

**Babravich v A.C. and S., Inc. (Armstrong Contr. & Supply)**

2014 NY Slip Op 31268(U)

May 15, 2014

Supreme Court, New York County

Docket Number: 104028/00

Judge: Barbara Jaffe

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

PRESENT: JAFFE  
Justice

PART 12

BABRUVICH, RICHARD, ET AL.

- v -

A.C. AND S., INC., ET AL.

INDEX NO. 104028/00

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

MOTION SEQ. NO. 03

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, 3, 4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAY 16 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/15/14

Barbara Jaffe  
**BARBARA JAFFE, S.C.  
J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 12

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

This Document Relates To:

Index No. 104028/00

RICHARD BABRAVICH and BONNIE BABRAVICH,  
*et al.*,

Plaintiffs,

**DECISION AND ORDER**

- against -

A.C. and S., INC. (ARMSTRONG CONTRACTING &  
SUPPLY), *et al.*,

Defendants.  
-----X

BARBARA JAFFE, J.:

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**FILED**

MAY 16 2014

**COUNTY CLERK'S OFFICE  
NEW YORK**

By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following cases for trial in two trial groups; in Group One: (1) Richard Babravich, Index No. 104028/00; (2) Joseph P. Burns, Index No. 105624/03; (3) Albert D'Alessandro, Index No. 114260/03; (4) Edward J. DeGeorgis, Index No. 106915/99; (5) William Long, Index No. 122024/98; (6) Luis R. Quintero, Index No. 102739/02; and (7) Peter Stefanidis, Index No. 105660/09; and in Group Two only Robert Shernowitz, Index No. 107014/08.

Defendants jointly oppose, with supplemental opposition submitted by: (1) The Goodyear Tire & Rubber company and Goodyear Canada Inc. (Goodyear), in the Babravich action; (2) Foster Wheeler, LLC and CBS Corporation in all of the actions; and (3) Cleaver-Brooks, Inc. in the DeGeorgis, Long, and Stefanidis actions.

### I. APPLICABLE LAW

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court. (See *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1<sup>st</sup> Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). Generally, in order to join actions for trial, there must be a “plain identity between the issues involved in the [ ]two controversies.” (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1<sup>st</sup> Dept 2005]). A motion for a joint trial should be granted unless the opposing party demonstrates prejudice to a substantial right. (*In re New York City Asbestos Litigation [Bernard]*, 99 AD3d 410 [1<sup>st</sup> Dept 2012]). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*).

In determining whether to consolidate the individual plaintiffs’ cases for a joint trial where exposure to asbestos is alleged, courts consider the factors set forth in *Malcolm v Nil. Gypsum Co.*, 995 F2d 346 (2d Cir 1993), which follow, in pertinent part:

- (1) whether the plaintiffs worked at a common or similar worksite;
- (2) whether the plaintiffs had similar occupations, as a “worker’s exposure to asbestos must depend mainly on his occupation,” such as those who worked directly with materials containing asbestos as opposed to those who were exposed to asbestos as bystanders;
- (3) whether the plaintiffs were exposed to asbestos during the same period of time;

- (4) whether the plaintiffs suffer or suffered from the same disease, as the jury at a consolidated trial will hear evidence about the etiology and pathology of different diseases, and prejudice may result where the jury learns that a terminal cancer engenders greater suffering and shorter life span than does asbestosis;
- (5) whether the plaintiffs are alive; “dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living”; and
- (6) number of defendants named in each case.

(*Malcolm*, 995 F2d at 350-353).

## II. PLAINTIFFS' INFORMATION

### A. Richard Babravich

Babravich suffers from lung cancer. While working as a machinist at General Electric from 1972 to the late 1980s, he was allegedly exposed to asbestos-containing material and products including insulation, pipe covering, boilers, pumps, gaskets, valves, packing, motors, and asbestos paper and cloth. The defendants remaining in his action are Crane Co., Dana, Foster Wheeler, GE, Georgia Pacific, Goodyear, Goulds, Ingersol Rand, Westinghouse, and Weil-McLain.

