

**Matter of New York City Asbestos Litig.**

2014 NY Slip Op 33672(U)

September 4, 2014

Supreme Court, New York County

Docket Number: 190256/10

Judge: George J. Silver

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

PRESENT: SILVER  
Justice

PART 10

Lucy CARFAGNO

INDEX NO. 190256/10

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

MOTION SEQ. NO. 1

A. D. SMITH WATER PRODUCTS

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

SEP 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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*George J. Silver*

Dated: SEP 04 2014

HON. GEORGE J. SILVER <sup>J.S.C.</sup>

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 10

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

-----X  
LUCY CARFAGNO, Individually and PUBLIC

ADMINISTRATOR BX COUNTY as Administrator for  
the Estate of MARIO CARFAGNO,

Plaintiffs,

Index No. 190256-2010

-against-

**DECISION/ORDER**

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

**FILED**

Defendants.

**SEP 04 2014**

-----X  
**HON. GEORGE J. SILVER, J.S.C.**

**COUNTY CLERK'S OFFICE  
NEW YORK**

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

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits & Exhibits Annexed.....	<u>1</u>
Answering Affirmation, Affidavit(s) & Exhibits.....	<u>2, 3, 4, 5</u>
Replying Affirmation, Affidavit(s) & Exhibits.....	<u>                    </u>

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Plaintiffs move by order to show cause for an order consolidating the following cases for joint trial in four separate trial groups pursuant to CPLR § 602: Group One: (1) Mario Carfagno, Index No. 190256-2010; (2) Frederick Greis, Index No. 190368-2010; (3) Gary Nankervis, Index No. 190169-2009; (4) Joseph Tackas, Index No. 190175-2009; (5) Gaetano Tardugno, Index No. 190461-2011; and (6) Alan Zelenka, Index No. 190428-2009. Group 2: (1) William McRae, Index No. 127574-2002; (2) Todd Graham Pelrah, Index No. 110904-2001; (3) Arthur Senecal, Index No. 110579-2002; and (4) Donald Simmons, Index No. 110502-2002. Group 3: John Clifford, Index No. 121913-1997 and James Elmore, Index No. 190056-2010. Group 4: Joseph DeCrescenzo, Index No. 190054-2010 and Harold Matejovic, Index No. 190245-2010. Defendants jointly oppose the motion and raise common and individual arguments against joint trial. Defendants Cleaver Brooks, Inc. (Cleaver Brooks), Oakfabco, Inc., The Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively Goodyear) submit supplemental opposition as well.

### 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 [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]). 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” it is “possible to go too far in the interests of expediency and to sacrifice basic fairness in the process” of joinder (*Malcolm v National Gypsum Co.*, 995 F2d 346, 354 [2d Cir 1993]). Joinder, therefore, 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 County 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 work site; (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 *Malcolm* factors, some trial courts have rejected a narrow focus on the specific locations of exposures and type of work performed by plaintiffs 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 [1<sup>st</sup> 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 *Malcolm* 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 v Underwood*, 93 AD2d 747, 748 [1<sup>st</sup> Dept 1983]). To successfully oppose consolidation, a party must demonstrate prejudice to "a substantial right" (*Chinatown Apts. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1<sup>st</sup> Dept 1984]). The allegations of prejudice must be specific and non-conclusory (*see Champagne v Consolidated R.R. Corp.*, 94 AD2d 738 [2d Dept 1983]).

## II. Proposed Joint Trial Group One

According to plaintiffs' submission, plaintiff Mario Carfagno (Carfagno) was diagnosed with lung cancer on July 20, 2007 and passed away on November 21, 2007. Carfagno was allegedly first exposed to asbestos in 1947 while serving in the United States Coast Guard. Carfagno was also allegedly exposed to asbestos while working a concrete worker at various commercial sites in and around New York City from 1962 through the 1980s when he was exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, pumps, flanges, boilers, sheetrock, joint compound, gaskets, ceiling tiles, floor tiles and fireproof spray.

Plaintiff Fredrick Greis (Greis) was diagnosed with lung cancer on March 24, 2008 and died on April 25, 2008. Greis was allegedly exposed to asbestos from 1947 through 1975 while working as an HVAC engineer and sheet metal workers at various residential and commercial sites in Long Island. Greis was allegedly exposed to asbestos-containing material used in connection with insulation, pipe covering, boilers, pumps, valves, flanges and gaskets.

