

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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In re: NEW YORK CITY ASBESTOS LITIGATION, :

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ALPHONSE DE PIETRO : Index No: 110099-99
LEONARD DUBIN : Index No: 110012-99
JOSEPH CHOPPA : Index No: 101623-99
EDWARD KRISTAN : Index No: 106437-00
ANTHONY ROTA : Index No: 113017-99
JOHN THOMAS SAVILLE : Index No: 110092-99
JOSEPH STIFF : Index No: 110966-99
FRANK WAKEFIELD : Index No: 110945-99
FREDERICK WILLS : Index No: 110090-99
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Hon. Martin Shulman, J.S.C.:

The captioned asbestos cases involving the following Plaintiffs: Alphonse De Pietro (“DePietro”), Leonard Dubin (“Dubin”), Joseph Choppa (“Choppa”), Edward Kristan (“Kristan”), Anthony Rota (“Rota”), John Thomas Saville (“Saville”), Joseph Stiff (“Stiff”), Frank Wakefield (“Wakefield”) and Frederick Wills (“Wills”)(collectively, “Plaintiffs”), as part of a cluster of about thirty-six cases have been transferred to this court pursuant to the NYCAL Amended Case Management Order for trial. All nine (9) Plaintiffs are deceased.

Pursuant to CPLR §602(a), Plaintiffs’ counsel moves to consolidate these nine

wrongful death actions for joint trial claiming the existence of common questions of law and fact (“Cons. Motion”).¹

Co-defendants, Keeler-Dorr-Oliver Boiler Company (“Keeler”), Mario & DiBono Plastering Company, Inc. (“M&D”), Foster Wheeler, LLC (“Foster”), CBS Corporation (“CBS”)², Cleaver Brooks (“C-B”) and Oakfabco, Inc. (“Oakfabco”) (collectively,

¹ The Saville, Stiff and Wakefield actions have settled and are no longer being included among the captioned actions for consolidation.

² CBS, a Delaware Corporation, formerly known as Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, was formerly known as Westinghouse Electric Corporation.

³ Oakfabco has adopted the respective facts and legal arguments of former co-defendant Good Year Tire and Rubber Company/Goodyear Canada, Inc.’s opposition to Plaintiffs’ Cons. Motion and CBS and C-B have adopted the respective facts and legal arguments of former co-defendant Kentile Floors, Inc.’s opposition to this motion. M&D has adopted the facts and legal arguments of Defendants in opposition to the Cons. Motion.

“Defendants”⁴), oppose the Cons. Motion, each contending that these remaining six (6) cases’ dissimilarities outweigh their commonalities.

⁴ As of November 3, 2009, among the Defendants opposing consolidation of these six actions for joint trial: Foster continues to be a named defendant in the DePietro and Wills actions; CBS continues to be a named defendant in the DePietro, Dubin, Kristan, Rota and Wills actions; Cleaver continues to be a named defendant in the Dubin and Choppa actions; Keeler continues to be a named defendant only in the Dubin action; Oakfabco continues to be a named defendant in the Dubin action; and M&D continues to be a named defendant only in the Kristan action.

In support of Plaintiffs' Cons. Motion, counsel's supporting affirmation sets forth obvious commonalities, i.e., Weitz and Luxenberg jointly represent Plaintiffs, four (4) of whom were alleged to have succumbed to asbestos-induced lung cancer while two (2) of Plaintiffs succumbed to mesothelioma. Among other common issues/factors which Plaintiffs claim predominate over individual ones are (Horner Aff. in Support of Cons. Motion at ¶¶ 5 and 20-28): Plaintiffs, while admittedly not exposed at one common work site, were exposed to the similar types of asbestos containing insulation or other materials⁵ ("ACM") at powerhouses and comparable commercial work sites;⁶ Plaintiffs were engaged in similar occupations in the construction trades⁷ and were exposed to ACM as end-users/bystanders; one (1) plaintiff had ACM exposures in the 1940s, four (4) of Plaintiffs had such exposures during the 1950s, five (5) of Plaintiffs were exposed to ACM during the 1960s, 1970s, and 1980s, and two (2) of Plaintiffs had exposures in the 1990s which allow for their respective exposure histories to temporally overlap and, in turn, will result in the same state-of-the-art, medical and expert evidentiary overlap at a joint trial; at trial, every defendant will seek to prove liability of one or more of their co-

⁵ Among the Plaintiffs, four (4) were exposed to asbestos containing gaskets and pipe covering and worked near or on asbestos insulated boilers, three (3) worked with asbestos containing material in conjunction with pumps, asbestos containing insulation and/or insulated wire, two (2) were exposed to floor tiles and worked on asbestos insulated turbines and valves and a respective plaintiff was exposed to either asbestos containing sheet material, packing, transite, sheetrock or joint compound (Horner Aff. in Support of Cons. Motion at ¶¶ 7-15).

⁶ Among these Plaintiffs working at these comparable work sites, only Wills appears to have additionally suffered ACM exposure at certain shipyards (Horner Aff. in Support of Cons. Motion at ¶ 14).

