

**Barton v A.O. Smith Water Prods. Co.**

2013 NY Slip Op 33052(U)

November 26, 2013

Sup Ct, New York County

Docket Number: 102900-2004

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

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

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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**Scanned** *scroll* = on *12/9/13* INDEX NUMBER

WILLIAM N. BARTON	<del>115214-2003</del>
CHARLES W. DIETRICH	115214-2003
ROBERT D. FREEMAN	100867-2004
ANGEL LAMBERTY	100988-2004
PATRICK W. LOWDEN	101357-2004
FRANCIS MARINO	116830-2003
ROBERT C. MCDONALD	111778-2004
THEODORE PENDERGAST	104850-2004
FRANCIS J. SMITH	118280-2003
RONALD B. YETTER,	116648-2003

**FILED**  
DEC -9 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs,

-against-

A.O. SMITH WATER PRODS.  
CO., et al.,

**AMENDED DECISION  
AND ORDER**

MOTION SEQUENCE 001

Defendants.

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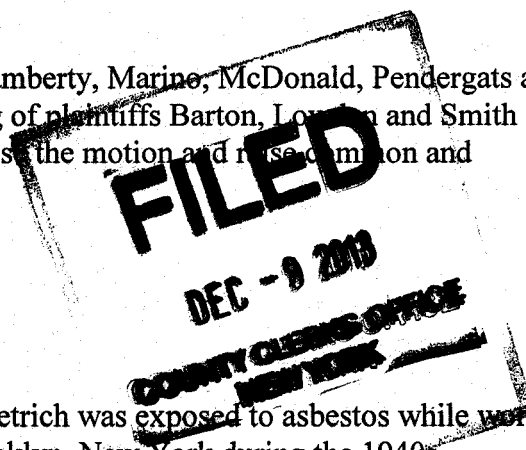
The following papers, numbered 1 to 6, were read on this motion for a joint trial:  
Notice of Motion/ Order to Show Cause — Affirmation — Exhibits : Numbers 1 and 2  
Answering Affirmation(s) — Exhibits : Numbers 3, 4, 5, and 6

**GEORGE J. SILVER, J.:**

The court's decision and order dated October 17, 2013 is hereby amended to read as follows:

The above captioned ten matters are asbestos-related personal injury actions. The plaintiffs in above captioned actions are moving by order to show to consolidate the cases into

two groups, one consisting of plaintiffs Dietrich, Lamberty, Marino, McDonald, Pendergats and Yetter (the mesothelioma group) and one consisting of plaintiffs Barton, Lorton and Smith (the lung cancer group) for joint trial. Defendants opposed the motion and raised common and individual arguments against joint trial.



The Mesothelioma Group

1. Charles Dietrich

According to plaintiffs' counsel, Charles Dietrich was exposed to asbestos while working as a boiler worker at the Bethlehem Shipyard in Brooklyn, New York during the 1940s. Specifically, Dietrich was exposed to asbestos-containing insulation used in connection with boilers, pipes, pumps and turbines. Dietrich was diagnosed with mesothelioma on April 25, 2003 and died on June 25, 2003.

2. Robert D. Freeman

Freeman was allegedly exposed to asbestos while working a boiler technician and engineer at various industrial sites and powerhouses from the 1970s until the 1990s. Freeman was allegedly exposed to asbestos while working with gaskets, packing, blankets and insulation used in connection with boilers, pipes, pumps, turbines and valves. Freeman was diagnosed with mesothelioma on May 27, 2003 and died on June 8, 2005.

3. Angel Lamberty

Lamberty was allegedly exposed to asbestos-containing material while working at Channel Master Corp. in Ellenville New York, Otisville Correctional Facility in Otisville, New York and Eastern Correctional Facility in Napanoch, New York. According to plaintiffs' counsel, Lamberty was exposed to asbestos-containing gaskets, packing and insulation used in connection with boilers, pipes and pumps. Lamberty was diagnosed with mesothelioma on March 10, 2003 and died on August 10, 2004.

4. Francis Marino

Marino was allegedly exposed to asbestos-containing insulation used in connection with boiler, pipes, pumps and turbines while working as an electrician, furnace worker and custodian at various industrial sites, powerhouses and shipyards in Brooklyn, New York from the 1940s until the 1970s. Marino was diagnosed with mesothelioma on June 30, 2003 and died on March 5, 2004.

