Lanza v Kaiser Gypsum Co., Inc.
2020 NY Slip Op 32940(U)
September 3, 2020
Supreme Court, New York County
Docket Number: 190014/2014
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

----------x

IN RE NEW YORK CITY ASBESTOS LITIGATION

----------X

RALPH LANZA, as Personal Representative for the Estate of SANTO LANZA, and RITA LANZA, as Spouse,

Plaintiffs Index No. 190014/2014

- against -

KAISER GYPSUM COMPANY, INC.,

Defendant

----------x
----------X

BRAM W. KRANICHFELD, as Executor of the Estate of HENRY C. KRANICHFELD,

Plaintiff Index No. 190434/2018

- against -

KAISER GYPSUM COMPANY, INC.,

Defendant

----------x

DECISION AND ORDER

APPEARANCES:

For Plaintiffs
Matthew Park Esq.
Early Law Firm, LLC
360 Lexington Avenue, New York, NY 10017

For Defendant
Troy P. Cunningham Esq.
Lewis Brisbois Bisgaard & Smith LLP
77 Water Street, New York, NY 10005

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiffs in these two asbestos product liability actions move for a joint trial. C.P.L.R. § 602(a). "The CPLR provides for consolidation where appropriate, without reference to whether the matter concerns asbestos or some other issue." Matter of New York City Asbestos Litig., 121 A.D.3d 230, 246 (1st Dep't 2014), aff'd, 27 N.Y.3d 765 (2016). Although no special rules otherwise apply to joint trials in asbestos product liability actions, the New York City Asbestos Litigation Case Management Order (CMO) § XXV(B) provides that the court may join two actions for trial where plaintiffs demonstrate that joinder is warranted according to the factors enunciated in Malcolm v. National Gypsum Co., 995 F.2d 346, 350-51 (2d Cir. 1993), and New York authority applying that precedent. Matter of New York City Asbestos Litig., 121 A.D.3d at 242, aff'd, 27 N.Y.3d 765; Matter of New York City Asbestos Litig., 99 A.D.3d 410, 411 (1st Dep't 2012). Both plaintiffs and defendant ask the court to apply these factors. As they are consistent with New York Law on joint trials, which are to reduce multiplicity of actions and the greater delay and expense they entail, the court complies with the CMO and the parties' request. Matter of New York City Asbestos Litig., 121 A.D.3d at 242, aff'd, 27 N.Y.3d 765; Cummin v. Cummin, 56 A.D.3d 400, 400 (1st Dep't 2008); Sokolow, Dunaud, Mercadier & Carreras v. Lacher, 299 A.D.2d 64, 74 (1st Dep't 2002). Since defendant does not dispute that a joint trial will reduce duplicity, delay, and expense, the only reason to deny a joint trial would be if

defendant demonstrates prejudice. Grynberg v. BP Exploration Operating Co. Ltd., 127 A.D.3d 553, 554 (1st Dep't 2015); Matter of New York City Asbestos Litig., 121 A.D.3d at 245, aff'd, 27 N.Y.3d 765; Cason v. Deutsche Bank Group, 106 A.D.3d 533, 533 (1st Dep't 2013); Matter of New York City Asbestos Litig., 99 A.D.3d at 410.

II. APPLICABLE STANDARDS

The factors enunciated in Malcolm v. National Gypsum Co., 995 F.2d at 350-51, include whether the same attorney represents plaintiffs and the same attorney represents defendant in the two actions, whether the injured persons for whom recovery is sought are living or deceased and suffered from the same disease, and the actions' relative readiness for trial. The parties do not dispute that the same attorney represents plaintiffs and the same attorney represents the same single remaining defendant, Kaiser Gypsum Company, Inc., in both actions; that the injured persons for whom recovery is sought, Santo Lanza and Henry Kranichfeld, both are deceased and suffered from pleural mesothelioma; and that both actions are ready for trial. The remaining factors relate to the similarity of the circumstances under which the decedents were exposed to work that plaintiffs claim released asbestos fibers into the air: the decedents' occupations, their work sites, and the periods over which plaintiffs claim the decedents were exposed to asbestos from defendant's products.

