

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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In Re: New York City Asbestos Litigation (Nov., 2004)

This Document Relates To:

**ANTHONY CASTELLUZZO and DIANE
CASTELLUZZO,**

Plaintiff,

Index No. **112641/03**

-against-

A.C.&S, INC., et al including TREADWELL CORP.,

Defendants.

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**LUCILLE MURDOCK for the ESTATE OF
ALPHONSE MURDOCK, DEC'D.**

Plaintiff,

Index No. **120182/03**

-against-

**A.W. CHESTERTON CO., et al, including
TREADWELL CORP.,**

Defendants.

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**CATHERINE CROCE for the ESTATE OF WILLIAM
CROCE, DEC'D.**

Plaintiff,

Index No. **120899/01**

-against-

**A.W. CHESTERTON CO., et al, including
TREADWELL CORP.,**

Defendants.

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LOUIS B. YORK, J.:

Introduction

The Court has been assigned three cases for trial from the November, 2004 In Extremis cluster of asbestos cases.

Plaintiff has moved for joint trials pursuant to CPLR 601. Defendant Keasbey Co., joined by Defendant Schutte and Koerting, Inc., opposes joinder of these three actions. Goulds Pumps had originally opposed the motion, but now having settled with the action, it has withdrawn the motion.

At the time the motion was made, only these three defendants, now two, of approximately thirty-five remaining defendants, opposed the motion. Because the Court holds that common questions of law and fact predominate over individual questions, the motion for joint trials is granted.

Facts

Plaintiff Anthony Castelluzzo is the only one of the three plaintiffs who is still alive. He suffers from mesothelioma. According to the moving papers, he worked for Consolidated Edison from 1963-2003. From 1963 to 1983, he worked on power-generating machinery such as boilers, turbines and pumps as a technician mechanic and supervisor.

William Croce was employed by Con Edison from 1950 to 1989. He was diagnosed with lung cancer and is now deceased. For his entire time at ConEd he worked in power houses. From 1950 to 1961 he was employed as a boiler cleaner and helper working in and around the same power-generating equipment as plaintiff Castelluzzo. From 1961 until his retirement in 1989, he remained inside a powerhouse as a Control Operator B and then as a Control Operator A.

Plaintiff Murdock was employed by ConEd from 1962-1985. During the time he

worked as a mechanic, he was exposed to the same power-generating equipment as plaintiffs Castelluzzo and Croce.

In the affidavit of opposition in behalf of defendant Keasbey, its attorney states that Justice Freedman has stated that lung cancer cases should never be consolidated with asbestos cases. Since defendant did not support this attribution with any other corroboration and since it articulated information with which I was unfamiliar, I went to the source. Justice Freedman categorically denied that she had ever made such a statement. I suspect that the attribution to Attorney Long, a member of Weitz, Luxembourg, but not attorney in this action (Lung cancer and mesothelioma cases will never be tried together) is incorrect. However, because Justice Freedman has sent these cases to me to try or settle and it is up to me, as she would readily agree, to make whatever determinations are necessary to resolve these matters. I intend to independently decide this issue. Defendants' counsel has also stated that Castelluzzo's physician has concluded that there is no evidence of disease. Once again, this is without any kind of corroboration that would be contained in a report or an affidavit. Defendants' opposition emphasizes that the plaintiffs suffered from different diseases and that in the lung cancer cases, only one of them was a heavy smoker, the work places were different, living and deceased plaintiffs are combined, and discovery is in its "infancy".

I find the latter comment to be lacking in believability. The Castelluzzo and Murdock cases have 2003 index numbers while the Croce case has a 2001 index number. The Case

Management Order for asbestos in extremis cases puts these matters on an extremely expedited five-month track to complete discovery. What has been going on for the last two and four years respectively?

These cases were sent to me for trial with discovery supposed to have been completed. As the trial judge, I do not deal with discovery. As everyone knows, Justice Freedman and the Special Master deal with discovery. If counsel has a problem with discovery being in its “infancy”, he is free to apply to Justice Freedman to take the case back. That he apparently hasn’t done so speaks volumes. Moreover, plaintiff’s counsel has stated that all of the witnesses they intend to rely on either with live testimony or deposition transcripts have been deposed, several of them several times and defendants’ attorneys are in possession of all the transcripts.

