

Matter of Adesso v A.O. Smith Water Prods. Co.
2018 NY Slip Op 31525(U)
February 5, 2018
Supreme Court, New York County
Docket Number: 190573/12
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X

IN RE NEW YORK CITY ASBESTOS LITIGATION

-----X
MARY ADESSO, as Administratrix for the Estate of
FRANCESCO ADESSO, and MARY ADESSO,
Individually,

Plaintiff,

- v -

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

Defendants.

-----X

HON. BARBARA JAFFE:

By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating certain active docket cases for trial. Following the recent revision of the Case Management Order (CMO), plaintiffs were directed to submit an amended application to conform therewith.

By letter dated June 23, 2017, plaintiffs ask that the following cases be tried together:
(1) John Swanson, Index No. 190535/12, with Donald Whitaker, Index No. 190220/10;
(2) Richard Hiddie, Index No. 119850/98, with Marc Rose, Index No. 190355/10; (3) John Cerato, Index No. 190391/12, with James Lynch, Index No. 190092/09; (4) Maria Costa, Index No. 190120/11, with Ann Endelmann, Index No. 190387/11; (5) Edmund Lehanka, Index No. 190531/12, with Robert Snider, Index No. 190025/13; (6) Gerald McCormick, Index No. 108222/02, with Joseph Munnely, Index No. 190415/11; (7) Melvin Kalachman, Index No. 190240/09, with Howard Rothman, Index No. 115117/05; (8) Raymond Hickey, Index No.

INDEX NO. 190573/12
MOTION DATE _____
MOTION SEQ. NO. 1

DECISION AND ORDER

116429/04, with Alphonse Litz, Index No. 113105/98; (9) Richard George, Index No. 115544/04, with Charles Toy, Index No. 190520/11; (10) Alvin Bascomb, Index No. 105780/02, with Denis Gallagher, Index No. 190480/12; (11) Paul Hutnick, Index No. 122549/01, with Robert Soto, Index No. 190290/12; and (12) George Hill, Index No. 190435/12, and Salvatore Lipari, Index No. 190369/11, with Lester Scott, Index No. 190175/12.

I do not address the motion as to plaintiffs Kevin Bonnell, Index No. 190327/12 and Richard Mekus, Index No. 190456/12, as their cases have fully settled, and I address only those cases as set forth in plaintiffs' letter dated June 23, 2017.

Defendants jointly oppose all consolidations. Cleaver-Brooks Inc. opposes in the Litz, Lynch, and McCormick cases; Union Carbide Corporation opposes in the Gallagher, Hill, and Munnelly cases; ThyssenKrupp VDM USA, Inc. opposes in the Lynch matter; Pneumo Abex, LLC opposes in the Hill matter; The Goodyear Tire & Rubber Company opposes in the Litz case; Caterpillar Inc. opposes in the Scott case; Foster Wheeler LLC opposes in the Gallagher, George, Hickey, Hill, Kalachman, Litz, McCormick, and Soto cases; and Carrier Corporation opposes in the Lipari matter.

I. APPLICABLE LAW

A motion for a joint trial rests in the discretion of the trial court. (CPLR 602[a]; *Matter of New York City Asbestos Litigation [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). The party seeking consolidation bears the burden of demonstrating common issues. Once shown, the opposing party bears the burden of demonstrating "prejudice to a substantial right." (Vincent C.

Alexander, Practice Commentaries, McKinneys Consol Law of New York, CPLR 602, C602-1). Allegations of prejudice must be specific (*Konstantin*, 121 AD3d at 245), although alleged prejudice to defendants in consolidated cases and potential juror confusion may be reduced by 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. (*Id.*).

While judicial economy and efficiency should be considered in determining whether to consolidate, those interests “must yield to a paramount concern for a fair and impartial trial.” (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). Thus, for actions to be consolidated for a joint trial, there must be a “plain identity” of issues. (*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]). In determining whether there is a plain identity of issues, courts consider a standard set of factors: (1) common worksites, (2) similar occupations, (3) similar time of exposures, (4) type of disease, (5) status as alive or deceased, (6) status of discovery, (6) whether all plaintiffs share counsel, and (7) type of cancer alleged. (*Malcolm v Ntl. Gypsum Co.*, 995 F2d 346, 350-351 [2d Cir 1993]; *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016] [citing *Malcolm*]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013] [same]; *Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012] [same]).

