

Matter of New York City Asbestos Litig.
2014 NY Slip Op 32336(U)
September 3, 2014
Supreme Court, New York County
Docket Number: 116852-2006
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

EA
9/14/14
E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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

ANTHONY M. BOVA, as Executrix of the Estate of
DOROTHY T. BOVA, and ANTHONY BOVA,
Individually, et al.,

sep no 2

Plaintiffs,

Index No. 116852-2006

-against-

DECISION/ORDER

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

Defendant(s)

RECEIVED
SEP 04 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

FILED

Papers

SEP 04 2014

Numbered

Notice of Motion/Order to Show Cause, Affirmation, Affidavit(s) & Exhibits...
Answering Affirmation, Affidavit(s) & Exhibits...
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 joint trial in two separate trial groups: Group One: (1) Irving Feuerman, Index No. 108170-2006; (2) Francis Gilroy, Index No. 101591-2007; (3) Walter Jensen, Index No. 101333-2007; (4) Herbert Klindt, Index No. 105764-2006; (5) James Monarchio, Index No. 113486-2006; (6) Ernest Moon, Index No. 105887-2006; and (7) Thomas Nolan, Index No. 108180-2006. Group 2: (1) Dorothy Bova, Index No. 116852-2006. Defendants oppose the motion and raise common and individual arguments against joint trial.

I. Applicable Law

CPLR § 602 [a] permits a court to join actions involving common questions of law or 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 [1st 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 [1st 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 [1st Dept 2002]; *Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1st 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 [1st 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 Appellate Division, First Department recently noted that, with respect to the first two *Malcom factors*, some trial courts have rejected a narrow focus on the specific locations of exposures and type of work in favor of an analysis that considers whether two or more plaintiffs were engaged in occupations related to maintenance, inspection and/or repair and were exposed to asbestos in the traditional way, that is, by working directly with the material (*Matter of New York City Asbestos Litig.*, 2014 NY Slip Op 5054 [1st Dept]). In contrast, other courts have focused on the types of asbestos product to which the plaintiffs were exposed and whether they were manufactured and distributed by different defendants (*id.*). With respect to the third factor, the time of exposure, the focus is on evidence of the state of the art at the time (*id.*). Courts have reached inconsistent rulings regarding the fourth factor, type of disease. With respect to the fifth factor, the effect of different plaintiffs’ statuses, the focus is on whether defendants would be prejudiced by the presence of deceased plaintiffs in the case. Not all of the *Malcolm factors* need be present; consolidation is appropriate so long as individual issues do not predominate over common questions of law and fact.

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).

II. Proposed Joint Trial Group One

According to plaintiffs’ submission, plaintiff Irving Feuerman (Feuerman) was diagnosed with mesothelioma on April 20, 2005 and passed away on September 1, 2005. Feuerman was allegedly first exposed to asbestos while working as a boiler maker from 1956 through the

1990's. Feuerman's co-worker, Daniel Elrose, testified that he was exposed to asbestos-containing material and asbestos used in connection with insulation, packing, boilers, pumps, valves, gaskets, cement, asbestos wire, firebrick, wallboard, plaster, joint compound, floor tiles, and ceiling tiles.

Plaintiff Francis Gilroy (Gilroy) was diagnosed with lung cancer on August 13, 2004, and died on February 5, 2005. Gilroy was allegedly exposed to asbestos while working as a steamfitter at powerhouses and commercial sites in an around New York City from 1961 through the 1980's. His co-workers, Leonard Gropper and Joseph Daly, testified that Gilroy was exposed to asbestos containing materials and asbestos used in connection with such products as insulation, boilers, pipe covering, pumps, valves, gaskets, cement, turbines, ceiling tiles, flanges and blocks.

Plaintiff Walter Jensen (Jensen) was diagnosed with mesothelioma on May 5, 2006, and died on August 11, 2006. Jensen was first exposed to asbestos from 1955 through 1958 while serving as a seaman for the U.S. Navy while aboard the USS Leyte. His co-worker, John Arouty, only testified that he was exposed to asbestos containing material and asbestos used in connection with such products as insulation, pipe covering, packing material, boilers, pumps, valves, gaskets, firebrick, fireboxes, motors, and asbestos wiring from 1958 through 1995 while working as a sheet metal worker at various industrial and commercial sites in and around New York City.