Plaintiffs need not demonstrate all these factors. CMO § XXV(B); Matter of New York City Asbestos Litig., 121 A.D.3d at

242, aff'd, 27 N.Y.3d 765. A joint trial is warranted as long as "individual issues do not predominate over the common questions of law and fact." Matter of New York City Asbestos Litig., 121 A.D.3d at 242, aff'd, 27 N.Y.3d 765; Matter of New York City Asbestos Litig., 99 A.D.3d at 411. See C.P.L.R. § 602(a); Cason v. Deutsche Bank Group, 106 A.D.3d at 533.

III. COMMON ISSUES

The deceased Santo Lanza suffered from pleural mesothelioma that plaintiffs claim was caused by his exposure to asbestos while working as a painter on commercial and residential buildings from 1970 to 1977, where he applied and sanded joint compound containing asbestos on sheetrock walls. Plaintiffs claim that the main brand of joint compound that he used was Kaiser Gypsum's product.

The deceased Henry Kranichfeld also suffered from pleural mesothelioma that plaintiff claims was caused by his exposure to asbestos while working as a carpenter at commercial buildings from 1970 to 1980, where he applied, sanded, and cleaned up joint compound containing asbestos on sheetrock walls and worked in the vicinity of other carpenters performing the same tasks. Plaintiff claims that one of the main brands of joint compound used by Henry Kranichfeld and the other carpenters he worked with was Kaiser Gypsum joint compound. In both actions Kaiser Gypsum has admitted that it sold joint compound containing asbestos from the mid-1950s to 1976.

Although Lanza and Kranichfeld did not share precisely the

same occupation and did not work at the same work site, the circumstances of their claimed exposure to asbestos are remarkably similar. Defendant fails to articulate why the differences in the decedents' work sites and duties created a difference in the circumstances of their exposure. Joinder does not require congruent work histories. Matter of New York City Asbestos Litig., 121 A.D.3d at 244, aff'd, 27 N.Y.3d 765. Even if each action were tried separately, each would involve multiple work sites. The key factors are that both Lanza and Kranichfeld worked on construction or renovation of buildings where plaintiffs claim both workers applied and sanded defendant's joint compound on sheetrock walls and, at Kranichfeld's work sites, other workers in his vicinity performed the same work. Thus the application and sanding processes that plaintiffs claim exposed Lanza and Kranichfeld to asbestos, as well as the products to which they were exposed, were the same. Id.

Defendant points to the different sizes and layouts of the decedents' work sites, but fails to explain the relevance of these differences. Id. While the differences in the duration of their exposure, the ventilation at their work sites, and the number of co-workers with whom Kranichfeld worked are more relevant, these circumstances vary among the work sites at which any one decedent worked. Defendant fails to explain how the further differences among the decedents' respective work sites will so complicate or confuse the trial as to weigh against a joint trial. Id.

The periods over which plaintiffs claim the decedents were exposed to asbestos from defendant's products also overlap substantially: 1970-77 and 1970-80. In both actions defendant likely will try to show that no exposure occurred after 1976, when defendant ceased selling joint compound containing asbestos, even though plaintiffs may try to show that those products remained in the stream of commerce after 1976. The deposition testimony has shown that neither decedent knew about the dangers of asbestos when plaintiffs claim each decedent was exposed to defendant's products containing asbestos. Since those exposures were during a substantially overlapping period, the core issues of defendant's knowledge about the dangers of asbestos during that period and the measures defendant could have taken to prevent those exposures will be the same. Id.; Matter of New York City Asbestos Litig., 99 A.D.3d at 410. Separate trials would risk inconsistent determinations on these core common issues based on the same facts: an injustice that joint trials are designed to prevent. Grynberg v. BP Exploration Operating Co. Ltd., 127 A.D.3d at 554; Vecciarelli v. King Pharms., Inc., 71 A.D.3d 595, 596 (1st Dep't 2010); Kallas v. Milberg Weiss LLP, 61 A.D.3d 451, 452 (1st Dep't 2009); Cummin v. Cummin, 56 A.D.3d at 400.