Although not all of the factors need be demonstrated to establish a sufficient commonality among or between plaintiffs, “consolidation is appropriate so long as ‘individual issues do not predominate over the common questions of law and fact.’” (*Konstantin*, 121 AD3d 230, 242, quoting *Bernard*, 99 AD3d 410, 411). Moreover, a shared mechanism of exposure or

product may render insignificant certain differences among worksites and occupations unless the differences impacted on the manner of exposure such that the evidence should be heard separately. (*Konstantin*, 121 AD3d 230 at 242; *Matter of Ballard*, Sup Ct, New York County, Sept. 10, 2009, Feinman, J., index No. 190102/2008; see *Matter of Landry*, Sup Ct, New York County, Jan. 21, 2010, Feinman, J., index No. 111058/2003).

Many of the concerns about the consolidation of numerous cases for trial are no longer pertinent given the recently revised CMO provision. As of July 20, 2017, two cases may be joined for trial where a plaintiff demonstrates that joinder is warranted under *Malcolm* and New York State cases interpreting *Malcolm*. A maximum of three cases may be joined for trial, upon good cause shown and if three or more of the *Malcolm* factors are present and all three plaintiffs suffer(ed) from one of the following diseases: pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers.

II. JOINDER OF TWO PLAINTIFFS' CASES

A. John Swanson and Donald Whitaker

Swanson died of mesothelioma at 78. From 1955 to 1957, he served in the Navy as a fire control technician on a ship and was allegedly exposed to asbestos released from others' renovation work, including the removal of asbestos-containing pipe insulation. From 1960 to 1963, he worked as a construction supervisor at MIT and was present during installation of ceiling and floor tile and plaster.

Whitaker died of mesothelioma at the age of 68. He helped construct his family's home in Texas from 1952 to 1958 whereby he was allegedly exposed to asbestos-containing ceiling and floor tiles, shingles, joint compound, and wallboard. During this time, he also worked as a pipe insulator, using asbestos-containing pipe covering and cement. In 1958, he worked for an

automobile supply company relining asbestos-containing brakes and clutches, and from 1959 to 1964 served in the Navy as an aviation boatswain's mate when he was allegedly exposed to asbestos in nearby engine, propulsion, boiler, and pump rooms, and was present when others removed, used, mixed, cut, and handled asbestos-containing pipe covering, insulation, refractory cement, firebrick, and gaskets. From 1965 to 1973, he worked as an automobile mechanic in Texas, where he maintained tree-trimming trucks and replaced asbestos-containing brakes and clutches.

Of the ten defendants remaining in their cases, only three are in both.

Defendants argue that Whitaker's exposure in the automotive context is sufficiently dissimilar from Swanson's predominantly Navy-related exposure to warrant denial of plaintiffs' motion. (NYSCEF 85).

While both plaintiffs served in the Navy and died from mesothelioma, their different post-Navy occupations, work sites, nature of work, and some of the products to which they were exposed will require different evidence, as will the mechanics of their exposures. Moreover, Swanson's exposure ended ten years before Whitaker's, and a small number of the same defendants remain in each case. Joinder is thus not warranted.

B. Richard Hiddie and Marc Rose

Hiddie was diagnosed with pleural disease and now suffers from lung cancer. From 1951 to 1989, he was employed at Hooker Chemical in Niagara Falls, New York, where he worked as a material handler, pipe fitter, electrician, chemical operator, plant operator, and mason tender. He alleges exposure to asbestos while cracking, removing and replacing asbestos-containing pipe covering and tank insulation using asbestos-containing cement, cloth, and felts, using asbestos-containing packets and gaskets for pumps and valves, using asbestos-containing insulated wiring,

removing asbestos-containing ceiling tiles, drilling through asbestos-containing wallboard, and disposing of asbestos-containing broken pipe insulation in garbage cans, and while present while others worked with asbestos-containing pipe covering.

Rose also suffers from lung cancer. He worked as an electrician from 1971 to 2009 at commercial sites in the New York City area, installing electrical components on the outside of boilers and using asbestos-containing bakelite insulating material, panel boards, arc shields, and insulated wire. He alleges that when he worked in boilers rooms, he was exposed to asbestos-containing external block, cement insulation, firebrick, and rope insulation.