Plaintiff Gary Nankervis (Nankervis) was diagnosed with lung cancer on September 17, 2008 and died on November 26, 2010. Plaintiffs' submission states that Nankervis was exposed to asbestos from 1960 to 2006 while he worked as an electrician, steamfitter and demolition worker at various residential sites in and around New York City. Nankervis is also alleged to have been exposed to asbestos while working for his brother's electric, plumbing and heating company. Nankervis was allegedly exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, joint compound, boilers, pumps, valves, ceiling tiles, floor tiles, asbestos cement, sheetrock, asbestos cloth, asbestos rope, boiler jackets and firebrick.

Plaintiff Jack Tackas (Tackas) was diagnosed with lung cancer on October 30, 2007. He was allegedly exposed to asbestos from 1959 through 1981 when he worked as an apprentice and journeyman with Local 12, the insulators union, at various commercial and residential sites, as well as powerhouses, in and around New York City. Tackas was allegedly exposed to asbestos-containing material used in connection with products such as insulation, firebrick, cement, boilers, pipe covering, pumps, valves, flanges, gaskets, packing material, sheetrock, tape, joint compound and turbines.

Plaintiff Gaetano Tardugno (Tardugno) was diagnosed with lung cancer on November 21, 2008. Tardugno was allegedly exposed to asbestos as a maintenance worker/laborer at Madison Square Garden from 1972 through 1981 and while working as an apprentice/carpenter at various commercial and industrial sites in New York City from 1981 through 1995. Tardugno alleges that he was exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, asbestos cement, boilers, valves, joint compound, ceiling tiles, floor

tiles, plaster, sheetrock and fireproof spray.

Plaintiff Alan Zelenka (Zelenka) was diagnosed with lung cancer on March 10, 2008 and died on August 11, 2009. It is alleged that Zelenka was exposed to asbestos from 1960 through the mid-1980s while working as a steamfitter at various commercial and industrial sites in and around New York City. Zelenka was allegedly exposed to asbestos-containing material used in connection with products such as packing material, boilers, pumps, gaskets, turbines, asbestos cement and asbestos rope.

Applying *Malcolm*, all plaintiffs in proposed joint trial Group One were diagnosed with lung cancer, all plaintiffs are represented by the same law firm and defendants do not point to any outstanding discovery issues. With respect to the first and second *Malcom* factors, 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 related to maintenance, inspection and/or repair. Each plaintiff is alleged to have been exposed to asbestos in the traditional way, i.e., by working directly with the material over a period of years. Moreover, the plaintiffs in Group One are generally alleged to have been exposed to asbestos-containing material in products such as insulation, pipe covering, valves, gaskets, boilers, sheetrock and tiles. Thus, there is sufficient commonality among Carfagno's, Greis', Nankervis', Tackas', Tardugno's and Zelenka's work sites, occupations, the asbestos-containing products they were allegedly exposed to and the manner in which they were exposed to them so as to warrant a joint trial. As the Appellate Division, First Department broadly stated, it is sufficient for the purposes of joint trial that all plaintiffs in Group One were exposed to asbestos "by being in the immediate presence of dust that was released at the same time they were performing their work" (*Matter of New York City Asbestos Litig.*, 2014 NY Slip Op 5054 [1<sup>st</sup> Dept]). Although defendants have articulated differences in plaintiffs' work sites and occupations defendants have not sufficiently established why "the differences in environments and job duties had such an impact on the manner of exposure" that it is necessary for evidence of each plaintiff's exposure to be heard separately (*id.*). Further, the differences in plaintiffs' work sites and occupations do not outweigh the substantial overlap of common 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 [1<sup>st</sup> Dept 2013]). Moreover, while not purely overlapping, the plaintiffs in Group One are alleging sufficiently common pre and post-OSHA exposure periods to warrant a joint trial. Furthermore, all of the plaintiffs in proposed joint trial Group One suffered from or are presently suffering from lung cancer making the medical evidence offered with respect to lung cancer will be applicable to all plaintiffs.

Cleaver Brooks' contention that its misidentification defense in the Zelenka case will become lost in a lengthy and complex joint trial is speculative. Equally unpersuasive and speculative is Goodyear's argument that Tackas should be tried separately because defendants may seek to introduce evidence that Tackas, as a member of Asbestos Workers Local 12, was provided with warnings and information regarding the dangers of asbestos that other plaintiffs in Group One may not have received. To offset the danger of any juror confusion and to minimize any unfairness to defendants the court will provide the jury with continuous limiting, explanatory and curative instructions and remind the jury when a particular line of testimony or the introduction of certain evidence applies only to a certain plaintiff or plaintiffs (*Matter of New*

*York City Asbestos Litig.*, 2014 NY Slip Op 5054). Jurors will also be provided with notebooks for taking notes and with plaintiff-specific interrogatories and verdict sheets (*id.*). Accordingly, the Carfagno, Greis, Nankervis, Tackas, Tardugno and Zelenka matters will be tried jointly.