5. Robert McDonald

Plaintiffs' counsel alleges that McDonald was exposed to asbestos-containing material while serving as an electrician in the United States Army during the 1950s. McDonald was allegedly exposed to asbestos-containing Bakelite, chassis and insulation used in connection with pipes. McDonald was diagnosed with mesothelioma on December 13, 2002 and died on July 8, 2006.

6. Theodore Pendergast

Pendergast was allegedly exposed to asbestos-containing gaskets, floor tiles, brakes and insulation from the 1950s until the 1970s while working as steamfitter and auto mechanic at various industrial and commercial sites and while performing home renovations. Pendergast was diagnosed with mesothelioma on January 2, 2004 and died on January 20, 2005.

7. Ronald Yetter

Yetter was allegedly exposed to asbestos-containing gaskets, packing, firebrick and insulation used in connection with boilers, pipes, pumps and turbines while working as a machinist mate at the Brooklyn Navy Yard from the 1950s until the 1970s. Yetter was diagnosed with mesothelioma on June 20, 2003 and died on September 9, 2005.

The Lung Cancer Group

1. William N. Barton

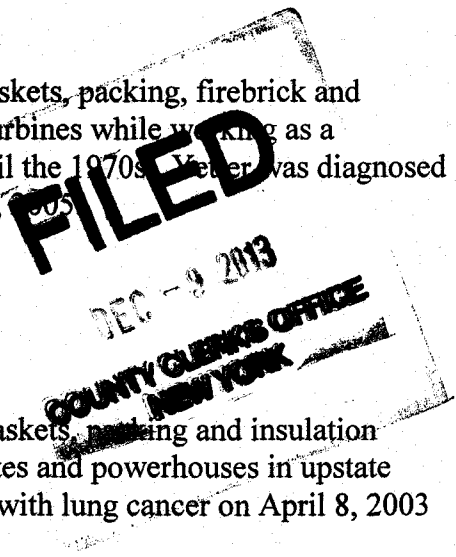
Barton was allegedly exposed to asbestos-containing gaskets, packing and insulation while working as an operating engineer at various industrial sites and powerhouses in upstate New York from the 1950s until the 1990s. He was diagnosed with lung cancer on April 8, 2003 and died on July 6, 2005.

2. Patrick W. Lowden, Jr.

Lowden was allegedly exposed to asbestos-containing gaskets, packing, blankets and insulation while working as a carpenter and laborer at various sites from the 1960s until the 1990s. He was diagnosed with lung cancer on November 9, 2001 and died on February 16, 2002.

3. Francis J. Smith

Plaintiffs' counsel alleges that Smith was exposed to asbestos-containing gaskets, floor tile, arc shoots, arc proofing and insulation in connection with his work as an electrician at various commercial, industrial and powerhouse sites and while performing home renovations from the 1950s until the 1980s. Smith was diagnosed with lung cancer on May 23, 2003 and



died on August 24, 2004.

Discussion

CPLR § 602 [a] permits a court to join actions involving common questions of fact; joinder of common matters is appropriate “where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts” (*Chinatown Apartments, Inc. v New York City Transit Authority*, 100 AD2d 824, 826 [1<sup>st</sup> Dept 1984]). The courts are given “great deference” in the decision to join matters (*Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, 10 AD3d 518, 519 [1<sup>st</sup> Dept 2004]). 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 [1<sup>st</sup> Dept 2002]; *Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1<sup>st</sup> Dept 1993], *affd* 82 NY2d 821, 625 NE2d 588, 605 NYS2d 3 [1993]). Yet, “considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial” (*Johnson v Celotex Corp.*, 899 F2d 1281, 1284 [2d Cir 1990]). Joint trials are not appropriate when “individual issues predominate, concerning particular circumstances applicable to each plaintiff” (*Bender v Underwood*, 93 AD2d 747, 748 [1<sup>st</sup> Dept 1983]). Thus, although a joint trial 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 as well as [] encourage settlements” (*Malcolm v National Gypsum Co.*, 995 F2d 346, 354 [2d Cir 1993]), it is “possible to go too far in the interests of expediency and to sacrifice basic fairness in the process” of joinder, and joint trial should be denied where (1) individual issues predominate over common issues in the cases sought to be joined, or (2) the party opposing the joint trial demonstrates substantial prejudice” (*Ballard v Armstrong World Industries*, 191 Misc2d 625, 627-28 [Sup Ct Monroe Cty 2002]).