Decision

CPLR §602(a) states that “When Actions involving a common question of law or fact are pending before a Court, the Court, upon motion, may order a joint trial of any or all of the matters in issue ...” The criterion to be applied in determining whether common questions predominate over individual ones in determining whether joinder is appropriate is found in *Aikman v Alexander, Inc.*, 224 AD2d 180, 637 NYS2d 123 (1st Dept 1966). Although *Aikman* was not an asbestos case, the criteria it utilized was adopted directly from *Johnson v Celotex Corp.*, 889 F2d 1281, an asbestos case. They are:

1. common worksite,
2. similar occupation,

3. similar time of exposure,
4. similar injury,
5. status of disclosure,
6. representation by the same attorney.

Although the three plaintiffs did not work at the same worksite, they all worked at very similar worksites for the same employer - powerhouses owned and operated by ConEd. All three worked at these power plants around the same types of power-generating equipment, and shared exposures to such equipment from the early '60's to the middle '80's. The similarity of diseases or injury requirement is satisfied in that two of the plaintiffs have died from allegedly asbestos induced lung cancer, and the third is going to die of the fatal asbestos disease, mesothelioma. Defendants' citation of *Malcolm v National Gypsum*, 995 F2d 346, 61 USLW 2735 would not be controlling even if it was a New York Court of Appeals case. Defendants cite this case as holding that mesothelioma and lung cancer cases should not be tried together. In truth, *Malcolm* had 48 plaintiffs, not 3 as in the instant case. Each of these plaintiffs named between 14 and 42 defendants. Here, there are 25 defendants altogether at the time that the motion was made and the Court has recently received a letter from defendants dated April 18, 2005 listing a total of 18 defendants. The letter has been placed in the court file. It is expected that there will be considerably less than 18 defendants by the time we go to trial.

Malcolm does not end with the between 14 and 42 defendants for each of the 48 plaintiffs. The plaintiffs consisted not only of mesothelioma and lung cancer patients, as in this case, but also asbestosis, a non-malignant disease. Several of the defendants impleaded third-

party defendants. Thirteen days before trial, Owens Corning Fiberglass Corporation impleaded over 200 companies. Several of the third-party defendants impleaded fourth-party defendants. Management of such a huge number of defendants in a single trial was an impossible task. Juror confusion was inevitable. The Court also pointed out that some of the defendants were alive while others were dead. There, unlike here, there was a combination of malignant and non-malignant diseases. It is understandable that the Court opined that the defendants in the non-malignant asbestosis sufferers' cases would be prejudiced from being tried with deceased lung cancer and mesothelioma patients. Obviously, such a case was out of control and no note taking and well-placed curative instructions would be of help to the jurors to assist them in reaching rational conclusions.

This Court finds no prejudice in combining three malignant asbestos-related diseases. The defendants in the mesothelioma case will not be prejudiced by the testimony of the deceased patients since the prognosis in mesothelioma cases is also death, that death is always inevitable. Finally, all of the plaintiffs are represented by the same attorneys.

Common to all of these cases will be state-of-the-art testimony, proof of liability, medical testimony about how asbestos causes the diseases in question, what is asbestos, the anatomy of the lungs, epidemiological evidence of asbestos disease, and the operation and maintenance of ConEd powerhouses. Not having to duplicate this testimony three times will save all of the participants in this litigation a considerable amount of time.

Joint trials is the favored method to adjudicate the claims in asbestos-related cases.

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 impaneling 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 Circ. 1995] vacated on other grounds 518US 1031 [1996]

Trying these three cases together will not be a formidable task. Note taking in trial notebooks in which plaintiffs in the cases are each separated out from each other, together with curative and clarifying instructions by the Court, should alleviate problems of juror confusion. This Court and others have successfully tried clusters significantly larger than this three-case cluster. The knowledge and experience exists for a successful trial of the three actions. Accordingly, it is

ORDERED that plaintiffs' motion for joint trial of the instant three actions is granted with \$100 motion costs.

Enter:

Dated: May 12, 2005

Louis B. York, J.S.C.