The fact that plaintiffs in proposed joint trial Group One satisfy the Appellate Division, First Department's broad interpretation of the *Malcolm* factors does not end the inquiry, however. As discussed *infra*, efficiency and judicial economy are also factors to be weighed when determining whether cases should be jointly tried. 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 joint trials have the potential to reduce the costs of litigation, speed disposition of cases and encourage settlements (*In re New York City Asbestos Litig. [Brooklyn Naval Shipyard Cases]*, 88 AD2d 214 [1<sup>st</sup> Dept 1993]). However, it is not apparent to this court how conducting a joint trial consisting of six plaintiffs and twenty seven defendants will promote judicial economy or advance any of the other chief policy considerations behind CPLR § 602. Rather, a joint trial composed of over thirty parties will, in all likelihood, result in jury selection and a trial that will take several weeks, if not months, to complete. In order to avoid such a scenario, and in spite of the fact that all six cases in proposed joint trial Group One satisfy the *Malcolm* factors, the Tackas and Tardugno cases, in which both plaintiffs are still alive, will be tried jointly but separately from the Carfagno, Greis, Nankervis and Zelenka cases.

### III. Proposed Joint Trial Group Two

According to plaintiffs' submission, plaintiff William McRae (McRae) was diagnosed with lung cancer on July 5, 2009 and died on July 29, 2009. McRae was allegedly exposed to asbestos from 1960 through the mid 1980s while working as a steamfitter at various commercial and industrial sites in and around New York City. McRae was allegedly exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, packing material, pumps, gaskets and motors.

Plaintiff Todd Graham Pelrah (Pelrah) was diagnosed with lung cancer on November 11, 2009 and died on February 22, 2010. Pelrah was allegedly exposed to asbestos from 1972 through 2003 while working as a pipefitter at various commercial and industrial sites throughout upstate New York. It is alleged that Pelrah was exposed to asbestos-containing material used in insulation, pipe covering, boilers, valves, gaskets, flanges and block insulation.

Plaintiff Arthur Senecal (Senecal) was diagnosed with lung cancer on October 26, 2007 and died on September 30, 2008. It is alleged that Senecal was exposed to asbestos from 1966 through 1986 when he worked as a laborer at various commercial, residential and industrial sites throughout upstate New York. Senecal was allegedly exposed to asbestos and asbestos-containing material used in connection with insulation, pipe covering, boilers, joint compound, sheetrock, turbines, pumps, compressors and floor tiles.

Plaintiff Donald Simmons (Simmons) was diagnosed with lung cancer on November 17, 2005 and died on March 30, 2006. Plaintiffs allege that Simmons was exposed to asbestos from 1951 through 1960 while working as a furnace tender/laborer in Massena, New York and from 1961 through 1989 when he worked as a construction laborer in and around upstate New York. Simmons was allegedly exposed to asbestos and asbestos containing material used in insulation,

floor tiles, joint compound, ceiling tiles, pumps, boilers, sheetrock, rope, gaskets, flanges, cement, mastic, electrical panels, breakers, siding/roofing shingles and roofing papers.

All plaintiffs in proposed joint trial Group 2 suffered from lung cancer and all are deceased. Each plaintiff is represented by the same law firm. While their work sites and occupations are not common, the plaintiffs in Group Two were exposed to asbestos in a similar manner “by being in the immediate presence of dust that was released at the same time they were performing their work” (*Matter of New York City Asbestos Litig.*, 2014 NY Slip Op 5054) and there is sufficient overlap in the alleged exposure periods of each of the plaintiffs. Thus, the McRae, Pelrah, Senecal and Simmons matters will be tried jointly.

#### IV. Proposed Joint Trial Group Three

According to plaintiffs’ order to show cause, plaintiff John Clifford (Clifford) was diagnosed with lung cancer on October 12, 2010. Clifford was allegedly exposed to asbestos from 1952 through 1956 while serving as a boiler tender for the U.S. Navy aboard the USS Iowa, the USS Missouri, the USS Coral and the USS Intrepid. Clifford was also allegedly exposed to asbestos from 1956 to 1957 while working as boiler tender at the Todd Erie Basin Shipyard and from 1958 through 1977 while working as a field engineer. Clifford was allegedly exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, boilers, pumps, gaskets, generators, turbines and fireproofing spray.