Four defendants remain in Hiddie's case; three in Rose's, none of which are in Hiddie's.

Defendants contend that although Hiddie worked, *inter alia*, as an electrician, he does not claim exposure to equipment, electrical or otherwise, but to asbestos contained in or used with kilns, tanks, insulation, valves, pumps, and motors, whereas Rose worked exclusively with electrical equipment and components, and that the equipment with which each worked is different in terms of type, function, and purpose. Defendants also observe that they have no defendants in common. (NYSCEF 85).

While both plaintiffs suffer from lung cancer, out of approximately sixty years of exposure, theirs overlap by only ten years, which will require different state-of-the-art evidence. Additionally, their occupations differ significantly in that the mechanisms of exposure will require distinct evidence, and they share no defendants in common. Joinder is thus not warranted.

C. John Cerato and James Lynch

Cerato was first diagnosed with pleural disease in 2013 and now suffers from lung cancer. From 1955 to 1959, he served as a fireman and shipfitter on a Naval ship, where he

worked with or near others working with boilers, firebricks, gaskets, insulation, packing, pumps, steam traps, and valves which he alleges contained asbestos or had asbestos-containing components. From 1967 to 1980, he renovated his home, when he was allegedly exposed to asbestos-containing floor tiles, joint compound, and drywall.

Lynch was first diagnosed with asbestosis and now suffers from lung cancer. From 1956 to 1960, he served in the Navy as a diver/shipfitter working on boilers and valves, thereby disturbing and releasing into the air asbestos contained in packing, gaskets, and insulation. From 1964 to 1973, he worked for a private salvage diving company, spending most of his time aboard a Navy ship, on which he was allegedly exposed to asbestos as when he served in the Navy. In 1965, he worked as a diver and pipe driver in various powerhouses, which required him to enter the powerhouses twice daily, thereby allegedly exposing him to asbestos released from the work of other trades on or with boilers, cement, gaskets, insulation, packing, pipe covering, and valves.

Two defendants remain in the Cerato case; eight remain in Lynch, one of which is in the Cerato case.

Defendants assert that the sole element shared by plaintiffs is their naval service, that Lynch was mostly exposed to asbestos during his civilian employment to products to which Cerato was not exposed, and that only Lynch worked in powerhouses where he was allegedly exposed to automotive friction products. (NYSCEF 85). ThyssenKrupp also focuses on the different occupations and worksites (NYSCEF 100), and Cleaver-Brooks argues that joining these cases for trial when they are not named as defendants in all cases prejudices them by an inability to cross examine all of the witnesses. (Aff. in Opposition of William J. Downes, Esq., dated Apr. 11, 2017).

Both plaintiffs served in the Navy during the 1950s and suffer from lung cancer, their exposures overlapped from the 1950s to the 1970s, and they were exposed to many of the same products. While Lynch worked primarily as a diver during his career, the mechanics of his exposures are similar to Cerato's, for example, through work with or on and around others working with or on boilers, gaskets, insulation, packing, and valves. Of the two remaining defendants in Cerato's case, one of them is also in Lynch's case. Joinder is thus warranted. Defendants do not demonstrate that the asserted inability to cross examine every witness at a trial prejudices their rights, especially as the court will instruct the jury that each defendant must be treated as a separate entity.

D. Maria Costa and Ann Endelmann

Costa suffers from lung cancer, allegedly contracted when, from 1958 to 1992, her husband worked as an asbestos sprayer and plasterer at commercial and residential sites in the New York City area, including the World Trade Center, where he was exposed to asbestos-containing drywall, joint compound, spray, and tape. Costa alleges that when she laundered her husband's allegedly asbestos-covered work clothes two to three times weekly, she inhaled dust.

Endelmann died of lung cancer at the age of 72. At least once a week, she shook out and laundered her husband's clothes which were allegedly covered with asbestos dust through his work as a plumber at commercial, industrial, and residential sites in the New York City area from the 1950s to the 1970s when he regularly worked with asbestos contained in or used with products such as boilers, cement, insulation, pipe covering, and valves, and was in the immediate vicinity of coworkers while they sprayed an asbestos-containing substance.

There are three defendants remaining in Costa's case and two in Endelmann's case; none in common.