⁷ As summarized in a chart annexed to Plaintiffs' counsel's supporting affirmation (see Exhibit A to Cons. Motion), DePietro and Wills were electricians, Dubin and Choppa were plumbers, Kristan was an elevator maintenance worker and Rota was a school custodian/maintenance worker (see *also*, Horner Aff. in Support of Cons. Motion at ¶¶ 7-15).

defendants, any settling tortfeasor and one or more absentee bankrupt tortfeasors to mitigate their own liability under CPLR Article 16 and this proof via documentary and testimonial evidence will provide for considerable overlap; consolidating these six (6) decedents' cases for trial will not be prejudicial since "there is no risk that their 'death[s] may present the jury with a powerful demonstration of the fate that awaits other claimants that are still living.'" (Horner Aff. in Support of Cons. Motion at ¶ 24); and finally, these cases are trial ready.

In opposition, Defendants uniformly and severally highlight certain differences they claim predominate over the common factors: (1) Plaintiffs did not uniformly share common work sites which ranged from commercial sites to powerhouses and shipyards (only 1 plaintiff); (2) Plaintiffs did not uniformly share common occupations; (3) Plaintiffs did not uniformly experience common exposures; namely, some of Plaintiffs were exposed as end-users of ACM whereas others were exposed as bystanders; (4) as gleaned from Plaintiffs' respective interrogatories and deposition testimonies, none of them share the same time period or length of exposure (e.g., Wills' exposure spanned 26 years [1956-1982] and DePietro only experienced 7 years of exposure [1957-1964]); (5) the anticipated state-of-the-art testimony will have to span sixty years and for each discrete time period which will foster jury confusion if Plaintiffs' actions were jointly tried; and (6) distinct expert medical testimony will be offered for lung cancer and mesothelioma and because four (4) decedents who suffered from lung cancer had extensive smoking histories, there will also be medical testimony causally linking smoking to lung cancer which is not relevant to mesothelioma cases.

Discussion

CPLR § 602(a) permits a court to consolidate two or more actions for joint trials if they involve common questions of law and fact. “Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts. . .” *Chinatown Apartments, Inc. v. New York City Transit Auth.*, 100 AD2d 824 (1st Dept. 1984). Joint trials will also foster judicial economy, quicken the disposition of cases (*City of Rochester v. Levin*, 57 AD2d 700 [4th Dept. 1977]) and potentially encourage settlements (*In re New York City Asbestos Litigation [Brooklyn Naval Shipyard Cases]*), 188 AD2d 214, 225 [1st Dept. 1993], *aff’d* 82 NY2d 821 [1993]). Fairness compels the court to consider joint trials ill-advised “where individual issues predominate, concerning particular circumstances applicable to each plaintiff. . .” (*Bender v. Underwood*, 93 AD2d 747, 748 [1st Dept. 1983]) and one or more of the defendants.

In exercising discretion to consolidate these nine actions, the court should consider certain suggested factors in determining whether joint trials here are appropriate, to wit: “(1) common work site; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs are represented by the same counsel; and (8) type of cancer alleged.” *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2nd Cir.1993).

Notwithstanding Defendants’ contrary view and consistent with this court’s earlier decisions (Exhibits D, E and F to Horner Aff. in Support of Cons. Motion), this court finds that certain commonalities do exist and certain issues Defendants collectively

claim predominate over the commonalities will not defeat Plaintiffs' application for joint trials generally. First, Plaintiffs are represented by the same law firm. Second, Plaintiffs are all deceased. Third, this court has previously held that except under unique circumstances, the *Malcolm* factors generally do not compel Plaintiffs to share a common (i.e., identical) work site, occupation or time period of exposure. Thus, this court finds there are similarities in the manner in which almost all of Plaintiffs performed their respective tasks in the construction trades at similar commercial sites and powerhouses which exposed them to ACM during overlapping periods of time from the 1940's to the 1990's. Finally, against this backdrop, the state of the art testimony and other expert testimony in a general way will be substantially common to Plaintiffs.

However, Defendants almost uniformly contend that the smoking habits of four (4) of Plaintiffs (i.e., Choppa, Kristan, Rota and Wills) who succumbed to lung cancer will be offered as an additional substantial factor for jury consideration in their cases. "Without this significant factor, . . . lung cancer and mesothelioma otherwise share a comparable etiology and pathology . . ." (see *In re New York City Asbestos Litigation [AK, et al.] n.o.r.* Index No. 104333/04, et al., [Sup. Ct., N.Y. Co., 2006])(Exhibit E to Horner Aff. in Support of Cons. Motion). This significant factor warrants severing these cases from the mesothelioma cases. Accordingly, it is

ORDERED that the Cons. Motion is granted, in part, to consolidate the Choppa, Kristan, Rota and Wills actions for a joint trial. The DePietro and Dubin actions shall be jointly tried afterwards.

The parties are directed to appear for a short pre-trial conference in Part 1, Room 1127B at 111 Centre Street, New York, New York, 10013 on December 3, 2009 at 9:30

a.m. to resolve any outstanding issues of concern and then proceed to jury selection forthwith.

This constitutes this court's Decision and Order. Courtesy copies of same have been furnished to counsel for the parties.

Dated: New York, New York
November 5, 2009

HON. MARTIN SHULMAN, J.S.C.