

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
Justice

PART 10

JOAN ZATTA  
v.  
A.C. & S. INC

INDEX NO. 106589/02  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 12/21/11

  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

-----X  
IN RE NEW YORK CITY ASBESTOS LITIGATION  
July FIFO Cluster  
-----X

Auletta, Vincent	Index # 106509/02	Decision/Order
Chimera, Richard	Index # 116076/02	
Cripps, Donald	Index # 104292/02	
Day, Richard	Index # 110478/02	
Federick, John	Index # 109589/06	
Galli, Richard	Index # 111436/98	
Peluso, Rocco	Index # 105625/02	
Rybacki, Charles	Index # 116797/07	
Skrabacz, Frank	Index # 11056/98	
Waldron, Weslie	Index # 110319/02	
Weaver, David	Index # 108982/02	
Wimmer, Thomas	Index # 108985/02	

-----X

Pursuant to CPLR 2219(A) the following numbered papers were considered in connection with this motion:

<b>PAPERS</b>	<b>NUMBERED</b>
OSC, DH affirm., exhibits.....	1
NMK affirm. In Opp.....	2

Gische J.:

*Upon the foregoing papers the decision and order of the court is as follows:*

In all of the above referenced cases, each of the plaintiffs claims that he suffered injuries as a result of exposure to asbestos. Plaintiffs now move to have their claims jointly tried. The motion is collectively opposed by all defendants. Defendant, ITT Corporation ("ITT"), has separately submitted a memorandum of law, making additional arguments in opposition to the motion that are unique only to it. Plaintiffs' claim that all of

the twelve (12) above referenced cases should be tried together. In the alternative, they propose that the cases be grouped into two separate groups, with the distinguishing characteristic being that six (6) of the cases involve a "navy/shipyard exposure" while the other six (6) do not. As a second alternative, the plaintiffs propose that the cases be grouped according to the distinguishing characteristic of the disease each individual contracted. Thus, they claim that the four (4) cases in which the plaintiffs each contracted mesothelioma should be grouped together for trial and the remaining eight (8) cases in which the plaintiffs each contracted lung cancer should be grouped together for trial. Defendants contend that each of the twelve (12) cases should be separately tried .

## **DISCUSSION**

CPLR §602 permits the court, within its discretion, to join cases for trial when there are common questions of law and fact. Not all of the facts or issues need to be identical, but there must be some identity of issues, such that the salutary goal of judicial economy is served. Cummin v. Cummin, 56 AD3d 400 (1<sup>st</sup> dept. 2008); Bradford v. John A. Coleman, 110 AD2d 965 (3<sup>rd</sup> dept. 1985). Once the requirement of commonality has been satisfied, the opponent needs to demonstrate that a joint trial will unduly prejudice a substantial right. Geneva Temps. Inc. v. New World Communities, 24 AD3d 332 (1<sup>st</sup> dept. 2005).

In the case of asbestos litigation, joint trials of more than one plaintiff at a time, have been routinely permitted. see e.g.: In re New York Asbestos Litigation, 23 Misc3d 1109(A) (NY Co. Sup Ct. 2009; Shulman, J); New York City Asbestos Litigation v. A.O. Smith Water Products, 9 Misc3d 1109(A) (NY Co. Sup. Ct. 2005, York, J.); Ballard v. Anchor Packing Company, (index # 190102/08; NY Co. Sup. Ct., order dated Sept. 9,

2009, Feinman, J.); Ames v. A.O. Smith Water Products, et. al., (index #107574, NY Co. Sup Ct. Order dated March 16, 2009, Friedman, J.); Bauer v. A.O. Smith Water Products, (index #115756/07, NY Co. Sup. Ct., order dated August 21, 2008; Lobis, J.); Matter of New York Asbestos Litigation, 173 Misc2d 121 (NY Co. Sup. Ct., 1997, Lehner, J.). This court has itself, on prior occasions, permitted the grouping of cases within a particular case cluster for joint trial. (In re: NYC Asbestos Litigation, 2011 WL 1826854 [Order dated January 27, 2011]; In re: NYC Asbestos Litigation, index # 114483/02 and others, [Order dated May 2, 2011]). The joint trial format is advantageous because it reduces litigation costs, makes more economical use of the trial court's time, speeds the disposition of cases and encourages settlements. In re New York City Asbestos Litigation (Brooklyn Naval Shipyard Cases), 188 AD2d 214 (1<sup>st</sup> Dep't 1993) *aff'd* 82 NY2d 821 (1993).