Defendants argue that Costa’s exposure to asbestos differs significantly from Endelmann’s, and that their husbands’ occupations, job duties, and exposures were different. They also claim they would be prejudiced by the joinder of a living plaintiff with a deceased one, and that different state-of-the-art evidence will be at issue as Endelmann’s exposure ended in 1973 while Costa’s extended into the 1990s. (NYSCEF 85).

While each plaintiff claims second-hand exposure through her husband’s work, the mechanisms of the husbands’ alleged exposures to asbestos differ significantly and Endelmann’s exposure ended in the 1970s while Costa’s continued into the 1990s. Joinder is thus not warranted.

E. Edmund Lehanka and Robert Snider

Lehanka died from mesothelioma at the age of 78. From 1953 to 1956, while serving in the Navy as a machinist’s mate aboard a ship operating out of the Brooklyn Navy Yard, Lehanka disassembled pumps and valves, and removed asbestos-containing gaskets which required scraping, wiping, and dusting their surfaces and repacking them with asbestos-containing materials. He was also regularly present when others cracked, cut, scraped, mixed, and replaced asbestos-containing gaskets, pipe covering, and insulating cements on pipes, pumps, and valves.

Snider died from mesothelioma at 89. He served in the Navy aboard three ships as a pharmacist’s mate from 1943 to 1946, and was allegedly exposed to asbestos from dust created after a “kamikaze attack” and while in the vicinity of others working on asbestos-containing gaskets, pumps, valves, cement, pipe insulation, and firebrick and products requiring the use of asbestos. From 1951 to 1952, while serving as a hospital corpsman aboard a Navy ship he was allegedly exposed to asbestos in the same manner as he was in the 1940s, and from 1953 to 1978,

he worked as a computer analyst, when he was allegedly exposed to asbestos from other trades' work on boilers, valves, gaskets, and pipe insulation.

Of the six defendants remaining in Lehanka's case and three in Snider's, two are named in both.

Defendants maintain that joinder is not warranted as the only commonality between the two plaintiffs' cases is their Navy service, and Snider's bystander exposure was minimal whereas Lehanka's was direct. (NYSCEF 85).

Although both served in the Navy and died of mesothelioma, their periods of exposure briefly overlap, and the mechanisms of their exposures differ significantly. Joinder is thus not warranted.

F. Gerald McCormick and Joseph Munnelly

McCormick passed away from lung cancer and pleural disease at the age of 69. From 1962 to 2000, he worked as a bricklayer at commercial and industrial sites in the Buffalo, New York area, and rebuilt old furnaces, chipping away old asbestos-containing firebrick and installing new firebrick, and used asbestos-containing refractory material such as firebrick, mortar, insulation, packing, and castables. He also worked around others working on boilers and pipes, allegedly exposing him to asbestos contained in or used with insulating cement, pipe covering, and gaskets.

Munnelly died of lung cancer at 80. He worked as a carpenter at commercial sites in the New York City area from 1962 to 1998, where he scraped, tore, and removed asbestos-containing floor tiles, and installed new ones by cutting, snapping, and sawing the tiles. He also applied asbestos-containing joint compound, and removed and installed asbestos-containing ceiling tiles, roofing shingles, and sheetrock, and was also present while others worked on

boilers, pumps, valves, and other equipment, allegedly exposing him to asbestos-containing insulating cement, gaskets, and pipe covering.

Three defendants remain in McCormick's case, six in Munnely's, with only one in common.

Union Carbide argues that as it is a defendant only in the Munnely case and the only product that it produced at issue is joint compound, trial evidence as to other products is irrelevant to the case against it, and would prejudicially confuse the jury. It also observes that the products to which each plaintiff was exposed are different, and that only McCormick worked at chemical plants and powerhouses. (NYSCEF 115). Cleaver-Brooks maintains that the occupations and diseases differ, and that it is prejudiced by the inability to cross examine witnesses at trial.

Foster Wheeler submits statistics to support its argument that consolidated trials result in lengthier jury selection and trial, less defense verdicts, and exceedingly large plaintiff's verdicts, all of which prejudice its rights. Moreover, it contends that consolidation violates all of its rights in a variety of ways. (NYSCEF 102).