### B. Joseph Burns

Burns died from lung cancer on June 13, 2010. He was allegedly exposed to asbestos from 1964 to 1994 while employed as a millwright at Bethlehem Steel in Lackawanna, New York, working with asbestos-containing insulation, pipe covering, boilers, pumps, gaskets, valves, packing, and motors. The defendants remaining in his action are Crane Co., DB Riley, Foster Wheeler, GE, Georgia Pacific, Goulds, Ingersol Rand, and Westinghouse.

C. Albert D'Alessandro

D'Alessandro passed away from lung cancer on April 25, 2005, and was allegedly exposed to asbestos from 1954 to the late 1980s while employed as a laborer at Bethlehem Steel in Lackawanna, New York, working with asbestos-containing insulation, pipe covering, boilers, pumps, gaskets, valves, and motors. The two defendants remaining in his action are Foster Wheeler and Westinghouse.

D. Edward DeGeorgis

DeGeorgis suffers from lung cancer, and was allegedly exposed to asbestos while employed by AT&T as a communications technician, building technician, and clerk from 1977 to the 1990s. He was allegedly exposed to asbestos contained in insulation, pipe covering, boilers, pumps, gaskets, packing, switch gears, and panel boards. The defendants remaining in his action are Cleaver Brooks, GE, Goulds, Ingersol Rand, Westinghouse, and Weil-McLain.

E. William Long

Long suffers from lung cancer. He was allegedly exposed to asbestos when he was employed as a steamfitter at powerhouses and industrial and commercial sites in and around New York City from the 1960s to 1983, working with asbestos-containing insulation, pipe covering, boilers, pumps, gaskets, valves, packing, turbines, and fireproofing spray. The defendants remaining in his action are Cleaver Brooks, Con Edison, Crane Co., DB Riley, Foster Wheeler, GE, Goodyear, Goulds, Mario & DiBono, Owens-Illinois, Peerless, Treadwell, and Westinghouse.

F. Luis Quintero

Quintero suffers from lung cancer. While working as a boilermaker and welder at various

industrial and commercial sites in and around New York City from 1975 to the 1990s, he was allegedly exposed to asbestos contained in insulation, pipe covering, boilers, pumps, gaskets, valves, packing, and turbines. The defendants remaining in his action are Con Edison, Crane Co., DB Riley, Foster Wheeler, GE, Ingersol Rand, Lilco, and Westinghouse.

G. Peter Stefanidis

Stefanidis suffers from lung cancer. He was exposed to asbestos from 1951 to 1952 while serving the United States Navy, and also from 1962 to 1982 while employed as a steamfitter at powerhouses and industrial and commercial sites in and around New York City. He was allegedly exposed to asbestos-containing material used with insulation, pipe covering, boilers, pumps, gaskets, valves, turbines, fireproofing spray, and sheetrock. The defendants remaining in his action are Cleaver Brooks, Foster Wheeler, GE, Goulds, Ingersol Rand, Mario & DiBono, Morse Diesel, Owens-Illinois, Tishman, and Westinghouse.

III. ANALYSIS

A. Judicial economy

Plaintiffs argue that consolidating these cases will save time and lead to more efficient and speedier dispositions as the same state of the art evidence and medical evidence will be introduced at each trial. However, state of the art evidence is specific to a particular occupation or industry, and may differ among, for example, that specific to automotive or friction products, powerhouse workers, and Navy engineers. (See *Curry v Am. Standard*, 2010 WL 6501559 [SD NY 2010] [differences in degree and duration of plaintiffs' asbestos exposure would likely require presentation of different complex state-of-art evidence in each case, further mitigating against potential efficiency of consolidation]). Moreover, while medical evidence may be

\* 7 ]  
duplicative, it takes less trial time than that spent on each plaintiff's medical history. Thus, the length of the trial depends on the plaintiffs' occupations and medical histories.

Defendants assert that the more plaintiffs in a trial group, the more defendants, and a correspondingly longer jury selection and trial. And when a multi-plaintiff trial is scheduled, jurors are asked to serve weeks if not months. Thus, they maintain, finding jurors who will commit to a lengthy trial prolongs jury selection, as does the necessity of selecting extra alternates against the possibility that one or more jurors will seek to be released before the trial concludes. Defendants also note that jurors who are students or professionals and/or hold managerial or supervisory positions may be unable to serve for a long period, yielding a less diverse pool.