Plaintiff Herbert Klindt (Klindt) was diagnosed with mesothelioma on January 12, 2005 and passed away on February 13, 2005. He was allegedly exposed to asbestos from 1945 through 1969 during his service in the U.S. Airforce as a radar technician, but his brother and co-worker, Gary Klindt, only testified that he was exposed to asbestos while serving as an aircraft mechanic at SAIR Aviation in Syracuse, New York from 1970-1977. Gary Klindt testified that his brother was exposed to asbestos containing material and asbestos used in connection with such products as insulation, pipe covering, gaskets, brakes, and flanges.

Plaintiff James Monarchio (Monarchio) was diagnosed with lung cancer on June 7, 2005. Monarchio was allegedly exposed to asbestos while working as a cement finisher at various commercial sites, industrial sites, and powerhouses in and around New York City from the 1950's through 1979. He testified that he was exposed to asbestos containing material and asbestos used in connection with such products as insulation boilers, cement, fireproofing spray, mastic, and plaster.

Plaintiff Ernest Moon (Moon) was diagnosed with mesothelioma on February 23, 2004 and died on May 1, 2004. From 1938 through 1964, Moon was exposed to asbestos while working for various industrial and commercial sites throughout New York as an assembler. Moon's son, Ernest Moon Jr., only testified that his father was exposed to asbestos containing material and asbestos used in connection with such products as insulation, packing materials, boilers, pumps, valves, and gaskets.

Plaintiff Thomas Nolan (Nolan) was diagnosed with lung cancer on July 22, 2003 and died on November 19, 2006. He was exposed to asbestos while working as a sheet metal worker at various commercial sites throughout New York from 1955 through the 1970's. Nolan's co-worker, John Rozonweski, testified that Nolan was exposed to asbestos containing material and asbestos used in connection with such products as insulation, boilers, pumps, gaskets, and flanges.

Plaintiffs argue that all plaintiffs in proposed joint trial Group One are in the same stage

of discovery and are represented by the same counsel. With respect to the first and second *Malcolm* factors, this court joins those courts that have rejected a rigid application of the common worksite and similar occupation prongs of *Malcolm*. All seven of the plaintiffs in proposed joint trial Group One are alleged to have been exposed, in general, to asbestos at commercial and residential job sites in and around the New York City area while working in occupations requiring them each to engage in hands-on work using the same or similar asbestos-containing products. Each plaintiff is alleged to have been “exposed to asbestos in a similar manner, which was by being in the immediate presence of dust that was released at the same time as they were performing their work. [Defendants] ha[ve] failed to articulate why the differences in the environments and job duties had such an impact on the manner of exposure that it was necessary for the evidence of exposure to be heard separately.” (*In re New York City Asbestos Litig.*, 2014 NY Slip Op 05054 [1st Dept July 3, 2014]) Moreover, the plaintiffs in Group One are generally alleged to have been exposed to asbestos-containing material in products such as insulation, gaskets, pumps, and boilers, among others. Thus, there is sufficient commonality among the worksites, occupations, the asbestos-containing products that Plaintiffs Feuerman, Gilroy, Jensen, Kilroy, Monarchio, Moo, and Nolan were allegedly exposed to and the manner in which they were exposed to them so as to warrant a joint trial. The differences in worksites and occupations pointed to by defendants do not outweigh the substantial overlap of factual and legal issues, or suggest the prejudice of defendants’ right to a fair trial (*Matter of New York City Asbestos Litig.*, 111 AD3d 574 [1st Dept 2013]). Moreover, the exposure periods of all seven Plaintiffs proposed joint trial Group One, while not purely overlapping, are sufficiently common. The Court in *In re New York City Asbestos Litig.*, held that each of the Plaintiffs was exposed “to asbestos containing material or products during overlapping periods of time from the 1940’s to the 1990’s [and] against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to all Plaintiffs.” (11 Misc 3d 1063(A)). Where the Plaintiffs have a very similar overlapping exposure period to the above cited case, it is sufficiently common to warrant a joint trial.