To date, no New York appellate court has considered the statistics cited by defendants. In any event, they are too anecdotal. (*See Hudson v Merrill Lynch Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [plaintiffs' reliance on statistics as evidence of pretext or bias unavailing, as sample sizes "too small to support an inference of discrimination]). Moreover, recent experience reveals that even single-plaintiff cases take an inordinate amount of time for jury selection.

Both plaintiffs died of lung cancer, were exposed from the 1960s to the late 1990s, and worked at commercial sites. The mechanisms of their exposures are similar and they both allege exposure through their own work and that of others in their presence. Joinder is warranted.

G. Melvin Kalachman and Howard Rothman

Kalachman passed away from lung cancer at the age of 68. From 1959 to 1962, he served in the Navy as an electrician aboard a ship docked at the Brooklyn Navy Yard, where he was allegedly exposed to asbestos contained in or used with bakelite, switches, panel boards, and insulated wire, and while in the vicinity of other trades working on boilers, firebrick, gaskets, insulation, packing, pipe covering, pumps, and valves.

Rothman passed away from lung cancer at 81. From 1956 to 1966, he served in the Navy as an electronic mechanic stationed in the Brooklyn Navy Yard. He removed and installed equipment, allegedly exposing himself to asbestos-containing floor tiles, insulation, pipe covering, and vermiculite.

Only Foster Wheeler remains in Kalachman's case, while in Rothman's case, six other defendants remain in addition to Foster Wheeler.

In opposing consolidation, defendants argue that Kalachman actually suffered from colon cancer, not lung cancer, and that he was an infrequent smoker for less than three years, while Rothman was a lifelong smoker. (NYSCEF 85).

The order transferring this cluster to me for trial reflects that Kalachman suffered from a cancer other than lung cancer. Nonetheless, the similarities in their cases outweigh that difference, as both plaintiffs are alleged to have been exposed from the 1950s to the 1960s through naval service and while performing electronic work. Joinder is thus warranted.

H. Raymond Hickey and Alphonse Litz

Hickey died of pleural disease at 78. From 1944 to 1946, he served in the Navy as an electrician's mate aboard a ship operating in the Norfolk Naval Shipyard, where he worked with asbestos contained in or used with products such as arc chutes, bakelite, gaskets, switches, and wire insulation, and around other trades working with cement and pipe covering. From 1946 to 1987, Hickey worked as a union electrician for several electrical contractor companies at commercial, residential, and industrial sites, and handled asbestos-containing materials including panel boards, switches, and wire insulation and removed asbestos-containing ceiling tiles and drilled through wallboard.

Litz passed away from lung cancer at 79. From 1942 to 1948, he served in the Navy as an electrician, and from 1948 to 1985, as an electrician in a steel factory in Syracuse, New York. He was allegedly exposed to asbestos contained in or used with arc chutes, bakelite, gaskets, insulation, packing, pipe covering, pumps, and valves, and while present when others worked on and with boilers, firebrick, gaskets, insulation, packing, pipe covering, pumps, and valves. From 1957 to 1966, Litz also worked for a private contracting business, removing and replacing boilers and pumps from commercial and residential sites around Syracuse, which allegedly exposed him to asbestos emanating from boilers, cement, gaskets, insulation, packing, pipe covering, and valves.

The two defendants remaining in Hickey's case are among the eight remaining in Litz's case.

Goodyear opposes consolidation of the Litz case with Hickey's case on the ground that their exposures differed. They also worked at different worksites. (NYSCEF 105).

Hickey and Litz both suffered from lung cancer, served in the Navy in the 1940s performing electrical work, and were exposed from the 1940s to the 1980s, and to similar products. The two remaining defendants in the Hickey matter are also defendants in Litz's case. Joinder is thus warranted.

I. Richard George and Charles Toy

George passed away from lung cancer at the age of 74. From 1955 to 1964, he served in the Navy as a boatswain's mate on active duty and in the Navy reserve and aboard naval ships, one of which was docked at the Brooklyn Navy Yard. On the ships, he performed general maintenance, including painting, repairing asbestos-containing equipment in the mechanical and boiler rooms, and maintaining boilers, pumps, and engines. While at the Navy Yard, he worked near pipes allegedly covered with asbestos-containing insulation and was present when other trades repaired pipe covering and block insulation.

