Matter of New York City Asbestos Litig.
2015 NY Slip Op 31358(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 190411/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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MICHAIL ANDREADIS,

Plaintiff,

- against -

ABB, INC., *et al.*,

Defendants.

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Index No. 190411/13

DECISION AND ORDER

BARBARA JAFFE, J.:

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By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following "in extremis" cases for a joint trial: (1) Michail Andreadis, Index No. 190411/13; (2) Joseph Barry Best, Index No. 190109/14; (3) David William Fahy, Index No. 190259/13; (4) Donald Nefsey, Index No. 190051/14; (5) Donald Rocovich, Index No. 190042/14; and (6) William Weil, Index No. 1900434/11. Plaintiff seeks to try the cases in four groups as

follows: Group one - Andreadis; Group two - Fahy; Group three - Best and Nefsey; and Group four - Rocovich and Weil.

Defendants jointly oppose; opposing in the Nefsey matter are defendants The William Powell Company (Powell), Milwaukee Valve Company, Inc., Oakfabco, Goulds Pumps, Inc., and The Fairbanks Company (Fairbanks); opposing in the Rocovich matter are defendants Oakfabco and Goulds; opposing in the Best matter is defendant Goulds; and opposing in the Weil matter are defendants Andal, Goulds, and Mario & DiBono.

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]*, 121 AD3d 230 [1st Dept 2014]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st 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 [1st 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 [1st Dept 2012]), and allegations of prejudice must be specific and non-conclusory (*Dummitt*, 121 AD3d at 245). 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 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) 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 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*, 121 AD3d at 245).

II. PLAINTIFFS' INFORMATION

As there is no opposition to proposed groups one and two (Andreadis and Fahy), I address only groups three (Best and Nefsey) and four (Rocovich and Weil).

A. John Barry Best

Best recently passed away at the age of 68 from mesothelioma. From 1966 to 1970, he

served as a shopkeeper for the United States Navy, and was allegedly exposed to asbestos while taking damaged returned parts, such as asbestos-containing gaskets and packing, to the shop from ship engineers while they were doing repair work. He also assisted with, and worked near others performing, work on boilers, engine, pumps, valves, steam traps, and turbines, and general clean-up. After he left the Navy, Best performed brake jobs on vehicles using asbestos-containing brakes. (NYSCEF 95).

Defendants remaining in his action are Carrier Corporation, Goulds, ITT Corporation, and Warren Pumps, LLC.

B. Donald Nefsey

Nefsey is 81 years old and suffers from mesothelioma. From 1951 to 1955, he served in the Navy as a fireman aboard the USS Charles P. Cecil, DDR 835, and was allegedly exposed to asbestos from asbestos-containing pumps, steam traps, and valves. From 1946 to 1979, Nefsey also worked as a fireman, laborer, and pipefitter, during which time he was exposed to asbestos contained in and used with boilers, heating coils, insulation, pumps, steam traps, and valves. (NYSCEF 95).

Defendants remaining in his action are Armstrong International, Inc. f/k/a Armstrong Machine Works, Aurora, Bell & Gossett Company, Bryan Steam Corporation, Burnham Corporation, Burnham LLC, Crown Boiler Co., FMC Corporation on behalf of Peerless Pumps, Fort Kent Holdings, Inc. f/k/a Dunham-Bush, Inc., Goulds, Jenkins Bros., Milwaukee Valve, Oakfabco, Perma-Pipe (a subsidiary of MFRI, Inc.), Riley Power, Inc., Sterling Fluid Systems (USA), LLC (formerly known as Peerless Pump Company), Taco, Inc., Fairbanks, Powell, and Warren Pumps, LLC.

C. Donald Rocovich

Rocovich recently passed away at the age of 84 from lung cancer. From 1949 to 1974 he worked as an insulator at various residential, commercial, and industrial sites, and was allegedly exposed to asbestos from asbestos-containing insulation, piping and fittings, valves, elbows, steam traps, pumps, turbines, and other related equipment. Defendants remaining in his action are Goulds and Oakfabco. (NYSCEF 95).

D. William Weil

Weil is a 76-year-old suffering from lung cancer. From 1957 to 1979, he worked as a sheet metal worker, and was allegedly exposed to asbestos from asbestos-containing joint compound, insulation, and fireproofing while working on construction of the World Trade Center. He also performed home renovations in the 1950s and 1960s, and was allegedly exposed to asbestos-containing floor tiles and joint compound. Defendants remaining in his action are Andal, Kaiser Gypsum Company, Mario & DiBono, Port Authority of New York and New Jersey, Tishman Realty & Construction Co., Inc., and Tishman Realty Corporation.

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 offered at each trial. (NYSCEF 95).

Defendants assert that the more plaintiffs in a trial group, the more defendants, and the correspondingly longer process needed for 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 be released before the trial concludes. Defendants also observe 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. (NYSCEF 102).

