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

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Annie E. Blenkensopp

-v-

A. C. + S Inc.,

INDEX NO. 104633/07

MOTION DATE

MOTION SEQ. NO. 02

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

FILED
AUG - 8 2011
COUNTY CLERK'S OFFICE
NEW YORK

→ The case of Lawrence Ligammare (index # 10433/01) is hereby returned to Hon. Sherry Klein Heitler for reassignment to another cluster of asbestos cases

→ The cases of Blenkensopp (104633/07), Martin (103611/01) Thomas (105352/9) and Wyant (101774/01) are scheduled for a pre trial conference on 10/27/11 @ 2:00pm

Dated: 8/5/11

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

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

Supreme Court of the State of New York
County of New York: Trial Term 10

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IN RE NEW YORK CITY ASBESTOS LITIGATION
December 2010

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Decision/Order

David Blenkensopp (dec.)	Index # 104633/07
Lawrence Ligammare (dec.)	Index # 104033/01
William Martin (dec.)	Index # 103611/01
Albert Thomas	Index # 105352/01
Edward Wyant (dec.)	Index # 101774/01

----------x Seq. No. 002

Hon. Judith J. Gische:

Pursuant to CPLR 2219(a) the following numbered papers were considered by the Court on this motion for a joint trial:

PAPERS	NUMBERED
OSC, DH affirm., exhibits	1
TLP affirm. in Opp	2
6/30/11 Letter obo def'd Treadwell corp	3
6/30/11 Letter obo def'd A.O.Smith Water Products Company	4

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

By order of the Administrative Judge, dated December 22, 2010, the above refernced five (5) cases were referred to this court for trial, along with twenty-six (26) other cases. (Collectively "December 2010 FIFO cluster"). At the time of this decision, only seventeen cases, in the December 2010 FIFO cluster, remain to be resolved. [1]

Plaintiffs' attorneys were given leave to move for joint trial groupings among the

[1]Plaintiff's attorneys represented to the court that as of 6/29/11, twenty-five cases were still unresolved. Since that time eight cases that were on trial before the court resolved, leaving seventeen cases still to be resolved.

cases still pending in the entire cluster.[2] Defendants were directed to have a lead counsel interpose one opposition to the motion which would contain all arguments common to all defendants. All other defendants were given leave to interpose opposition only to the extent it concerned their particular client. In this regard, general opposition was filed by Crane Co. Although Crane Co. is no longer a defendant in this cluster, since their opposition was filed on behalf of all defendants, it will still be considered by the court. Defendant Treadwell Corporation submitted separate opposition only on its own behalf. Since Treadwell Corporation is still a defendant in this cluster, it will be considered by the court as well. Defendant A.O. Smith Water Products Company also submitted separate opposition. Since A.O. Smith Water Products Company has resolved its cases in the December 2010 FIFO cluster, its opposition to this motion will not be considered by the court.

Plaintiffs only seek consolidation of five (5) of the remaining cases. After the motion was brought, however, it was determined that the case brought on behalf of Lawrence Ligammare would be re-assigned to a new cluster. Accordingly, the Ligammare case is respectfully referred to the Hon. Sherry Klein Heitler for reassignment to another cluster. To the extent that this motion seeks to have the Ligammare case jointly tried with other cases in the December 2010 FIFO group, it is denied as moot.

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[2] A motion had been previously made to consolidate other cases in the December 2010 FIFO cluster. Plaintiffs attorneys represented to the court that they were under the impression that sequential ongoing motions could be made while all of the cases within a particular cluster were being resolved. After that motion was decided, in a court conference held on May 23, 2011, the court made it clear that in the future only one motion should be made in any particular cluster, which could request multiple groupings of cases for trial. Due to the misunderstanding, leave was given for this additional motion with respect to the December 2010 FIFO cluster. Thus, the court expected that this motion would concern groupings for trial whatever cases remained in the December 2010 FIFO cluster.

This motion concerns the consolidation of four cases concerning David Blenkensopp; William Martin; Albert Thomas; and Edward Wyant. The defendants affected by this decision are: Burnham, Foster Wheeler, Mario & DiBono, Tishman, Treadwell Corporation and Con Edison.[3]

All of the cases in the cluster claim personal injuries and/or wrongful death, as a result of each plaintiffs' exposure to asbestos. Plaintiffs now seek to have these identified four (4) cases jointly tried.

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 (1st dept. 2008); Bradford v. John A. Coleman, 110 AD2d 965 (3rd 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 (1st 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

[3] The identity of the defendants was ascertained from the 6/29/11 update provided by plaintiffs' attorneys and the courts own knowledge that Crane Co. has since settled.

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 itself, on prior occasions, has permitted the grouping of cases, within a particular 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 reduces the costs of litigation, make 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 (1st 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 (2nd Cir. 1993), where the Second Circuit Court of Appeals delineated specific factors that are relevant in determining whether to jointly try cases based upon asbestos exposure. The factors include: [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. None of these factors is dispositive on its own, 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:

common work site / similar occupations

It is conceded that the plaintiffs involved on this motion did not work at any of the same work sites and they all have disparate occupations. Blenkensopp was an iron worker; Martin was a sheet metal worker, Thomas was an electrician and Wyant was a laborer.