Toy died of lung cancer at the age of 76. From 1952 to 1970, he served in the Navy as a ship fitter, repairing and maintaining naval ships while at different shipyards, including the Brooklyn Navy Yard. He maintained the hull and piping systems in the ships, requiring him to repair valves with gaskets and packing, disturbing thermal and pipe insulation, and standing fire watch during overhauls.

Only Foster Wheeler remains in George's case, while four other defendants remain in Toy's case.

Both plaintiffs died of lung cancer, and served in the Navy in the 1950s and 1960s, and performed similar work, including working on or around piping and insulation. While there are no defendants in common, only five defendants remain in the two cases. Joinder is thus warranted.

J. Alvin Bascomb and Denis Gallagher

Bascomb was diagnosed with asbestosis in 2001 and colon cancer in 2011. In the 1970s and 1980s, he worked on automobiles, allegedly exposing himself to asbestos-containing engine and brake gaskets. In 1988, he performed demolition work in apartments in the Bronx and Manhattan, where he destroyed pre-existing boilers with saws and sledgehammers, breaking apart asbestos-containing parts including insulation, gaskets, pipe covering, and valves, and removing them from the premises.

Gallagher also suffers from colon cancer. From 1968 to 1979, he performed renovations on his home and brake work on his personal vehicles, and also worked as a carpenter at commercial jobsites in and around New York City from 1970 to 1979, where he worked around five-gallon metal buckets of joint compound used for drywall, sheetrock, and ceilings and near other workers who were applying and removing asbestos from boilers, gaskets, pumps, valves, steam traps, joint compound, sheetrock, plaster, cement, insulation, pipe covering, floor tiles, roofing shingles, and fireproofing spray.

Three defendants remain in Bascomb's case and 14 in Gallagher's, none in common.

Defendants maintain that as Bascomb's primary exposure is from automotive work and his only exposure to pipe-related equipment lasted one year, while Gallagher's primary exposure was to sheetrock and floor tile, their exposures differed significantly.

Although both plaintiffs suffer from the same disease, their exposures overlap by only a decade, and while they both performed automotive repair work, most of Bascomb's exposure was from these repairs, whereas Gallagher was mainly exposed through construction work, and uniquely exposed to joint compound used for drywall, sheetrock, and ceilings, steam traps, sheetrock, plaster, cement, insulation, pipe covering, floor tiles, roofing shingles, and

fireproofing spray. Moreover, only Gallagher claims bystander exposure, and there are no common defendants. Joinder is not warranted.

K. Paul Hutnick and Robert Soto

Hutnick passed away from asbestosis at the age of 78. He served in the Navy from 1949 to 1953 as a boilermaker aboard a ship operating out of the Brooklyn Navy Yard, where he was exposed to asbestos while working with boilers, firebrick, gaskets, insulation, packing, pipe covering, pumps, steam traps, and valves.

Soto also passed away from asbestosis. From 1945 to 1957, he worked as a fireman, pumpman, and engineer on naval and private ships, and was exposed to asbestos while performing maintenance, cleaning, and operating the ship's boilers, pumps, valves, and turbines, thereby exposing him to firebrick, pipe insulation, gaskets, and packing, all while wearing asbestos-containing gloves.

Only Goulds remains in Hutnick's case; four other defendants remain in Soto's case.

Defendants deny that Soto served on any naval ships; rather, they claim he was as a Merchant Marine on privately-owned vessels. They argue that non-Navy cases should not be joined with Navy cases. (NYSCEF 85).

Both plaintiffs died of asbestosis, and were allegedly exposed to asbestos at roughly the same time. While Soto may not have served in the Navy, he worked aboard naval ships, and defendants do not establish that the law applicable to naval exposure does not apply to Soto. They were also exposed to the same or similar products, including boilers, firebrick, gaskets, insulation, and packing. There are five remaining defendants in the two cases. Joinder is thus warranted.

III. JOINDER OF THREE PLAINTIFFS' CASES

Again, the CMO permits the joinder of a maximum of three cases for trial upon good cause shown, and if: (1) joinder is warranted under three or more of the *Malcolm* factors, and (2) the three plaintiffs suffer(ed) from one of the four following diseases: pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers.