Plaintiff James Elmore (Elmore) was diagnosed with lung cancer on February 12, 2010 and died on August 30, 2013. Elmore was allegedly exposed to asbestos from 1943 through 1947 while serving as a radioman for the U.S. Navy at naval shipyards in Brooklyn, New York and Portsmouth, Virginia and aboard the USS Bogue, the USS Croatan, and the USS Mission Bay. Elmore was also allegedly exposed to asbestos while working as a roustabout at an oil field from 1948 to 1950 and as a salesman from 1950 through 1991. Elmore was allegedly exposed to asbestos-containing material used in connection with products such as insulation, pipe covering, joint compound, pumps, valves, boilers, furnaces, gaskets, cement, firebrick and floor tiles.

Although the majority of Elmore’s alleged exposure occurred when he worked as a salesman and plaintiffs’ submission does not establish if Elmore was salesman of asbestos-containing products or was merely present at various sites when work with asbestos-containing products was being performed by others the distinction is irrelevant for the purposes of consolidation. *Malcolm* does not require plaintiffs to share an identical work site, occupation or time of exposure either as bystanders or end-users of asbestos-containing products or materials (*Matter of New York City Asbestos Litig.*, 2010 NY Slip Op 32462[U] [Sup Ct, New York County] [Shulman, J.]). Therefore, regardless of whether Elmore was exposed as a salesman of asbestos-containing products or as bystander, he is alleging that he was exposed “by being in the immediate presence of dust that was released at the same time [he] [was] performing [his] work” (*Matter of New York City Asbestos Litig.*, 2014 NY Slip Op 5054 [1<sup>st</sup> Dept]). Adhering to the less rigid application of the common work site and similar occupation prongs of *Malcolm* the court finds that there is sufficient commonality in the manner in which these plaintiffs were exposed to asbestos while performing their work on Navy ships and in residential and commercial construction sites. There is also sufficient overlap in each plaintiff’s period of exposure since Clifford’s period of exposure is completely encompassed within Elmore’s. Each

plaintiff is represented by the same law firm and each was diagnosed with lung cancer. As discussed above, the fact that Elmore is still alive does not mandate that the actions be tried separately. Accordingly, the Clifford and Elmore matters will be tried jointly.

#### V. Proposed Joint Trial Group Four

According to plaintiffs' order to show cause, plaintiff Joseph DeCrescenzo (DeCrescenzo) was diagnosed with lung cancer on November 14, 2005 and died on January 3, 2011. DeCrescenzo was allegedly exposed to asbestos while serving in the U.S. Army from 1951 through 1953 and from 1949 through 1988 when he worked as an automobile and brake mechanic at various commercial sites in an around New York City. DeCrescenzo was allegedly exposed to asbestos-containing material used in products such as brakes, clutches, gaskets, joint compound and sheetrock.

Plaintiff Harold Matejovic (Matejovic) was diagnosed with lung cancer on January 6, 2010. Matejovic was allegedly exposed to asbestos while working as a mechanic/engine repairman at a commercial site from 1960 through 1985 and as auto mechanic for the MTA from 1985 through 1987. Matejovic was alleged exposed to asbestos in brakes, clutches, gaskets, generators, engines and brake blocks/shoes.

Again, each plaintiff in Group 4 was diagnosed with cancer and each is represented by the same law firm. There is sufficient overlap in each plaintiff's alleged exposure period and each plaintiff is alleging, in general, to have been exposed to asbestos in automotive/friction products while working as a mechanic. The fact that Matejovic is living and DeCrescenzo is deceased is of little consequence as the different life statuses of plaintiffs is not determinative on the issue of joinder in asbestos cases. There is no prejudice in joining a deceased plaintiff with a living plaintiff who will, unfortunately, suffer the same fate (*see Matter of New York City Asbestos Litig.*, 11 Misc3d 1063[A] [ [Sup Ct, New York County 2006]). DeCrescenzo and Matejovic, therefore, will be jointly tried.

In accordance with the foregoing, it is hereby


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

- (1) Tackas, Index No. 190175-2009 and Tardugno, Index No. 190461-2011 will be tried jointly
- (2) Carfagno, Index No. 190256-2010, Greis, Index No. 190368-2009, Nankervis, Index No. 190169-2009 and Zelenka, Index No. 190428-2009 will be tried jointly;
- (3) McRae, Index No. 127574-2002, Pelrah, Index No. 110904-2002, Senecal, Index No. 110579-2002 and Simmons, Index No. 110502-2002 will be tried jointly; and
- (4) Clifford, Index No. 190054-2010 and Elmore, Index No. 190245-2010 will be tried jointly; and

(5) DeCrescenzo, Index No. 190054-2010 and Matejovic, Index No. 190245-2010 will be tried jointly; 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 September 30, 2014 at 9:30 a.m.

Dated: **SEP 04 2014**  
New York County

  
George J. Silver, J.S.C.

**GEORGE J. SILVER**

**FILED**

**SEP 04 2014**

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