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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30
Justice

Robert Stitt

- v -

Burnham Corporation

INDEX NO. 190478/12
MOTION DATE
MOTION SEQ. NO. 2
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

is decided in accordance with the memorandum decision dated 9.4.13

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

Dated: 9.4.13

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ROBERT STITT and HELEN STITT,

Plaintiffs,

-against-

BURHAM CORPORATION, et al.,

Defendants.

----------X

Index No. 190478/12
Motion Seq. 002

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended May 26, 2011 ("CMO"), which governs New York City Asbestos Litigation ("NYCAL"), plaintiffs move to vacate the July 1, 2013 written recommendation of Special Master Shelley Rosoff Olsen, which upheld the objecting defendant's request that this case be excluded from this court's In-Extremis calendar on the ground that plaintiff had no exposure to asbestos within the five boroughs of New York City ("Recommendation").[1] Plaintiffs' motion is opposed by defendant Georgia-Pacific, LLC ("Defendant"). As set forth below, plaintiffs' motion to vacate the Recommendation is denied.

BACKGROUND

On October 16, 2012, plaintiffs Robert Stitt and his wife Helen Stitt commenced their action in this court to recover for personal injuries caused by Mr. Stitt's alleged exposure to asbestos. In connection with this matter Mr. Stitt was deposed on February 6, 2013, February 7, 2013, and February 12, 2013. His videotaped deposition was taken on February 12, 2013. Mr. Stitt testified that he was exposed to asbestos from various construction materials while working for Republic

[1] A copy of the Recommendation is submitted as exhibit C to the moving papers.

Aviation in Farmingdale, New York from 1949 through 1964. He also testified that he was exposed to asbestos-containing insulation and gaskets from 1970 to 1993 while working as a boiler serviceman at various locations throughout Suffolk County, New York. There is no dispute that the entirety of Mr. Stitt's alleged exposure occurred outside of New York City.

CMO § XIII(A) provides that NYCAL cases shall be placed on one of three dockets: an Accelerated or "In-Extremis" Docket[2], an Active or "FIFO" Docket[3], or a Deferred Docket[4]. In-Extremis clusters are designated twice a year, in April and October. All other active cases are placed on the FIFO docket. By letter dated April 9, 2013, plaintiffs applied to be included in this court's October 2013 In-Extremis cluster on the ground that Mr. Stitt has mesothelioma. As set forth above, the Special Master found there is an insufficient nexus to New York City to qualify plaintiffs for inclusion in an In-Extremis cluster in this court.

Plaintiffs contend that the Recommendation should be rejected because this action is properly venued in New York County under CPLR 503(a)[5] and nothing in the CMO specifically precludes the plaintiffs from obtaining a trial preference. The Defendant contends a New York City nexus has always been required to obtain a trial preference in NYCAL and plaintiffs should not be permitted to forum shop.

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2 In-Extremis cases are given a trial preference. To be eligible for inclusion in an In-Extremis cluster, the plaintiff must be "terminally ill from an asbestos-related disease with a life expectancy of less than one year." (CMO XIII(A)(1)).

3 FIFO cases are clustered and scheduled for trial in an order determined by the date that the action was commenced. CMO § XV(B)(1).

4 Cases on the Deferred Docket consist of all cases that do not meet the medical criteria necessary to be included on the FIFO or In-Extremis Dockets. CMO § XV(C).

5 CPLR 503(a) provides that, "[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced . . . ."

DISCUSSION

This motion concerns what has traditionally been referred to in NYCAL as a "forum objection." Distilled to its essence, the issue is whether a trial preference over other NYCAL cases should be granted to plaintiffs whose exposure and injuries occurred completely outside of New York City. In this regard, this court has the inherent authority to manage its calendars[6], and has been designated to manage the NYCAL calendar in accordance with standards that include the efficient utilization of judicial resources and facilities of the court. (See 22 NYCRR 202.69[b][3]; [c][2]). This court's discretionary authority extends to the power to determine whether an action is entitled to trial preference. (See 22 NYCRR 202.25[b]).