However, the court, in its discretion, finds that the Gilroy, Monarchio, and Nolan cases matter should be tried separately from the rest of the proposed Group One Plaintiffs, where the type of cancer alleged (the eighth *Malcolm* factor) is different. Plaintiffs Gilroy, Monarchio, and Nolan were all diagnosed with lung cancer and each had a history of smoking. The “pathology of lung cancer is substantively different than that of mesothelioma, and the differences in medical testimony that will be required for this disease makes grouping plaintiffs who are diagnosed with this condition a reasonable basis on which to segregate them from the remainder of the plaintiffs, all of whom are diagnosed with some form of mesothelioma.” (*In re New York City Asbestos Litigation*, 2012 WL 3276720) With these three cases (where the Plaintiffs each have/had lung cancer and have smoking histories) the Defendants will likely elicit testimony from their medical experts about the causal links between smoking and lung cancer. This individual issue (unique to the three Plaintiffs listed above) predominate over common issues in the cases sought to be joined. While the absence of this eighth *Malcolm* factor alone may not be sufficient to deny Plaintiffs Order to Show Cause, coupling it with the desire for efficiency and judicial economy is sufficient to warrant these three Plaintiffs to be jointly tried with one another, but tried separately from the proposed Group One of Plaintiffs. Efficiency and judicial economy are important factors to be weighed when determining if cases should be tried jointly. Asbestos cases have traditionally been tried jointly in New York County (*Matter of New York City Asbestos Litig.*

[Dummit], 36 Misc3d 1234[A] [Sup Ct, New York County 2012] [Madden, J.] under the theory that consolidation has the potential to reduce the cost of litigation, promote judicial economy, speed disposition of cases and encourage settlements (*In re New York City Asbestos Litig. [Brooklyn Naval Shipyard Cases]*, 188 AD2d 214 [1st Dept 1993]). A joint trial composed of over thirty parties (seven plaintiffs and well over twenty Defendants) will, in all likelihood, result in jury selection and a trial that will each take several weeks to complete. Therefore, in order to avoid such an inefficient scenario, the Gilroy, Monarchio, and Nolan cases, in which all three plaintiffs were diagnosed with lung cancer, will be tried jointly but not as part of joint trial Group One. Asbestos cases should not be joined for trial simply because doing so has been the routine, nor should the terms "efficiency" and "judicial economy" be used to justify consolidation where experience has shown that consolidation of asbestos cases generally does not advance these lofty goals.

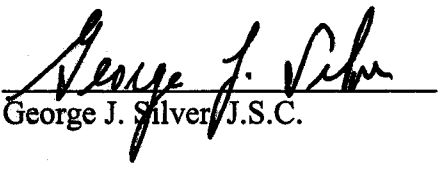
II. Proposed Joint Trial Group Two

Plaintiff Dorothy Bova (Bova) was diagnosed with lung cancer on June 6, 2005 and passed away on June 15, 2005. Her husband, Anthony Bova, was diagnosed with lung cancer on June 19, 2002. Mrs. Bova was exposed to asbestos by virtue of her husband's exposure as a machine helper and operator at Bethlehem Steel in Lackawanna, New York from the 1950's through the 1980's. Mr. Bova testified to exposure to asbestos containing material and asbestos used in connection with such products as insulation, packing material, pipe covering, gaskets, pumps, and valves. Plaintiff Bova will be tried individually after the remaining two groups are tried. In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' order to show cause is granted as follows:

- (1) Irving Feuerman, Index No. 108170-2006, Walter Jensen, Index No. 101333-2007, Herbert Klindt, Index No. 105764-2006, and Ernest Moon, Index No. 105887-2006 will be tried jointly;
- (2) Francis Gilroy, Index No. 101591-2007, James Monarchio, Index No. 113486-2006, and Thomas Nolan, Index No. 108180-2006 will be tried jointly;
- (3) Dorothy Bova, Index No. 116852-2006 will be tried individually; and it is further

ORDERED that all parties are to appear for a pre-trial conference in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007 on October 7, 2014 at 9:30 a.m.


George J. Silver/J.S.C.

Dated: **SEP 03 2014**
New York County

FILED

SEP 04 2014

Index No. 116852-2006

COUNTY CLERK'S OFFICE
NEW YORK