

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK

Justice

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VINCENT BOCCIA, ET AL,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS, ET AL

Defendants.

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AMENDED DECISION

AND ORDER

Index No. 119366/03

Motion Date 07/20/04

Motion Seq. No. 04

Motion Cal. No.

The following papers, numbered 1 to were read on this motion for Joint Trials

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

 **PAPERS**

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Cross-Motion: Yes No

INTRODUCTION

Before the Court are ten personal injury cases assigned to this justice for trial. They are part of May, 2003 accelerated trial cluster of ten asbestos cases. All plaintiffs suffer from the disease mesothelioma, caused by exposure to asbestos. There are ten cases in this group. Six of the defendants are alive at this time, four are dead.

Plaintiff moves for joint trials in all ten cases on the ground that there are common questions of law and fact. The defendants oppose arguing that individual differences among the plaintiffs and among the defendants predominate over the common matters. For the reasons that follow, the Court joins the cases for the following plaintiffs and

severs the rest. Joint trials are granted for plaintiffs Donnelly, Feldman, Mendoza, Rice, Turner, Yanik and Deixler. The trials of plaintiffs Boccia, Cohen and Parcase are severed. Thus, out of the ten plaintiffs actions, only seven are joined for trial.

DISCOVERY

Some of the defendants have complained about discovery not having been completed. Under the Court's Case Management Order, all discovery, and in fact, all pre-trial motions are to be brought before the Special Master and Justice Freedman, who coordinates the trials of these matters before the undersigned judges in the asbestos group.

There are now approximately 30,000 asbestos cases that are assigned to this court. Every six months in May and November 200 of them are put on the extremis docket to be tried as quickly as possible with a schedule set for the following six months. The extremis docket consists of the most dire cases - those where the plaintiffs have died or suffer from an asbestos disease that is fatal. These cases came out of the May Extremis docket; meaning that when they came to me, all discovery and other pretrial activities were to be concluded. My job was to try the case and deal with trial issues such as scheduling trial, deciding motions in limine and dealing with trial matters. Since discovery is not one of them, I will not entertain any discovery matters. I remind the litigants that it is now nearly four months since these cases have been assigned to me. One would expect that given the exigency of the situations, whatever discovery was left would have been concluded by now and the parties would be preparing for trial, not

dealing with discovery. Only if Justice Freedman or Ms.

Pacheco, the Special Master, were inclined to ask the Court for a delay, however, to complete discovery, would I give an adjournment that serious consideration.

FACTS

The plaintiffs were exposed at different sites. They all are represented by Belluck and Fox. They all suffer from the same fatal asbestos disease - mesothelioma. Many of their exposures overlap, while others don't. Plaintiff Boccia's exposure occurred in the 1940's, 60's and 70's. Cohen's exposures are described as all of his life. This claim is too bereft of any facts for the Court to join it with the others. Donnelly's exposures were between 1947 and 1965. Feldman's exposures were from 1947 - 1965. Mendoza's exposures were during the 1960's. Parcase's exposures were between 1975 and 2000. His exposure occurs well after the others, thereby tending to prejudice the other defendants with much later state-of-the-art testimony. Rice came in contact with asbestos between 1956 and '59, and then between '61 and '65. Turner was exposed from 1946 - 1951 and 1955 through 1959. Yanik's exposure was between 1956 and '82. Deixler from 1955-1975.

Of the plaintiffs who are joined, six of them were exposed in the sixties. Only one of them, Turner, was not exposed in the sixties, but his exposure ended in 1959. Six of them -share exposure in the 50's. Only one, Mendoza, whose exposure was limited to the 1960's was not exposed in the 50's.

DISCUSSION

CPLR 602 provides that whenever there are common questions of law and fact in actions before the Court, it may order joint trials in order to avoid “unnecessary costs or delay.” In mass torts cases such as this, the Court of Appeals has stated:

It requires little imagination to recognize that without consolidation, the Courts are simply incapable of handling litigation of such volume. The waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering. This is all the more true when one recognizes that each successive jury must be educated by expert witnesses to understand the toxicity of asbestos fibers, the etiology of asbestos - induced diseases, the state-of-the-art regarding the industry’s knowledge of these dangers through the years, and the economic issues involving loss of services and future income that recur so frequently in these cases.

Consorti v Armstrong World Industries, 72 F3rd 1003, 1006 (2d Cir 1995), vacated on other grounds 518 US 1031 (1996) Some of the defendants have argued that *Seventh District Asbestos Litigation*, 1901 Misc2d 625, 744 NYS2d 304 (Sup Ct Monroe Cty 2002), sets forth the prejudice that results from combining deceased plaintiffs with ones still living. First, the Court can see no reason that the plaintiffs are prejudiced because some of them have already died. Also, in Seventh Judicial District, plaintiffs consisted of those with mesothelioma, a fatal disease with those who had non-fatal diseases. There, there could have been some prejudice to those litigants who were being sued by the still alive plaintiffs as the horror of mesothelioma might sway the jury against those

defendants. But here, all the plaintiffs have mesothelioma, thereby minimizing any potential prejudice since all the plaintiffs' symptoms are similar and the same fate - death, awaits the plaintiffs still living. In *Malcolm v National Gypsum*, 995 F2d 346, 161 USLW 2735, another case cited by plaintiffs, the magnitude of 48 cases that were tried together resulted in reversal. Here, only seven cases are being tried together.

Workable guidelines to adjudicate these types of cases with no factor being more important than any others was set forth in *Malcolm* at 995 F2d 350-351. They were (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease, whether plaintiffs are living or deceased; (5) status of discovery; (6) whether all plaintiffs were represented by the same counsel and; (7) type of cancer.

The Court has already shown that the disease and type of cancer are the same, and all plaintiffs were represented by the same attorneys. Whether plaintiffs are living or dead is not a factor here, as it may have been in *Malcolm*, since here, unlike *Malcolm*, all the plaintiffs suffered from the same fate and discovery is substantially concluded for most and should have been concluded by the others.

Much time can be saved by all sides and the Court by trying these cases together. For instance, the experts needed to describe the state-of-the-art during plaintiffs' exposures can be greatly diminished by having that testimony accomplished in one trial than by having it repeated over and over in multiple trials. The same is true for pathology and etiology testimony as well as savings in the use of economists and other experts.

The crushing burden that would be placed on the Court by trying these cases one at a time should be avoided where possible. While trying multiple cases at the same time is a formidable challenge, it has been met by this Court and others. Note taking in trial notebooks in which plaintiffs in each case are separated out from each other, together with curative and clarifying instructions by the Court should remove defendant's objections that joint trials are too confusing for the jury. It won't be easy, but it can be done.

This constitutes the Order and Decision of the Court.

Dated: September 8, 2004

Enter:

Louis B. York, J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**