Generally, trial preferences are governed by CPLR 3403, and in the case of terminally ill parties, CPLR 3407. The CMO streamlines these procedures by creating two In-Extremis clusters in NYCAL each year to plaintiffs who meet certain requirements. As set forth above, to be eligible for inclusion in an In-Extremis cluster, the plaintiff must be "terminally ill from an asbestos-related disease with a life expectancy of less than one year." (CMO XIII(A)(1)). CMO § XIV provides in relevant part that "[t]he Court, having in mind the directions of, and its discretion under, the

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[6] *See Landis v N. Am. Co.*, 299 U.S. 248, 254-255 (1936) (there is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."); *Schwartz v Schwartz*, 79 AD3d 1006, 1010 (2d Dept 2010) ("The trial court has the inherent authority to manage its calendar in balancing the litigants' rights against the demands of the calendar."); *Hoven v Hoven*, 100 AD2d 684, 685 (3d Dept 1984) ("It is the duty of the courts to manage calendars and to make procedural decisions to minimize confusion, effectively utilize the time of the courts, avoid duplication and make certain that disputes are resolved in an orderly manner."); Holland v. State, 134 Misc. 2d 826, 828 (N.Y. Ct. Cl. 1987) (internal citations omitted) ("'It is ancient and undisputed law that courts have an inherent power over the control of their calendars and the disposition of business before them' . . . . This power is not derived from nor dependent upon legislative grant. . . . Rather, it is intrinsic to the efficient regulation of a court's own activities in the administration of justice.")

provisions of CPLR 3407, will assign for trial on the first Monday in April and the first Monday in October of each calendar year a special Accelerated Trial Cluster of living plaintiffs."

While the CMO does not expressly state that a NYCAL plaintiff must demonstrate a nexus between his exposure and New York City in order for his case to be placed in an In-Extremis cluster, this court has explicitly articulated such requirement as a qualifying standard, i.e., there "must be a nexus to New York City for a case to remain on an In-Extremis docket and that forum objections should be addressed on a case-by-case basis." *Logan v A.P. Moller-Maersk, Inc.*, Index No. 190203/12 (Sup. Ct. NY Co. June 17, 2013, Heitler, J.). In addition to being consistent with long-standing procedures concerning NYCAL calendar placement,[7] *Logan* is consistent with this court's inherent and designated authority to manage its calendar. This requirement is especially necessary to discourage forum shopping, and to ensure the efficient, economic, and fair resolution of the tens of thousands of asbestos cases that have already been filed in NYCAL and the hundreds of new cases filed each year.

Plaintiffs' argument that this threshold standard is inconsistent with New York's venue rules[8] is misplaced. The NYCAL forum objection analysis is wholly independent and distinct from any venue analysis. The mere fact that an action may be properly venued in this court pursuant to CPLR 503 does not mean that it also should be entitled to a trial preference over other NYCAL cases. The venue issue has no bearing on the trial preference issue, and there is no direction here that plaintiffs' choice of venue be disturbed.

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[7] See recommendations in *O'Connor v Air & Liquid Systems Corp. et al.*, Index No. 190156/10 and *Lowe v. Air & Liquid Systems Corp. et al.*, Index No. 190332/11, submitted as Defendant's exhibits E & F, respectively.

[8] CPLR 500, *et seq.*

Plaintiffs' arguments do not persuade this court to depart from the standard articulated in *Logan*. However, since Mr. Stitt's injuries occurred in Suffolk County, if plaintiffs wish to seek a trial preference in that jurisdiction under CPLR 3403 & 3407, upon written request therefor this court will issue an appropriate transfer order of the file of this action and respectfully request the Clerk of the Suffolk County Supreme Court to give this matter a trial preference. Should plaintiffs decline to request a transfer, this action shall be carried in its proper place on this court's FIFO calendar.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to vacate the Special Master's July 1, 2013 Recommendation is denied in its entirety, and the Recommendation is hereby confirmed; and it is further

ORDERED that plaintiffs' application to include this matter in this court's October 2013 In-Extremis cluster is denied; and it is further

ORDERED that the Special Master shall place this matter on this court's FIFO docket.

This constitutes the decision and order of the court.

DATED: 9.4.13

SHERRY KLEIN HEITLER
J.S.C.