

Matter of New York City Asbestos Litig.
2016 NY Slip Op 31527(U)
August 9, 2016
Supreme Court, New York County
Docket Number: 190111/2015
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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RICHARD CLARK AND THELMA CLARK, et al.,
Plaintiffs,

Index No. 190111/2015

-against-

DECISION/ORDER

AVOCET ENTERPRISES, INC., et al.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

This court has been assigned six asbestos actions for trial, comprising the Meirowitz and Wasserberg, LLP October 2015 In Extremis trial group. Plaintiffs have brought the present motion to consolidate these actions into two separate groups for joint trial, claiming that there are common questions of law and fact.

They have requested that there be two groups of trials as follows:

Group 1: Monseratte Acosta, Dario Battistoni and Adrian Smith

Group 2: Richard Clark, Angelo Guerra and Louis Votta

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 Monserrate Acosta and Adrian Smith. The case of Dario Battistoni will not be consolidated. Group 2 will consist of Richard Clark, Angelo Guerra and Louis Votta. As to the two groups being consolidated, this court finds that the trials in Group 1 and 2 involve common questions of law and fact and that consolidation of these cases into the two groups will not prejudice a substantial right of defendants. As to group 1 and 2, 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 Group 1 have mesothelioma and all of the plaintiffs in group 2 have lung cancer. All of the plaintiffs in Group 1 are alive and all of the plaintiffs in Group 2 are deceased. 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 1 and Group 2, 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.

However, the court finds that Dario Battistoni’s case should not be consolidated as he is the only plaintiff who claims he was exposed to asbestos as a result of working with kitchen equipment as a cook and butcher’s assistant, which is not a traditional source of asbestos exposure and the only defendant in that case is a kitchen equipment manufacturer.

Finally, defendants argue that there should not be any determination with respect to consolidation of the actions commenced by plaintiffs Richard Clark and Angelo Guerra as they have passed away since the action has been commenced and no executor has been appointed. With respect to plaintiff Clark, an executor has been appointed at this time. With respect to Guerra, an executor has been appointed but only with the limited right to bring an action in Kings County. If at the time of the trial of Guerra’s action, an executor has been appointed with the right to bring an action in New York County, the court will try his case with the two cases with which it is consolidated but if the executor does not have the authority to bring an action in New

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York county, this court will dismiss the action at the time of trial.

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: 8/9/16

Enter: CG

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