

Matter of New York City Asbestos Litig.
2015 NY Slip Op 30709(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 190105/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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GEORGE R. BIRRELL AND RAMONA J. BIRRELL,
et al.,

Plaintiffs,

Index No.190105/2013

-against-

DECISION/ORDER

AERCO INTERNATIONAL, et al.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

This court has been assigned 9 asbestos actions for trial, comprising the Williams Law Firm In Extremis trial group. Plaintiffs have brought the present motion to consolidate all of these actions for joint trial, claiming that there are common questions of law and fact.

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 follows. Group 1 will consist of Harry Moore, Earl Skinnider and Owen Traynor. Group 2 will consist of Onorato Balacich and Salvator Murabito. Group 3 will consist of George Birrell, Charles Hermida, Guisepe Liotta and Joseph Parkin. As to the three groups being consolidated, 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 three groups will not prejudice a substantial right of defendants. As to the three 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 3 in which all of the plaintiffs have lung cancer. Although all of the groups have living and deceased 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 2, the plaintiffs have similar occupations and exposures as they both allege that their exposure was from home renovations and working as a pizza oven operator and server. With respect to the other two groups, although the 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 all had overlapping periods of exposure.

The other arguments raised by defendants in opposition to consolidation, including their due process and equal protection arguments, are without basis. The First Department has just recently held that the trial courts have the authority to consolidate asbestos cases pursuant to CPLR 602 (a) where they involve common questions of law and fact. *See Matter of New York City Asbestos Litig. (Dummitt)*, 121 A.D.3d 230 (1st Dept 2014). Moreover, the court sees nothing inappropriate in consolidating trials from the 2013 and 2014 In Extremis trial group as all of these cases are currently before the court and ready for trial. The court also sees nothing improper in consolidating the case of Balacich with another case even though he allegedly has a different type of mesothelioma. *See Dummitt*, 121 A.D.3d at 244 (upholding consolidation even

though two plaintiffs have different types of mesothelioma). The court also sees nothing improper in consolidating cases where the plaintiff was in the navy with cases where the plaintiff was not in the navy.

Based on the foregoing, the motion to consolidate the cases for trial is granted to the extent stated herein. As discussed at the first conference of this matter, the court will post an order on the NYCAL website two weeks before the date scheduled for jury selection for each group. This constitutes the decision and order of the court.

Dated: 4/29/15

Enter: CK

J.S.C.
CYNTHIA S. KERN
J.S.C.