To decide whether a joint trial is proper in the context of asbestos-related personal injury and wrongful death actions, courts consider the factors set forth in *Malcolm v National Gypsum Co.*, 995 F2d 346, 351-352 (2d Cir 1993). Specifically, courts look at “(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” (*id.* at 351 [quotations and citations omitted]). The party moving for joinder bears the initial burden of demonstrating the commonality of the issues, at which point the burden shifts to the opponent to establish prejudice and potential jury confusion (*Bender*, 93 AD2d at 748). *Malcolm* does not require that plaintiffs share identical occupations, identical workplaces or identical time of exposure. Rather, *Malcolm* only requires that there be similarity among these criteria and any other interpretation would undermine the purposes of joint trial, i.e., the conservation of judicial resources and litigation expenses and the fostering of settlement (*Assesnio v A.O. Smith Water Prods.*, 2013 NY Slip Op 30801[U] [Sup Ct, New York County]).

Plaintiffs have established that there is sufficient commonality among the three plaintiffs in the proposed Lung Cancer Group so as to warrant a joint trial. Obviously, all three plaintiffs suffered from lung cancer, meaning that the expert medical testimony regarding the etiology and pathology of the plaintiffs’ conditions will be similar. All three plaintiffs in the Lung Cancer

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Group are deceased, and each is represented by the same law firm. Moreover, although the three plaintiffs did not engage in identical occupations at identical worksites over identical periods of time, all three plaintiffs allege exposure from the same or similar products - namely asbestos-containing insulation, boilers, pumps and gaskets. Testimony and evidence regarding most of these products and the type of asbestos exposure that could result them will be identical or nearly so in all three cases. The fact that Smith alone alleges exposure to asbestos-containing floor tiles, arc proofing and arc shoots does not warrant denying plaintiffs' order to show cause. Further, the alleged periods of exposure for these three plaintiffs range from the 1950s through the 1990s, and therefore, the state of art evidence will sufficiently overlap. Accordingly, the Lung Cancer Group actions will be tried jointly.

Among the proposed Mesothelioma Group, there is sufficient commonality among plaintiffs Freeman, Lamberty, Marino and Pendergast to warrant a joint trial of their actions. However, because Dietrich, McDonald and Yetter allege exposure while working at a shipyard (Dietrich and Yetter) or while serving in the Army (McDonald) it is appropriate to segregate these actions as they potentially involve federal government contractor defenses that would not be applicable to the other cases.

Accordingly, it is hereby

ORDERED that plaintiffs' order to show cause is granted to the extent that Barton, Index Number 102900-2004, Lowden, Index Number 101357-2004 and Smith, Index Number 118280-2003 shall be tried jointly and all parties to these actions shall appear for a pre-trial conference on in Part 10, Room 422 of the courthouse located at 60 Centre Street, New York 10007 on November 26, 2013 at 9:30 am; and it is further

ORDERED that Freeman, Index Number 100867-2004, Lamberty, Index No. 100988-2004, Marino, Index Number 116830-2003 and Pendergast, Index Number 104850-2004 shall be tried jointly and all parties to these actions shall appear for a pre-trial conference in Part 10, Room 422 of the courthouse located at 60 Centre Street, New York 10007 on November 26, 2013 at 9:30 am; and it is further

ORDERED that Dietrich, Index Number 115214-2003, McDonald, Index Number 111778-2004 and Yetter, Index Number 116648-2003 shall be tried jointly and all parties to these actions shall appear for a pre-trial conference in Part 10, Room 422 of the courthouse located at 60 Centre Street, New York 10007 on November 26, 2013 at 9:30 am; and it is further

Dated: NOV 26 2013  
New York County

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*George J. Silver*  
George J. Silver, J.S.C.

**GEORGE J. SILVER**