

**Abrams v Foster Wheeler Ltd.**

2014 NY Slip Op 31893(U)

July 18, 2014

Sup Ct, New York County

Docket Number: 108667/07

Judge: Barbara Jaffe

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

BARBARA JAFFE

J.S.C.

PRESENT: \_\_\_\_\_



Justice

PART 19

ABRAMS, CAROLYN, ET AL.

INDEX NO. 108667/07

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

- v -

FOSTER WHEELER LTD, ET AL.

MOTION SEQ. NO. 01

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

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

**FILED**

JUL 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/18/14

Bj  
BARBARA JAFFE

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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. 108667/07

CAROLYN ABRAMS, Individually and as Administratrix,  
for the Estate of Frederick J. Abrams, *et al.*,

Plaintiffs,

**DECISION AND ORDER**

- against -

FOSTER WHEELER LTD., *et al.*,

Defendants.  
-----X

BARBARA JAFFE, J.:

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**FILED**

JUL 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following "FIFO" cases for a joint trial: (1) Frederick Abrams, Index No. 108677/07; (2) Anthony Bova, Index No. 102148/03; (3) James Futia, Index No. 100919/08; (4) William Gay, Index No. 127678/02; (5) James McGinnity, Index No. 104643/07; and (6) Denise Obremski, Index No. 108412/07.

Defendants jointly oppose; defendant Goodyear separately opposes in the Bova and Gay

actions, and defendant Cleaver Brooks opposes in the Futia action.

### I. APPLICABLE LAW

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court. (See *Matter of New York City Asbestos Litigation [Dummit]*, \_\_ NYS2d \_\_, 2014 NY Slip Op 05054 [1<sup>st</sup> Dept 2014]; *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]), and allegations of prejudice must be specific and non-conclusory (*Dummitt*, 2014 NY Slip Op 05054). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*; *Bernard*, 99 AD3d 410).

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 Ntl. 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 ]
- (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).

To reduce juror confusion and minimize any alleged prejudice to defendants in consolidated cases, the court may use various techniques such as providing “limiting, explanatory and curative instructions,” giving notebooks to jurors to “assist them in recording and distinguishing the evidence in each case,” and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Dummitt*, 2014 NY Slip Op 05054).

## II. PLAINTIFFS’ INFORMATION

### A. Frederick Abrams

Abrams died from lung cancer on April 8, 2010. While serving in the United States Navy as a shipfitter during the 1960s, he was allegedly exposed to asbestos-containing material and products including insulation, pipe covering, pumps, boilers, and valves. The defendants remaining in his action are Foster Wheeler, GE, and Goulds.

### B. Anthony Bova

Bova suffers from lung cancer. He was allegedly exposed to asbestos from the 1950s to the 1980s while employed as a machine helper and operator at Bethlehem Steel in Lackawanna, New York, working with asbestos-containing insulation, gaskets, packing, pipe covering, pumps,

[\*5]  
and valves, and also while renovating his home during the 1970s. The defendants remaining in his action are Crane Co., Foster Wheeler, GE, Georgia Pacific, Goodyear, and Goulds.

C. James Futia

Futia passed away from lung cancer on December 30, 2006, and was allegedly exposed to asbestos from the 1960s to the 1980s while working as an electrician at various commercial and residential sites, as well as a naval shipyard. He was allegedly exposed to asbestos-containing insulation, gaskets, rope, pipe covering, pumps, boilers, and generators. The defendants remaining in his action are Cleaver Brooks, Foster Wheeler, Goulds, Westinghouse, and Weil McLain.

D. William Gay

Presently suffering from lung cancer, Gay was allegedly exposed to asbestos contained in insulation, gaskets, rope, pipe covering, pumps, boilers, and valves while working as a plumber and steamfitter at various commercial and industrial job sites from the 1960s to the 1980s. The two defendants remaining in his action are Foster Wheeler and Goodyear.

E. James McGinnity

McGinnity died from mesothelioma on September 17, 2007. He was allegedly exposed to asbestos while working with asbestos-containing insulation, pipe covering, pumps, boilers, and generators during his employment as an electrician at various commercial job sites from the 1950s to the late 1960s. The defendants remaining in his action are Foster Wheeler, GE, and Goulds.

F. Denise Obremski

Obremski died from mesothelioma on January 2, 2007. She was allegedly exposed to

asbestos through her husband, who was exposed to asbestos contained in insulation, packing, pipe covering, pumps, boilers, turbines, and valves at the Brooklyn Navy Yard in 1977, and through her own exposure while laundering his clothes. The two defendants remaining in her action are Foster Wheeler and GE.

### 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, 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 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 process of 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.

A case I tried recently 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 last case that I tried, 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, with the trial lasting approximately five weeks.

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).

[\* 8]

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 them.

#### B. Obremski

Obremski is the only plaintiff claiming secondary or secondhand exposure through the work of another and she alleges exposure for one year only. Absent any shared occupation or worksite or exposure, her case should be tried separately from the others. (*See Bischofsberger v AO Smith Water Prods.*, 2012 WL 4462393, 2012 NY Slip OP 32414[U] [Sup Ct, New York County] [denying consolidation of two cases where one plaintiff’s sole exposure was through laundering husband’s work clothes]; *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] [denying consolidation to one plaintiff as she experienced secondary exposure from dust brought

home from husband]).

C. Bova, Futia, Gay, and McGinnity

Bova, Futia, Gay, and McGinnity all allege exposure at industrial, commercial and/or residential sites, and were similarly employed. Bova's and McGinnity's exposures began in the 1950s, and all four were exposed during the 1960s, with Bova's, Futia's, and Gay's exposures continuing through the 1980s. Given these similarities, any state of the art evidence they offer overlaps. (See eg *Dummitt*, 2014 NY Slip Op 05054 [in analyzing whether times of exposure were common, focus is on state of art evidence at time]; *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 also allege exposure to asbestos contained in insulation, pipe covering, and pumps, three of them were exposed to valves, boilers, and gaskets, and two were exposed to rope and generators. (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]). Three of them have lung cancer (see *Baruch*, 111 AD3d at 574 [affirming consolidation of three cases even though one plaintiff had mesothelioma and other two had lung cancer]), and two of the four are still alive. Foster Wheeler is a defendant in all of their cases, Goulds is a defendant in three cases, and GE and Goodyear in two cases.

For these reasons, there exist in these cases several 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]). To the extent that evidence will differ in their cases, the jurors will be provided with notebooks and I will issue instructions as needed. (*Dummitt*, 2014 NY Slip Op 05054).

D. Abrams

Abrams is the only Navy shipfitter among the plaintiffs, and he alleges exposure to asbestos only during the 1960s. 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. Moreover, federal maritime law may apply uniquely to his action. (*See 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]; *Altholz*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[U] [severing for trial case where that plaintiff uniquely exposed while working on ship; addition of federal maritime law could confuse jury]).

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) Anthony Bova, Index No. 102148/03; (b) James Futia, Index No. 100919/08; (c) William Gay, Index No. 127678/02; and (d) James McGinnity, Index No. 104643/07;

It is further

ORDERED, that the Denise Obremski action, Index No. 108412/07, shall be tried

separately; it is further

ORDERED, that the Frederick Abrams action, Index No. 108667/07, shall be tried separately; it is further


ORDERED, that the trials of Obremski and Adams 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 jury selection as previously scheduled on December 1, 2014 at 9:30 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 jury selection; and it is further

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

ENTER:

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

**FILED**

JUL 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

DATED: July 18, 2014  
New York, New York