In denying plaintiffs' claim that consolidation results in speedier dispositions, defendants offer statistics reflecting that of the most recent 19 asbestos trials in New York County, those with only one plaintiff lasted up to three weeks each, whereas those with more lasted as long as 18 weeks. (*Id.*). Defendants also argue that longer trials involving more than one plaintiff almost always lead to large plaintiff verdicts, while trials with one plaintiff often lead to defense verdicts or smaller plaintiff verdicts. Their statistics show that of the nine trials in New York County with one plaintiff, six resulted in defense verdicts, and the other three in verdicts of $2.5 million, $3.8 million, and $7 million. In contrast, of the ten trials conducted with more than one plaintiff, only one had a defense verdict, and the remaining aggregate verdicts ranged from $7.3 million to $190 million, or between $2.43 million at the lowest and $38 million at the highest per plaintiff, representing an average of approximately $9 million per plaintiff.

Defendants also observe that the large verdicts are often reduced by the trial or appellate courts, illustrating a disconnect between juror verdicts in those cases and the sustained verdicts. They thus argue that there is no great efficiency in trying consolidated cases as final judgments must often await appellate scrutiny and decision. (*Id.*).

In juxtaposition to the alleged New York County consolidation trend (*see In re New York City Asbestos Litigation*, 188 AD2d 214 [1st 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 historically been consolidated for trial]), 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 are somewhat diverse 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 [1st Dept 2013]).

Moreover, state of the art evidence differs according to the pertinent occupation or industry, and may differ according to the product. (*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]). And, 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 often depends on the plaintiffs' occupations and medical histories.

Accordingly, in exercising my discretion in deciding whether to consolidate these cases, I duly consider judicial economy and efficiency.

B. Best and Nefsey

Powell, a defendant only in the Nefsey case, maintains that while it was also sued in the Best matter, it was granted summary dismissal, and it would thus be unfair to require it to participate in a trial from which it has been dismissed. It also argues that it would be prejudicial for it to try a case with a living plaintiff and a deceased one; that plaintiffs' economic losses are dissimilar as Best died at 68 years old while he was still working and Nefsey is 81 years old and retired; that as both plaintiffs served in the Navy during different decades, the state of the art does not overlap; and that as Nefsey was mostly exposed to asbestos in Michigan, Michigan law may apply and confuse the jury as only New York law applies in Best's case. (NYSCEF 100).

Milwaukee Valve and Oakfabco also oppose the consolidation of living and deceased plaintiffs, and observe that Best and Nefsey did not share a common occupation, worksite, or time of exposure. (NYSCEF 101). Goulds and Fairbanks advance the same arguments. (NYSCEF 120, 121).

Consolidating cases involving living and deceased plaintiffs is not inherently prejudicial. (*See In re Joint Eastern and Southern Dist. Asbestos Litig. [Schultz]*, 1990 WL 4772 [SD NY 1990] [coexistence of personal injury and wrongful death claims warrants use of cautionary instructions but is not so inherently prejudicial as to preclude consolidation]; *In re New York City Asbestos Litigation v A.O. Smith Water Prods. [Collura]*, 9 Misc3d 1109[A], 2005 NY Slip Op 51465 [Sup Ct, New York County 2005]).

Moreover, that a different state's law may apply to one of the plaintiff's cases does not require separate trials. (*See In re New York City Asbestos Litigation [Bernard]*, 99 AD3d 410 [1st Dept 2012] [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, and defendant did not demonstrate why alleged differences in states' laws cannot be cured with jury instructions]).

However, the only commonality between Best and Nefsey is their naval service, and the differences in their services predominate here. Moreover, their Navy exposure constituted only a part of their overall exposure, which also differs. Best was exposed, after 1970, to asbestos-containing brakes from work on vehicles. Nefsey was exposed from 1946 to 1979 while working as a fireman, laborer, and pipefitter to asbestos-containing boilers, heating coils, insulation, pumps, steam traps, and valves.

Finally, four defendants remain in the Best case, whereas 20 defendants remain in the Nefsey matter, and there are only two defendants in common. Thus, consolidating these cases for trial would result in 22 defendants participating in a trial in which they are involved in one of the plaintiffs' cases.

Plaintiffs have thus failed to establish that Best and Nefsey shared a common occupation, worksite, or exposure, or that joining these cases for trial would result in judicial economy or greater efficiency. (*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]).

C. Rocovich and Weil

Milwaukee Valve and Oakfabco oppose the consolidation of living and deceased

plaintiffs, and observe that Rocovich and Weil did not share a common occupation or worksite. (NYSCEF 101). Andal, a defendant in the Weil action only, advances the same arguments, and observes that Weil's lung cancer has been in remission since 2011. (NYSCEF 117).

Rocovich worked as an insulator from 1949 to 1974 at numerous residential, commercial, and industrial sites, while Weil's primary exposure came from his work as a sheet metal worker at the World Trade Center from 1957 to 1979. Weil also performed home renovation from the 1950s to the 1960s. They were exposed to only one common product, insulation. Two defendants remain in the Rocovich matter, while six remain in the Weil matter, and there are no defendants in common.

Absent the commonality of their occupations, worksites, or exposures, plaintiffs have not demonstrated that these two cases should be consolidated for trial.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order consolidating certain cases for trial is denied in its entirety; and it is further

ORDERED, that the parties are directed to appear for a final pretrial conference on August 19, 2015 at 2:30 pm at 80 Centre Street, Room 279, New York, New York.

ENTER:

Barbara Jaffe, JSC

DATED: July 24, 2015
New York, New York