In deciding what cases should be joined for trial, the courts have looked to the factors enunciated in the seminal case of Malcolm v. National Gypsum Co, 995 F2d 346 (2<sup>nd</sup> Cir. 1993). In Malcolm, the Second Circuit Court of Appeals delineated specific factors that are relevant in determining whether to jointly try cases based upon asbestos exposure, including: [1] common work site; [2] similar occupation; [3] similar time of exposure; [4] type of disease; [5] whether plaintiff's are living or deceased; [6] status of discovery in each case; and [7] whether all plaintiffs are represented by the same counsel. No one factor is dispositive but each serves as a guideline in assisting the court in deciding whether to combine all, some or none of the cases for trial. Malcolm v. National Gypsum Co., 995 F2d at 350. Moreover, these guideline are not exclusive of other considerations that might be relevant to any particular motion for a joint trial.

Applying these legal standards to the facts at bar, the court holds as follows:

In the cases of John Frederick (index # 109589/06) and Weslie Waldron (index # 110319/02), the Court is respectfully recusing itself and a separate order referring the matter to the Hon. Sherry Klein-Heitler for reassignment to another trial part has been signed. Thus, any issues about whether Frederick and Waldron should be jointly tried with any of the other cases considered on this motion is moot.

**Common work site and/or similar occupation**

It is conceded that the plaintiffs did not work at any of the same work sites and they all have disparate occupations.

Such a finding, however, is not the end of the inquiry, because 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 Asbestos Litigation, 1998 WL 230950 (SDNY 1998). 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 site 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 re: New York City Asbestos Litigation (index # 102968/99, NY Co. Sup. Ct., order dated January 9, 2009. Shulman, J) ("...this court finds that there are similarities in the manner in which almost all of the Plaintiffs performed their respective tasks in the construction trades which exposed them to [asbestos containing material] during overlapping periods of time...").

In this regard, the exposures claimed by a majority of the plaintiffs is substantially similar and will result in shared testimony about the nature of asbestos and the effects of exposure. It includes exposures to, among other things, insulation, boilers, pumps, pipes, valves, gaskets, turbines and firebrick.

There are common defendants in the cases. In the ten (10) remaining cases, there are twenty-one (21) remaining defendants. Sixteen (16) of these defendants have been sued in more than one case (see exhibit B to motion). Six (6) of those sixteen defendants have been sued by at least six (6) of the plaintiffs still before the court on this motion. Those defendants are: Crane Co [7 cases]; Foster Wheeler [7 cases]; GE [8 cases]; Goulds Pumps [7 cases]; Ingersoll Rand [6 cases]; and Westinghouse [7 cases]. Even when the cases are divided into smaller groups there are common products and defendants within the smaller groups. Testimony and evidence regarding these products, and the types of asbestos exposure that could result from such products, will be identical or similar in each matter. (In re: New York City Asbestos Litigation [Batista], index #190009/09, NY Co. Sup. Ct. Order dated 2/19/10 [Feinman, J.]).

**similar time of exposure**

The exposures for all plaintiffs are for overlapping periods of time, covering the 1940's through the 2000's. There will, therefore, be overlapping testimony regarding the state of the art. Although defendants claim that Auletta's exposure was limited in time, from 1941 to 1943, Auletta is claiming exposure from the 1940's to the 1980's. Although defendants claim that Day did not have any exposure until the mid 1970's, Day is claiming that his first exposure occurred in the 1960's. Since neither side has produced any admissible evidence regarding actual exposure for any of the plaintiffs,

the court assumes the widest dates of possible exposure for the purposes of this motion only.

