

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

IN RE: NEW YORK CITY
ASBESTOS LITIGATION

This Document Refers To:

Index No.: 190332/2011

JOHN K. LOWE, JR.

RECOMMENDATION OF THE
SPECIAL MASTER

Pursuant to the CMO, defense liaison counsel interposed a forum objection to the application of the Weitz & Luxenberg case of John K. Lowe, Jr., Index No. 190332/11. After plaintiff was deposed, defense liaison asserted that there was insufficient New York City exposure to warrant inclusion in the April 2012 *In Extremis* group.

After reading the entire deposition transcript, reading the various emails submitted supporting each side's contentions and holding a conference, I concur.

As I stated earlier in the *O'Connor* case, the test for whether a case may remain in NYCAL is not a bright line test. Significantly, it is not and has never been a traditional forum non conveniens analysis. The propriety of the forum is a matter for the Court's discretion as a means to control its docket and to prevent forum shopping. Access to the in extremis docket is limited to those plaintiffs who demonstrate significant exposure to asbestos in any one of the five boroughs. Significant exposure is measured by length of time and quality of exposure.

There is no "magic number" of days or weeks of exposure that is sufficient. It is a case-by-case analysis. In some cases, a few weeks might be sufficient. In other cases, two months might not be sufficient. The quality of exposure reflects how the plaintiff was exposed – was he a mere bystander or was he working directly with an identifiable asbestos-containing product? In addition, the Court looks at whether there is another forum where there is significant exposure that is more appropriate than New York.

Counsel for plaintiff relies on testimony wherein plaintiff describes the 10-15 days his ship was at the Brooklyn Navy Yard (pp. 102-103). Plaintiff claims he was exposed to asbestos in the engine room of the ship, but is unable to identify any piece of equipment to which he was exposed. When asked if the pipes he saw were insulated, plaintiff testified that they were "covered" but he did not know what material was used. He could not recall seeing any of the men working on the covered piping. This testimony does not rise to the level of a claim of substantial exposure. It does not evidence any exposure.

Plaintiff also testified, albeit equivocally, to asbestos exposure in South Carolina over a period of several months.

From the testimony it appears that there is no obvious jurisdiction where the case should be filed. For that reason counsel argues that it should, therefore, be permitted to be filed in New York. I disagree. To permit this case to be filed in New York would run afoul of the longstanding NYCAL rule that a plaintiff must demonstrate significant exposure to asbestos to pursue a claim in this jurisdiction. NYCAL is not and should not be the default jurisdiction for cases where there is no significant exposure in any particular jurisdiction.

Plaintiff may file this case in Maine, where he resides, or in a jurisdiction which, unlike NYCAL, does not have any jurisdictional requirements, such as Delaware or Illinois.

The forum objection is sustained.

Respectfully submitted

_____/s/_____

Laraine Pacheco
Special Master
November 16, 2011