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

In Re: NEW YORK CITY ASBESTOS LITIGATION,		
THE FOLLOWING PLAINTIFFS FROM THE NOVEMBER 2004 NYCAL *IN EXTREMIS* CLUSTERS:		INDEX NOS.: 104333/04 *et al.*
ALIYE D. AK	(Index No. 104333/04)	
JENNIE BAHR	(Index No. 104580/04)	**DECISION AND ORDER**
HON. JOHN S. LOCKMAN	(Index No. 104156/04)	
JOHN MAGARINO	(Index No. 102272/04)	
PATRICIA MALEK	(Index No. 106547/04)	
JOHN A. O'NEILL	(Index No. 103962/04)	
RICHARD PEYREK	(Index No. 104155/04)	
DONALD PORTUES	(Index No. 101675/04)	
	Plaintiffs,	
-against-		
AQUA-CHEM, INC., *et al.*,		
	Defendants	

Hon. Martin Shulman, J.:

The eight captioned matters, part of a November, 2004 *in extremis* cluster of asbestos cases (collectively,"Plaintiffs") , have been referred to this Court for trial. Four out of the eight named Plaintiffs are deceased. Pursuant to CPLR §602(a), Plaintiffs' counsel moves by order to show cause ("OSC") to consolidate these eight personal injury/wrongful death actions for joint trial claiming the existence of common questions of law and fact. Three of the co-defendants; *viz.*, Kentile Floors, Inc. ("Kentile") Keyspan Generation, LLC ("Keyspan") and Burnham Holdings, Inc. ("Burnham"), oppose the OSC,

each contending that these cases' dissimilarities outweigh their commonalities.[1]

Relevant Factual Background

Plaintiffs are jointly represented by Belluck & Fox, LLP. All eight Plaintiffs were/are afflicted with an asbestos-induced cancer or disease (six contracted mesothelioma, one contracted and died from severe asbestosis and one non-smoker is suffering from asbestosis and lung cancer). Four Plaintiffs died from their disease and the four living plaintiffs are terminally ill. Admittedly, the Plaintiffs were not exposed to identical asbestos containing products and materials ("ACM") at one common work site, but rather were exposed to similar types of ACM at similar work sites (such as ships and ship yards and construction sites [2]). Plaintiffs became exposed to ACM (i.e., gaskets, boilers, pumps, turbines, brakes, floor tiles, roofing materials, joint compounds and other similar products and materials) either as end-users and bystanders or via second hand exposure from family members who worked with these types of ACM or in proximity thereof. While Plaintiffs' discrete exposure periods range from the 1940s to the 1980s, however, it is expected that the proof as to the manner and type of their ACM exposures will overlap for

[1] Among these eight actions, Kentile is a defendant in only one case initiated by decedent-plaintiff, Alye D. Ak (Kentile Opp. Aff. at ¶4), Keyspan is a named defendant in only one case initiated by decedent-plaintiff, John Magarino (Keyspan Opp. Aff. at ¶3) and Burnham is a named defendant in the Ak and Magarino actions as well as four other actions (Burnham Opp. Aff. at ¶3).

[2] Two Plaintiffs claim exposure to ACM at residential sites as well.

the Plaintiffs.

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 Authority, 100 A.D.2d 824, 474 N.Y.S.2d 673 (1st Dept., 1984). Joint trials will also foster judicial economy, quicken the disposition of cases (Matter of City of Rochester v. Levin, 57 A.D.2d 700, 395 N.Y.S.2d 773 [4th Dept., 1977]) and potentially encourage settlements (Matter of New York City Asbestos Litigation [Brooklyn Naval Shipyard Cases], 188 A.D.2d 214, 225, 593 N.Y.S.2d 43, 50 [1st Dept., 1993]).

With this cluster of eight asbestos actions, Burnham, Keyspan and Kentile urge the court to consider certain suggested factors in determining whether joint trials here are appropriate, to wit: "(1) common worksite; (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).

Plaintiffs are represented by the same counsel, Bullock & Fox. While four of the plaintiffs have died from asbestos-causing diseases, their deaths will not prejudice the jury against the defendants , vis-a-vis, the living plaintiffs as the latter are all terminally ill and will

unfortunately suffer the same fate. Moreover, these three defendants' opposition affirmations to Plaintiffs' consolidation OSC do not probatively contend that any Plaintiff's alleged smoking habit, where applicable, constitutes an additional substantial factor in any of the Plaintiffs' cases. Without this significant factor, asbestosis, lung cancer and mesothelioma otherwise share a comparable etiology and pathology. Nor did these affirmations convincingly show any one defendant seriously lagging behind the Case Management Order's discovery schedule so as not to be ready for the March 14, 2005 trial date and with this Court's assistance, any discovery "loose ends" can easily be resolved during this pre-trial period. In addition, the state of the art testimony and other expert testimony will be substantially common to all Plaintiffs. And most of the remaining defendants are named in two or more actions comprising this *in extremis* cluster.

This Court recognizes that the alleged periods and nature of ACM exposure among the eight plaintiffs do not present precise commonalities meeting all of the Malcolm factors; still, there exist sufficient similarities to support a joint trial. Nor are these factors solely controlling as to the court's exercise of discretion whether or not to grant Plaintiffs' OSC for joint trials. Consideration can be had of other commonalities such as the existence of bankrupt, absentee tortfeasors which will arguably overlap in all of these actions and defendants' anticipated game plan to establish these tortfeasors' liability and mitigate their own liability under CPLR Article 16. See, Tancredi v. A.C.&S., Inc. (In re N.Y.City Abestos Litigation), 6 A.D.2d 352, 775 N.Y.S.2d 520 (1st Dept., 2004).

Trying these eight cases at the same time will be difficult, but not insurmountable.

The use of suggested jury innovations such as juror note-taking and notebooks, extensive preliminary instructions, attorneys' interim commentary (short summations at different stages during the trial), juror questions, written copies of the special verdict sheets for jury use during summations and a written copy of the court's charge to the deliberating jury should avoid any confusion for the jury in sorting out the respective liabilities and damages attributable to each of the eight Plaintiffs.

Accordingly, Plaintiffs' OSC to join theses eight cases for joint trials is granted. This constitutes the Decision and Order of this Court. Courtesy copies of same have been furnished to counsel for the parties.

Dated: New York, New York
February 28, 2005

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HON. MARTIN SHULMAN, J.S.C.