Defendants also contend that rather than promoting judicial economy and efficiency, consolidation has the opposite effect. According to their statistics, of the most recent 13 asbestos trials in New York County, those with only one plaintiff lasted up to two weeks each, whereas those with more lasted as long as 16 weeks. They insist that these statistics undercut plaintiffs' claims that consolidation results in speedier dispositions.

The last case I tried commenced with three plaintiffs and 14 defendants. At the verdict, there remained three plaintiffs and five defendants. Jury selection lasted approximately two weeks, and the trial approximately 12 weeks. In the case I am now trying, we began with three plaintiffs and 10 defendants, jury selection took four weeks, and the three plaintiffs took approximately three weeks to present their cases against the three remaining defendants.

In juxtaposition with the alleged New York County consolidation trend (*see In re New York City Asbestos Litigation*, 188 AD2d 214 [1<sup>st</sup> Dept 1993], *affd* 82 NY2d 821 [joint trials may

potentially reduce cost of litigation, promote judicial economy, speed disposition of cases, and encourage settlements]; *Matter of New York City Asbestos Litigation [Dummit]*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U] [Sup Ct, New York County 2012] [in New York County, asbestos cases have been consolidated for trial historically]), elsewhere the trend is to prohibit the consolidation of asbestos trials absent the consent of all parties. (Ohio R Civ P 41[A][2]; Tex Civ Prac & Rem Code Ann § 90.009; Kan Stat Ann § 60-4902[j]; GA Code Ann § 51-14-10; Mich Admin Order No. 2006-6).

And, while judicial economy and efficiency should be considered in determining whether to consolidate, they “must yield to a paramount concern for a fair and impartial trial.” (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). “The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff’s - and defendant’s - cause not be lost in the shadow of a towering mass litigation.” (*In re Brooklyn Navy Yard Asbestos Litig.*, 971 F2d 831 [2d Cir 1992]; see also *Malcolm*, 995 F2d at 350 [“benefits of efficiency can never be purchased at the cost of fairness”]). However, consolidating cases that have some differences does not “suggest the prejudice of defendant’s right to a fair trial.” (*In the Matter of New York City Asbestos Litigation [Baruch]*, 111 AD3d 574 [1<sup>st</sup> Dept 2013]).

Accordingly, in exercising my discretion in deciding whether to consolidate these cases, I duly consider judicial economy and efficiency. Moreover, as these cases form a FIFO cluster, there is less urgency to resolve these cases.

#### B. Babravich

Babravich is the only plaintiff claiming bystander exposure, and the only one exposed to

paper and cloth. Of the 10 defendants remaining in his action, one is involved only his action and three are only in his action and one other. As plaintiffs have not shown that he shared a common occupation or worksite with the others and as his exposure alleged exposure is different, his case will be tried separately from the others.

C. Burns and D'Alessandro

Burns and D'Alessandro both allege exposure at a Bethlehem Steel facility in Lackawanna, New York, were similarly employed, respectively, as a millwright and laborer, and their exposures overlap by 30 years. Given these similarities, any state of the art evidence they offer will overlap. (*See eg In re New York City Asbestos Litigation [Capozio]*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50072[U] [Sup Ct, New York County 2009] [almost all plaintiffs performed similar tasks in construction trades which exposed them to asbestos during overlapping periods between 1940s and 1990s; state of art and other expert testimony also would be substantially common]). These plaintiffs were also allegedly exposed to asbestos contained in insulation, pipe covering, boilers, gaskets, valves, and motors (*see Dummitt*, 36 Misc 3d at 1234[A] [finding sufficient similarity of occupations as both plaintiffs alleged exposure from work, including equipment repair and maintenance and construction work, and nature of exposure also similar]), are the only two who are deceased, and the only two defendants remaining in D'Alessandro's case, Foster Wheeler and Westinghouse, are also defendants in Burns's case.