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...").

Plaintiffs argue that they each were in traditional building , maintenance and repair trades. In addition to some particularized exposures, all four of them claim exposure to insulation; three of them claim exposure to boilers (Blenkensopp, Thomas and Wyant); three of them claim exposure to pumps (Blenkensopp, Martin and Wyant); and two of

them claim exposure to valves (Martin and Thomas). These similar exposures will involve overlapping evidence.

Defendants specifically claim that Thomas, as an electrician, had different exposure to asbestos than the other three plaintiffs. While it may be true that no other plaintiff worked with wires, Thomas still claims exposure to insulation, boilers and valves, which are common to other plaintiffs in this grouping.

similar time of exposure

All four plaintiffs allege exposure to asbestos in the 1960s, 1970s and 1980s. Two of the plaintiffs also allege exposure to asbestos in the 1950s (Blenkensopp and Wyant) and two of them allege exposure in the 1990s (Blenkensopp and Martin). The substantial overlap with respect to the dates of exposure will involve substantial commonality in connection with the state of the art testimony offered at trial.

type of disease

All four of the plaintiffs contracted Lung disease and all were smokers. There will be substantial overlapping testimony regarding the relationship of asbestos and lung disease as well as the relationship of smoking and lung disease. Each trial will also involve evidence about the relationship of smoking, asbestos exposure and lung disease.

whether plaintiff's are living or deceased

In this case, all of the plaintiffs are deceased, with the exception of Albert Thomas. Defendants argue that combining the case of one living individual with others that have died will be unduly prejudicial to them.

Many cases have held, however, that the life status of a particular individual is not outcome determinative of whether to jointly try cases or not. 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 lung cancer are facts that are presented in asbestos trials, regardless of whether the particularly named plaintiff is alive at the time of trial or not.

status of discovery in each case

Defendants claim that there is discovery outstanding. In particular, they claim they are still entitled to discovery in the Ligammare case. Since that case is no longer a part of this cluster, those discovery issues have no impact on this motion. Defendants also claim that they just received certain updated authorizations in the Thomas case.

The court does not anticipate setting a trial for the cases remaining in the December 2010 FIFO cluster before the end of October, 2011. This will permit the parties to complete any outstanding discovery. Consequently, the discovery issues remaining in the affected cases does not impact the issues concerning joining them for trial one way or the other.

whether all plaintiffs are represented by the same counsel

All of the plaintiffs are represented by the same counsel. This factor standing alone, is not a sufficient basis to warrant a joint trial.

additional considerations

Defendants argue that they will be prejudiced because the jury will be confused by having multiple plaintiffs and defendants. This case has been pared down considerably since this motion was first brought. Thus, while the motion originally concerned five (5) plaintiffs, now a joint trial could at most involve four (4) plaintiffs. While the motion originally concerned seventeen (17) defendants, presently there are only six (6)

defendants left. The present grouping proposed is not so large that the sheer volume of the litigation would prejudice the defendants in this case. Moreover, 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.]

Treadwell Corporation claims, in particular, that it would be prejudiced because it is only a defendant in the Blenkensopp case and no others. It argues that it should not have to sit through the testimony required for the other three plaintiffs. Blenkensopp's case, however, is the only one that involves all of the six remaining defendants and it will likely consume the greatest trial time, whether tried separately or together with the others. The additional trial time required if these cases are consolidated is not so great as to unduly prejudice Treadwell Corporation.

Weighing the factors, individually and together, the court finds that on balance, the motion for a joint trial should be granted. There is sufficiently commonality on the issues of state of the art, medical and causation testimony and exposure testimony, that the ends of justice would be served by a consolidated trial.

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that the cases of

David Blenkensopp (dec.)	Index # 104633/07
William Martin (dec.)	Index # 103611/01
Albert Thomas	Index # 105352/01
Edward Wyant (dec.)	Index # 101774/01

are hereby consolidated for joint trial; and it is further

ORDERED that the case of Lawrence Ligammare (dec.) Index # 104033/01 is hereby referred to the Hon. Sherry Klein Heitler for reassignment to another asbestos cluster; and it is further

ORDERED that the consolidated cases are set for a pre trial conference on October 27, 2011 at 2:00 p.m., at which time, among other things, a firm trial date will be set, and it is further

ORDERED that upon the completion of such consolidated cases, the remaining cases in the 2010 December FIFO cluster will be tried in succession, subject to at least 72 hours notice, in the following sequence:

Bishop
DeGannes
Donnelly
Fernandez
Hanmer
Kroger
Miglozzi
Nicastro
Randazzo
Rosati
Schwartz
Skelly

and it is further

ORDERED that any requested relief not otherwise expressly granted in this motion is deemed denied and that this constitutes the decision and order of the court.

Dated: New York, NY
August 5, 2011

SO ORDERED:

J.G. J.S.C.