### **Type of disease**

Among the those who remain in the proposed group, two contracted mesothelioma (Auletta and Rybacki), while eight (8) contracted lung cancer (Chimera, Cripps, Day, Galli, Peluso, Skrabacz, Weaver and Wimmer). The courts have recognized that each disease requires different medical testimony. In re New York city Asbestos Litigation (index # 104216/04, NY Co Sup. Ct., Order dated June 5, 2006, Shulman, J.). Notwithstanding that different and possibly additional medical testimony will be required, many joint trials have still included plaintiffs with both diseases (see: Carroll v. A.W. Chesterton Company [Index # 190295/09; NY Co. Sup. Ct., Order dated August 25, 2010, Friedman, J.]).

### **Whether plaintiff's are living or deceased**

Among what remains of the proposed group, only two (2) plaintiffs that are still alive (Skrabacz and Wimmer). Relying on the reasoning in Malcolm v. National Gypsum Co, supra, defendants argue that the presence of wrongful death claims and personal injury claims in one trial may present the jury with a powerful demonstration of the fate that awaits those claimants still living. Since Malcolm was decided, however, the experience of the courts in asbestos litigation has led to the conclusion that this factor is not as important as it was originally thought to be. Thus, many cases now routinely combine for trial cases with living and deceased plaintiffs. Matter of New York City Asbestos Litigation, 9 Misc.3d 1109(A)(NY Co. Feinman., J.); In re NYC Asbestos Litigation, 2008 WL 3996269 [nor] (Lobis, J. August 21, 2008). The poor prognosis of

plaintiffs with mesothelioma and lung cancer are facts that are routinely presented in asbestos trials, regardless of whether any particularly named plaintiff is alive at the time of trial or not.

**Status of discovery in each case**

When the cluster was assigned to the trial part, it was with the understanding that the cases were ready for trial. In any event, the first cases in this cluster are scheduled for jury selection on April 9, 2012. By that time, residual discovery issues, in any, will be long resolved. There are, therefore, no discovery impediments to joining any of the cases for trial.

**Whether all plaintiffs are represented by the same counsel**

All of the plaintiffs are represented by the same counsel.

**Additional considerations**

Defendants generally object that combining too many cases in itself thwarts the economy that the joint trial rule is supposed to facilitate. They argue that too many cases, with multiple defendants, is unwieldy and will result in jury confusion and prejudices the defendants. While ameliorative measures, such as clear jury instructions and jury note taking, can be utilized to prevent confusion (see: In re New York City Asbestos Litigation [index #190102/2008, New York County Sup. Ct., order dated September 9, 2009, Feinman, J.]), there is a point at which combining too many cases for a single joint trial is antithetical to the purpose of the consolidation statute.

In this case, the court believes that a joint trial of the remaining ten (10) cases, with twenty-one (21) defendants, is simply too large, without individual parties' rights getting lost in "the shadow of a towering mass litigation." In re Brooklyn Navy Yard

Asbestos Litigation, 971 F2d 831, 853 (2<sup>nd</sup> Cir. 1992). The court, therefore, elects to group cases together by predominant commonalities.

In this regard there are four cases in the ten (10) that remain which all share Navy and shipyard exposure (Auletta, Rybacki, Cripps and Weaver). All of these cases will involve issues and testimony on specific exposures in connection with working on and/or building ships, as well as governmental contractors' defenses. This is an area of law that is still developing and is unique to this group of cases. See: Feidt v. Owens Corning Fibergalss Corp., 153 F3d 124 (3<sup>rd</sup> Cir. 1998). It will require testimony and decisions on issues are not otherwise germane to the other plaintiffs. While the cases claiming Navy and shipyard exposure could be tried with those that do not make such claims, in formulating an appropriately sized group of cases, it makes sense to try the four cases claiming such exposures as a separate group from the others. Thus, the four cases which involve claimed exposure connected to the United States Navy and shipyards will be tried jointly as group 1 ("group 1").