George Hill, Salvatore Lipari, and Lester Scott

Hill passed away from lung cancer at the age of 82, after having first being diagnosed with asbestosis. Between 1953 and 1957, he served in the Navy as a fireman and boilermaker aboard two ships operating out of the Brooklyn Navy Yard where he was allegedly exposed to asbestos contained in or used with boilers, firebrick, gaskets, insulation, packing, pumps, steam traps, and valves through his personal use or as a bystander. From 1957 to 1996, Hill worked at Thatcher Glass in Elmira, New York, as a boilermaker, truck mechanic, and general helper, where he allegedly worked with asbestos contained in or used with boilers, gaskets, packing, steam traps, valves, brakes, and clutches.

Lipari passed away from lung cancer at the age of 73, after being first diagnosed with asbestosis. From 1957 to 1961, he served in the Navy as a fireman aboard the USS Des Moines and at different naval yards, and was allegedly exposed to asbestos contained in or used with boilers, firebrick, gaskets, insulation, packing, pumps, and valves by his own use and while in the vicinity of others working with asbestos. From 1976 to 1982, he worked as a boiler maintenance mechanic for the Happauge School District, where he repaired and maintained boilers, allegedly exposing himself to asbestos contained in or used with boilers, gaskets, insulating cements, packing, and valves.

Scott died from lung cancer at the age of 83. From 1948 to 1952, he served in the Navy as a welder aboard the USS Mindoro, and was exposed to asbestos contained in and used with pipe covering, insulation, gaskets, pumps, and valves, allegedly inhaling asbestos-containing fumes and smoke. From 1957 to 1969, he worked for a welding company, thereby allegedly exposing himself to asbestos-containing firebrick while in the presence of others working on boilers at residential and commercial sites. From 1969 to 1982, he worked as an automobile mechanic and was exposed to asbestos contained in or used with brakes, clutches, engine gaskets, and insulation, and in 2006 he was exposed to asbestos-containing floor tiles and sheetrock while renovating his home.

In Hill's case, 16 defendants remain; five of the nine defendants remaining in Lipari are defendants in Hill's case; three of the seven defendants remaining in Scott's case are defendants in Hill's case only.

Defendants maintain that Hill's predominant exposure was during his 50-year career as a mechanic, and that while Scott served in the Navy, his sole exposure is alleged as having occurred during home renovation work. (NYSCEF 85). Carrier argues that as it is only a defendant in the Lipari matter, and as Lipari's exposure differs from the others', having worked at different sites and different occupations, and having been exposed for different amounts of time, and as only Lipari is alleged to have been exposed to air compressors and oil purifiers, consolidation is not warranted. (NYSCEF 97). Caterpillar contends that as it is a defendant only in Scott's case, being tried with all three plaintiffs would prejudice its right to a fair and impartial jury, and observes that Scott did not identify any Caterpillar products at issue during his time in the Navy, and that he alone alleged exposure to work on brakes and clutches. (NYSCEF 103).

Union Carbide observes that is a defendant in only Hill's case, that plaintiffs' occupations differ, and that only Hill alleged exposure to friction products. (NYSCEF 115).

All three plaintiffs died of lung cancer, thereby satisfying one requirement of the CMO. Hill and Lipari both served in the Navy during the 1950s as firemen and were similarly exposed to asbestos contained in or used with boilers, firebrick, gaskets, insulation, packing, and pumps. Thereafter, they worked until the 1980s and 1990s as boilermen or boilermakers, working with boilers, gaskets, packing, and valves. Of the 20 remaining defendants in the Hill and Lipari actions, they share five defendants.

Scott, on the other hand, while also serving in the Navy in the 1950s, is the only plaintiff in this group who worked as an automotive mechanic for approximately 13 years and the only one exposed during home renovation work to asbestos-containing floor tiles and sheetrock. Three of the seven defendants remaining in Scott's case are in no other case.

Thus, plaintiffs establish that joinder is warranted in the Hill and Lipari cases, but that Scott ought not be joined with them. Moreover, and in any event, having failed to allege or show "good cause" for joining the three cases for trial as required by the CMO, plaintiffs fail to sustain their burden on this motion for their joinder.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to join certain cases for trial is granted to the extent specified above. Given the numerous cases at issue in this motion, plaintiffs are directed to submit a proposed order setting forth in which order they would like the trials to proceed in accordance with this decision, after which a supplemental order will be entered.

2/5/2018

DATE


BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: