHA exposure, the use of the intelligent management techniques discussed above will avoid juror confusion and enable the jury to differentiate the state of the art evidence as to each defendant. While certain plaintiffs in each trial group allege exposure prior to the 1960's and into the 1980's, this is not a basis to deny consolidation, as expert testimony regarding the evolution of the state of the art may assist jurors in assessing and evaluating the evidence and legal obligations of an individual defendant within the context of what was known as to the dangers of asbestos at the time of the alleged exposure. Goldstein, et al., (Index No. 190164-09, Sup Ct, NY Co., February 18, 2010, Feinman, J).

Finally, I find that although each Trial Group includes living and deceased plaintiffs, this factor alone is not a bar to consolidation as various courts have recognized, particularly where, as here, in Trial Groups 1 and 2, plaintiffs developed the same fatal disease. see Amato v A.O.

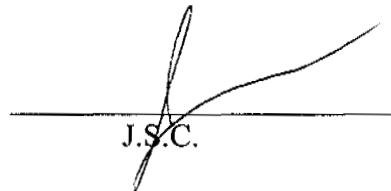
Smith Water Products Co., et al., (Index No. 19039/09; Sup Ct, NY Co., January 27, 2011, Gische, J.); Carroll v. A.W. Chesterton Company (Index No. 190295/09; Sup Ct, NY Co. August 25, 2010, Friedman, J.)

Accordingly, it is

ORDERED that the motion to consolidate is granted to the extent of consolidating the cases in the October In Extremis 2012 Cluster into three Trial Groups in accordance with the above with the Vara case to be tried separately, and it is further

ORDERED that and Trial Group 1 will be tried first, followed immediately by Trial Group 2, followed immediately by Trial Group 3 which is to be followed immediately by the Lieberman and then Vara trials.

Dated: April 17, 2013



J.S.C.

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