The remaining six (6) cases (Chimera, Day, Galli, Peluso, Skrabacz and Wimmer) possess sufficient commonalities for them to be jointly tried as group 2 ("group 2").

ITT raises an additional argument, unique only to it, that because it is only a defendant in one of the cases, it should not be part of any joint trial. ITT is a defendant in only the Skrabacz case. There are, however, fourteen (14) other defendants in the Skrabacz case, many of whom are also defendants in the other group 2 cases. For example, Crane Co. which is a defendant in Skrabacz along with ITT, is also a defendant in 3 other group 2 cases; Gould Pumps which is a defendant in Skrabacz along with ITT,

is also a defendant in 3 other group 2 cases; and Ingersoll Rand which is a defendant is Skrabacz along with ITT, is also a defendant in 3 other group 2 cases. The court finds that the overall commonality weighs in favor of a joint trial, notwithstanding ITT's particular status.

### **Conclusion**

In accordance herewith, the motion is granted as follows:

Group 1 will be tried jointly and consists of plaintiffs Auletta, Rybacki, Cripps and Weaver.

Group 2 will be tried jointly and consists of plaintiffs Chimera, Day, Galli, Peluso, Skrabacz and Wimmer.

The remaining cases in the July 2011 FIFO cluster will be tried individually.

Jury selection for group 1, is set to begin on April 9, 2012. Motions in limine are to be made returnable on April 9, 2012. For motions that are common to more than one defendant, a lead defendant council is to be selected to make the initial motion.

Defendants who have particular positions, unique to them on such motions, will be entitled to supplement the motions on those unique issues only. Likewise any motion in limine made by plaintiffs shall be opposed by a lead defendants' council in connection with arguments that are common to more than one defendant. Defendants who have particular positions, unique to them on such motions, will be entitled to supplement the opposition on those unique issues only.

Group2 will be tried, subject to court availability, on at least 5 days notice, following the completion of group 1.

The individual cases will be tried, subject to court availability, on at least 5 days

notice, following the completion of group 2, in the following order:

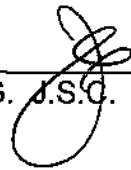
William M. Almond	Index # 109434/02
John c. Buckley	Index # 110848/02
James P. Cahill	Index 3 116079/02
William L. Carpenter	Index # 113809/02
Donald Carriero	Index # 109689/02
Anthony Celeste Sr.	Index # 110850/02
Frank J. Costello	Index # 109943/02
Phillip R. Cox	Index # 114082/05
Ralph J. De Georgia	Index # 106574/02
Elmo Dedon	Index # 105416/00
Ralph Gesualdi	Index # 100300/94
Edward C. Goebel	Index # 105623/02
James O. Hughs	Index # 110296/02
John J. Jakway	Index # 110297/02
Robert E. Kerns	Index # 105711/02
Donald Krentz	Index # 115012/02
Dominic Mickey M. Lattuca	Index # 120652/99
Joseph Laviero	Index # 108750/02
Carl P. Mangona	Index # 105712/02
Edward M. McInernery Jr.	Index # 114873/02
Warren H. McNally	Index # 120250/99
Kenneth G. Miller	Index # 110305/02

Aaron O'Brien	Index # 113939/02
Alfred Papantonio	Index # 125871/99
Leonard Pomposello	Index # 110859/02
Richard J. Potter	Index # 108610/00
John Reina	Index # 105559/02
Norman James Reinard	Index # 114650/02
Gerardo Rubino	Index # 109704/08
Edward Samson	Index # 106510/02
Charles Sneckenberg	Index # 112709/02
Irving Spitz	Index # 106266/02
Donald L. Sterner	Index # 114859/02
Faro P. Vitale	Index # 110776/02
Thomas J. Walsh	Index # 103811/01
Henry H. Willis	Index # 118528/02

This constitutes the decision and order of the court.

Dated: New York, NY  
December 21, 2011

SO ORDERED:

  
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J.G. J.S.C.