D. DeGeorgis

DeGeorgis's work as a communications technician, building technician, and clerk at an AT&T facility is unique, and he is the sole plaintiff alleged to have been exposed to asbestos in electrical switch gears and panel boards. As plaintiffs have not shown that he shared a common

occupation or worksite with the others, his case will be tried separately from the others.

E. Long, Quintero and Stefanidis

Long, Quintero and Stefanidis all worked as laborers at residential and industrial worksites in New York City. Long and Stefanidis, uniquely to this group, worked at powerhouses, and were exposed from the 1960s to the 1980s, apart from Stefanidis's alleged one year of exposure in the 1950s while in the Navy. Given Quintero's alleged exposure between the 1970s and the 1990s, there is an overlap of exposure periods of 20 years. While the three worked at different sites, a well-organized trial presentation, including materials for the jurors to use in organizing their deliberations, will aid their understanding of the evidence.

These plaintiffs were also all allegedly exposed to insulation, pipe covering, boilers, gaskets, and valves. Long and Stefanidis were uniquely exposed to fireproofing spray, and the three of them were uniquely exposed to asbestos-containing turbines. Five of the remaining defendants in these cases are involved in only one of the seven cases, while three other defendants are in two of these three cases. Aside from these defendants, these three plaintiffs have eight defendants in common, including three defendants that are in all three cases.

While Stefanidis's Naval experience is unique to this group, his alleged exposure period is only one year in the 1950s, and there is no indication from any of the parties that federal law applies. (*See Bernard*, 99 AD3d at 410 [as defendant had not yet asked court to determine whether different state's law applied to action, it would be premature to deny consolidation on that ground]; *cf Capozio*, 22 Misc 3d at 4 [as one plaintiff worked for Navy, federal law could be implicated and cause jury confusion if case consolidated with those not involving federal law]; *In the Matter of New York City Asbestos Litigation [Altholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[U] [Sup Ct, New York County 2006][severing for trial case where that plaintiff

uniquely exposed while working on ship; addition of federal maritime law could confuse jury]).

For these reasons, there exist in these three cases common issues that predominate over individual issues, and defendants have not established that any undue prejudice will result, or that their fourteenth amendment right to due process will be violated. (*See Baruch*, 111 AD3d 574 [consolidation properly granted; differences in plaintiffs' cases did not outweigh substantial overlap of factual and legal issues or suggest prejudice of defendant's right to fair trial]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to consolidate is granted to the extent of consolidating the following cases for a joint trial:

- (1) Group One: (a) William Long, Index No. 122024/98; (b) Luis R. Quintero, Index No. 102739/02; and (c) Peter Stefanidis, Index No. 105660/09; and
- (2) Group Two: (a) Joseph P. Burns, Index No. 105624/03; and (b) Albert D'Alessandro, Index No. 114260/03, with this group being tried last after all of the individual plaintiffs' trials;

It is further

ORDERED, that the Richard Babravich action, Index No. 104028/00, shall be tried separately; it is further

ORDERED, that the Edward J. DeGeorgis action, Index No. 106915/99, shall be tried separately; it is further

ORDERED, that the Robert Shernowitz action, Index No. 107014/08, shall be tried separately; it is further

ORDERED, that the trials of the remaining plaintiffs and Group Two shall commence

subject to court availability on at least five days' notice following the completion of the trials ahead of them; it is further

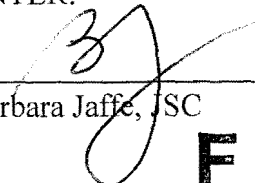
ORDERED, that the parties shall appear for a final pretrial conference as previously scheduled on August 18, 2014 at 10 am in room 279, 80 Centre Street, New York, New York; it is further

ORDERED, that the parties are directed to schedule a settlement conference with the Special Master to take place before the final pretrial conference; it is further

ORDERED, that the date of jury selection, as previously scheduled, on September 8, 2014 is hereby adjourned to September 15, 2014; and it is further

ORDERED, that the parties are directed to convert this matter to e-filing.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: May 15, 2014  
New York, New York

**FILED**

MAY 16 2014

COUNTY CLERK'S OFFICE  
NEW YORK