IV. POTENTIAL DIFFERENCES

Defendant focuses not on the decedents' exposure to defendant's products, but on their different exposures to other sources of asbestos. Defendant contends that Lanza removed and

replaced drywall, insulation, and vinyl floor tile and applied and sanded tile mortar and paint, all of which contained asbestos, as early as the 1950s. Defendant contends that Kranichfeld removed and replaced wall insulation, pipe insulation, flooring, and roofing materials, all of which contained asbestos, or worked in the vicinity of other carpenters performing the same tasks as early as 1962.

First, these differences are minimal. The only differences are Kranichfeld's testimony at his deposition that he removed and replaced roofing materials, which Lanza's son did not mention when describing Lanza's work in deposition testimony. His son testified that Lanza worked with tile mortar, which Kranichfeld did not mention as part of his work on flooring.

More significantly, to apportion liability to the manufacturers, distributers, or sellers of these other sources of asbestos exposure, defendant bears the burden to identify them and show that they were charged with knowledge of their products' hazards, but failed to warn about those hazards. Again, these nonparty tortfeasors vary for any one decedent. While apportionment of liability complicates any trial for a single plaintiff, defendant again fails to explain how the further differences among the nonparty tortfeasors that contributed to each decedent's injury will so complicate or confuse the trial as to weigh against a joint trial.

Given the undisputed facts and the parties' respective claims, separate trials will involve the same attorneys, the same

expert witnesses, and many of the same exhibits presenting the same evidence on the same issues. Joint trials are not limited to identical actions. There are always distinctions between two actions and between two plaintiffs. If a few distinctions were enough to keep actions separate, no actions ever would be jointly tried. Defendant identifies no individual issues that predominate over the common issues. Matter of New York City Asbestos Litig., 121 A.D.3d at 245, aff'd, 27 N.Y.3d 765. The differences identified do not outweigh the substantial commonalities. Yoon Jung Kim v. Gahee An, 150 A.D.3d 590, 594 (1st Dep't 2017); Karg v. Kern, 125 A.D.3d 527, 529 (1st Dep't 2015); Cason v. Deutsche Bank Group, 106 A.D.3d at 533; Matter of New York City Asbestos Litig., 99 A.D.3d at 410.

V. PREJUDICE

Defendant insists that it will be prejudiced by jurors' confusion over the two plaintiffs and consequent reliance on evidence pertaining to one plaintiff to bolster the jury's determination pertaining to the other plaintiff. Defendant fails to explain, however, why joinder would be any more confusing than if the two plaintiffs originally commenced an action as co-plaintiffs or when the jury must assess the different liability of multiple defendants to a single plaintiff. Matter of New York City Asbestos Litig., 121 A.D.3d at 244, aff'd, 27 N.Y.3d 765. In all trials, the parties and the court strive to prevent the jurors' confusion by allowing note taking, presenting the evidence in an easily understandable way, giving understandable

instructions that delineate where particular evidence applies to only one plaintiff, and asking verdict questions specific to each plaintiff. Matter of New York City Asbestos Litig., 121 A.D.3d at 245, aff'd, 27 N.Y.3d 765; Cason v. Deutsche Bank Group, 106 A.D.3d at 533; Matter of New York City Asbestos Litig., 99 A.D.3d at 411; Cummin v. Cummin, 56 A.D.3d at 400.

Using these measures, the parties and the court may assure that the trial fairly addresses each plaintiff's claims while managing the parties' and the court's resources and giving the parties and efficient, economical trial. Whatever distinctions are to be drawn between the two plaintiffs, defendant will receive a full opportunity to draw them at the trial.

VI. CONCLUSION

For all the reasons explained above, the court grants plaintiffs' motion for a joint trial. C.P.L.R. § 602(a).

DATED: September 3, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C