

Begin v Certainteed Corp.

2014 NY Slip Op 30674(U)

March 14, 2014

Sup Ct, New York County

Docket Number: 190125/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
IN RE: NEW YORK CITY ASBESTOS LITIGATION
-----X

NEYRA BEGIM,

Plaintiffs,

Index No. 190125/12

-against-

DECISION/ORDER

CERTAINTIED CORPORATION, et al.,

Defendants.

-----X
WAYNE BRYANT AND SHANNON BRYANT,
-----X

Plaintiffs,

Index No. 190161/13

-against-

DECISION/ORDER

ABB, INC., et al.,

Defendants.

-----X
HON. CYNTHIA KERN, J.S.C.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

This court has been assigned 17 asbestos actions for trial, comprising the Weitz & Luxenberg, P.C. October 2012 In Extremis trial group and the Weitz & Luxenberg, P.C. October 2013 In Extremis trial group. Plaintiffs have brought the present motion to consolidate these actions into six separate groups for joint trial, claiming that there are common questions of law

and fact.

They have requested that there be six groups of trials as follows:

Group 1: Bryant, Carmody, Dul, Hackshaw, Murray, Nilsson, Sweberg

Group 2: Carlson, Hillyer

Group 3: McDonald, Tarpey

Group 4: Yee

Group 5: Begim

Group 6: Fallon, Foley, Hewski, Rosen

Pursuant to CPLR section 602 (a), a trial court has discretion to consolidate two or more actions for joint trial if they involve common questions of law or fact. Moreover, “there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right.” *Matter of Progressive Ins. Co.*, 10 A.D.3d 518 (1st Dept 2004).

There are certain criteria which the courts follow in determining whether to consolidate asbestos cases for trial: “(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were 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.” *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350-351 (2d Cir. 1993). However, no single factor is dispositive. *In Re New York City Asbestos Litigation*, 2013 N.Y. Misc. Lexis 2080 (Sup Ct NY Co. 2013).

Considering all of these factors, the court grants the application of plaintiffs as requested

except that Group 1, consisting of seven plaintiffs, will be broken up into two separate groups as follows: Group 1(a) Bryant, Dul, Hackshaw and Sweberg and Group 1(b) Carmody, Murray and Nilsson. Initially, two of the seven groups only involve one plaintiff so there is no issue of consolidation raised by these groups (groups 4 and 5). As to the five groups being consolidated with more than one plaintiff, this court finds that the trials in each of the groups involve common questions of law and fact and that consolidation of these cases into the five groups will not prejudice a substantial right of defendants. As to the five groups, all of the plaintiffs are represented by the same law firm and are in the same phase of discovery as they have all been assigned to this part for trial. Moreover, in all of the groups, the plaintiffs allege the same type of cancer. All of the plaintiffs in each of these cases have mesothelioma except for group 6 in which all of the plaintiffs have lung cancer. Although not all of the groups have all living plaintiffs, the death of some of these plaintiffs will not prejudice the jury against the “defendants, vis-a-vis, the living Plaintiffs” because they are suffering from the same terminal illness and will suffer the same fate. *Matter of New York City Asbestos Litig.*, 11 Misc. 3d 1063[A].

Finally, “the Malcolm factors do not compel the plaintiffs to share a common occupation or common time of exposure.” *Id.* The courts have routinely granted consolidation of trials even where the plaintiffs work at different work sites and have disparate occupations on the ground that “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 New York City Asbestos Litigation*, (Index No. 114483/02, NY Co. Sup Ct., order dated May 2, 2011, Gische, J.); *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 sites 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 the present case, with respect to group 1(a), all four of the plaintiffs have worked as electricians and have been exposed to similar products and have overlapping periods of exposure. With respect to Group 1(b), although the three plaintiffs have had different occupations and worked at different job sites, they have had exposure to similar types of asbestos-containing products as well as exposures that have occurred in the same manner- by working directly with asbestos-containing products and by means of bystander exposure. Moreover, they have had overlapping periods of exposure. With respect to group 2, which consists of two plaintiffs, both of these plaintiffs were exposed to the same types of asbestos-containing products at similar job sites. Both of these plaintiffs allege that they experienced exposure while aboard ships in the US Navy as well as Navy Yard related overhaul exposure. They also allege overlapping periods of exposure. With respect to Group 3, both plaintiffs experienced exposure to press pads at commercial dry cleaning facilities as well as military ship-based exposures. Although one of the two plaintiffs also suffered railroad based exposures, this is not a sufficient basis by itself to require a separate trial in light of the overlapping issues between these two plaintiffs. Finally with respect to group 6, all of the plaintiffs have had exposures to the same types of asbestos-containing products, all were exposed in the same manner- by working directly with asbestos-containing products and by means of bystander exposure and all have overlapping periods of exposure.

Based on the foregoing, the motion to consolidate the cases for trial is granted to the

extent stated herein. All parties are to appear for a settlement conference on April 11, 2014 beginning at 10:00 a.m. Counsel for plaintiff shall set up a staggered schedule for these conferences on that date.

All parties in group 1(a) are to e-file a maximum five page letter outlining any in limine motions that need to be decided prior to jury selection by April 4, 2014, with a courtesy copy to be provided to the part clerk. All parties in Group 1(a) are to e-file a short list of witnesses on that day also, with a courtesy copy to be provided to the part clerk. Any letter in opposition to the in limine motions is limited to five pages and shall be e-filed by April 11, with a courtesy copy to be provided to the part clerk. Oral argument on the in limine motions will be held on April 21, 2014. The court will also have a pre-trial conference on that day for the cases in Group 1(a), in which a trial schedule will be set.

Jury selection in the group 1(a) cases will start April 28, 2014 with the jury trial to follow immediately thereafter. Each of the subsequent trials will be held consecutively unless the court notifies otherwise.

This constitutes the decision and order of the court.

Dated: 3/14/14

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