

<b>Omprakash v 85th Estates Co.</b>
2022 NY Slip Op 34225(U)
December 14, 2022
Supreme Court, New York County
Docket Number: Index No. 157855/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

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ANAND OMPRAKASH, TINA ASWANI TINA ASWANI-  
OMPRAKASH,

Plaintiff,

INDEX NO. 157855/2020

MOTION DATE 02/04/2022

MOTION SEQ. NO. 001

- v -

85TH ESTATES COMPANY, 86TH RETAIL LLC, CHARLES  
H. GREENTHAL MANAGEMENT CORP., DRMBRE-85TH  
FEE LLC, A.J.'S CUSTOM HOME IMPROVEMENTS, INC.,

Defendant.

**DECISION + ORDER ON  
MOTION**

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85TH ESTATES COMPANY, 86TH RETAIL LLC, CHARLES H.  
GREENTHAL MANAGEMENT CORP., DRMBRE-85TH FEE  
LLC

Plaintiff,

Third-Party  
Index No. 595974/2020

-against-

NEW YORK INSULATION, INC., KAY WATERPROOFING  
CORP. F/K/A K RESTORATION & ROOFING CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for TRANSFER.

In this action for asbestos-related personal injuries, defendant A.J.’s Custom Home Improvements, Inc. (AJ) moves to: (1) remove this matter from this court, pursuant to CPLR Sec. 25, and transfer it to the New York City Asbestos Litigation (NYCAL) docket established under “the Honorable Sherry Klein Heitler’s May 26, 2011 Amended Case Management Order (CMO)” (NYSCEF Doc No. 41, at 5); (2) amend the caption to reflect placement on the NYCAL docket; (3) place the case on the deferred docket within NYCAL as set forth in section XV (C) of

the CMO; and (4) allow the parties to serve interrogatories and requests for production and draft a discovery schedule as set forth in section VIII of the CMO (NYSCEF Doc No. 41).

Defendants 85th Estates Company, 86th Retail LLC, Charles H. Greenthal Management Corp., DRMBRE-85th Fee LLC (collectively 85th Estates), third-party defendant Kay Waterproofing Corp. (Kay) and defendant New York Insulation, Inc. (NY Insulation) all submit affirmations in support of AJ's motion, joining in with and adopting AJ's arguments with respect to the relief sought by AJ in its motion. Plaintiffs submit an affirmation in partial support of AJ's motion, to the extent that plaintiffs "do not object to the transfer of the within matter since their allegations against the defendants herein contain allegations related to asbestos" (NYSCEF Doc No. 57, Ansari Affirmation, ¶ 3). Plaintiffs, however, note in their papers that they "are also claiming exposure to other dirt, debris and substances" which caused and/or contributed to their injuries (*id.*).

In their bill of particulars, plaintiffs allege that beginning in October 2017 and continuing through November 27, 2017, while residing in apartment 16E at 185 East 85th Street (the subject premises), a "dangerous and defective condition existed in and around the plaintiffs' apartment in that dust, asbestos, and/or dangerous material/debris penetrated and accumulated as a result of certain work, labor and/or services being performed in the adjoining apartment [16D]" (NYSCEF Doc No. 48, Wik aff, exhibit G, ¶¶ 4-5).

Pursuant to CPLR 325, "Ground for removal," a party may move for removal of a case in the following circumstances: "By supreme court for mistake in choice of court. Where a mistake was made in the choice of the court in which the action is commenced, the supreme court, upon motion, may remove the action to the proper court, upon such terms as may be just."

The 2011 amended CMO, section I, states that “This order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter assigned to the undersigned [Justice Sherry Klein Heitler]” (NYSCEF Doc No. 50, Wik aff, exhibit I). The purpose of the CMO, drafted under the jurisdiction of the New York State Supreme Court for all counties of the City of New York, is for the standardization of pleadings and the coordination of discovery in all asbestos cases.

The CMO establishes three dockets for the placement of all asbestos-related cases in NYCAL: (1) an accelerated docket, an active docket and a deferred docket (NYSCEF Doc No. 50, Wik aff, exhibit I, section XIII; CMO of 2017, section XIV (A)). The accelerated docket “will be comprised of actions brought by plaintiffs who are terminally ill from an asbestos-related disease with a life expectancy of less than one year” (id., section XIII (A) (1)). The active docket “will be comprised of all actions brought by or on behalf of plaintiffs who have a functional impairment sufficient to warrant trial and meet the minimum criteria set forth in Paragraph XV.A.6. of this Order” (id., section XIII (A) (2); CMO of 2017, section XIV (C))

In the affirmation in support of its motion, AJ’s counsel describes the minimum criteria, as set forth in the CMO, sections XIII-XV, as

“providing the opinion of a board-certified pulmonary specialist that plaintiff’s chest x-rays, ‘to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening’ and plaintiff’s pulmonary function testing demonstrates decreased pulmonary function for which asbestos-related injuries are a substantial contributing factor; or a medical report stating that plaintiff has been diagnosed with cancer, which, to a reasonable degree of medical certainty, was caused by asbestos exposure”

(AJ aff in support at 8-9).

The deferred docket “consists of all actions brought on behalf of claimants who do not meet the minimum criteria” for the accelerated or active docket (id., section XV (C)). All cases on the deferred docket are “stayed . . . until further order of the Court” (id., section XV (C) (1)).

Here, plaintiffs allege in their complaint and bill of particulars that their injuries resulted from exposure to asbestos, as well as other dust and debris. All parties, including the plaintiffs, do not object to the transfer of this matter pursuant to CPLR 325 and the CMO, since plaintiffs' injuries are related to exposure to asbestos. Further, no party objects to the placement of this matter on the deferred docket. The court, therefore, grants defendant A.J. Custom Home Improvements, Inc.'s motion in its entirety. Accordingly, it is hereby:


ORDERED that defendant AJ Custom Home Improvements, Inc.'s motion (mot. seq. 001) is granted; and it is further

ORDERED that pursuant to CPLR Sec. 325, this matter shall be removed from this court and transferred to the New York City Asbestos Litigation (NYCAL) docket pursuant to the New York Supreme Court's Amended Case Management Order (CMO); and it is further

ORDERED that the parties amend the caption to reflect placement on the NYCAL docket; and it is further

ORDERED that the parties place the case on the deferred docket within NYCAL as set forth in section XV (C) of the CMO of 2017; and it is further

ORDERED that the parties serve interrogatories and requests for production and set forth a discovery schedule as set forth in section IX of the CMO of 2017.

<p><u>12/14/2022</u> DATE</p>			 <hr/> WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE