Matter of New York City Asbestos Litigation v A.W. Chesterton Co., Inc.
2013 NY Slip Op 32548(U)
October 17, 2013
Sup Ct, New York County
Docket Number: 190486-2011
Judge: George J. Silver
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[* 1]
SCANNED ON 10/21/2013

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

PRESENT: SILVER Justice PART 10

CARLUCCI, DANIEL, ET AL.

- V -

A.W. CHESTERTON, ET AL.

INDEX NO. 190486/11

MOTION DATE

MOTION SEQ. NO. 10

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

ORDER TO SHOW CAUSE DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION ORDER.

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

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: OCT 17 2013

George J. Silver J.S.C.

GEORGE J. SILVER

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

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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	INDEX NUMBER
DANIEL CARLUCCI	190486-2011
LOUIS FISHBEIN	190160-2012
MORTON FRIEDER	190212-2012
ANDRE KREKORA	190395-2011
MICHAEL LIGHTSY	190518-2011
JOSE PEREZ	190422-2011
JOHN RYAN,	190493-2011

Plaintiffs,

-against-

A.W. CHESTERTON CO., INC., et al., **DECISION AND ORDER**

Defendants.

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The following papers, numbered 1 to __7__, were read on this motion for a joint trial:

Notice of Motion/ Order to Show Cause — Affirmation — Exhibits	Number 1
Answering Affirmation(s) — Exhibits —Memorandum of Law	Numbers 2 through 7

GEORGE J. SILVER, J.:

The above captioned seven matters are asbestos-related personal injury actions. The cases are part of the October 2012 *In Extremis* Trial Group. The plaintiffs in the above captioned actions are moving by order to show for a joint trial of the actions on the ground that the actions present common issues of law and fact. Defendants oppose the motion and raise common and individual arguments against joint trial.

The Individual Plaintiffs

1. Daniel Carlucci

According to plaintiffs' counsel, Daniel Carlucci was exposed to various asbestos-containing products during his job as a truck driver in the late 1950s through the early 1980s. Allegedly, Carlucci was exposed to asbestos when making deliveries of equipment and material to the Brooklyn Navy Yard and various Con Edison facilities where he came into close contact with steam equipment such as boilers, valves and pumps while they were being repaired or otherwise manipulated by other workers. Carlucci was also allegedly exposed to asbestos by his handling and delivering of asbestos-containing products. According to plaintiff's counsel, Carlucci is 81 years old and living with mesothelioma.

2. Louis Fishbein

Plaintiffs' counsel contends that Fishbein was exposed to numerous asbestos-containing products. From 1940 to 1943 Fishbein assisted his father at various construction sites where he used numerous types of joint compounds. From 1943 to 1946 Fishbein worked as an assistant welder at Todd Shipyard where he worked in close proximity to boilers and boiler equipment. From 1947 to 1967 Fishbein was exposed to asbestos through his work as a dentist using asbestos dental strips. According to plaintiffs' counsel, Fishbein is 87 years old and living with mesothelioma.

3. Morton Frieder

Frieder is alleged to have been exposed to asbestos between 1972 and 1979 while operating a diner that primarily served Long Island Rail Road repair personnel. The railroad repair personnel, who allegedly worked directly on asbestos-containing boilers, valves, pipes and compressors, allegedly exposed Frieder to the asbestos dust on their clothing, skin and hair. Frieder is 83 years old and living with mesothelioma.

4. Andre Krekora

Plaintiffs' counsel alleges that Krekora was exposed to asbestos while in close proximity to workers performing repairs on asbestos-containing boilers, pumps, valves and pipes in the late 1980s when he worked as an elevator operator in lower Manhattan and was present when laborers performed repairs in the building's basement. Krekora was diagnosed with mesothelioma and died in 2012. Krekora was 57 years old.

5. Michael Lightsy

Lightsy is alleged to have been exposed to asbestos while working a boilerman for the New York City Public School System between 1968 and 1969[1] where he worked with boilers, pumps, valves and steam traps. Lightsy suffered from mesothelioma and died in 2012 at the age of 65.

6. Jose Perez

Perez was allegedly exposed to asbestos during his work as a laborer at various construction sites in New York during the 1970s. Perez allegedly worked with many types of joint compound at these sites and was also exposed to asbestos as a machinist from 1977 to 1986. Perez was diagnosed with lung cancer and died in 2011 at the age of 49.

7. John Ryan

Ryan was allegedly exposed to asbestos while serving as a machinist mate on the USS Benham between 1952 and 1955. Ryan allegedly kept watch in the ship's boiler room and also worked on asbestos-containing equipment associated with the ship's steam system, including pumps, valve, gaskets, packing and compressors. Ryan suffered from mesothelioma and died in 2012 at the age of 77.

In support of the order to show cause, plaintiffs' contend that joint trial is appropriate because (1) all seven plaintiffs have common exposure to boiler steam system and/or machine equipment and the

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[1] This appears to be a typographical error in the affirmation in support of the order to show cause.

evidence offered at trial will involve common types of asbestos-containing products associated the equipment, such as asbestos blankets, asbestos cement, gaskets, packing and other components; (2) three of the plaintiffs are living and if plaintiffs are forced to try their cases separately, the living plaintiffs' diseases may advance to the point that they are unable to be involved in the litigation; (3) plaintiffs were exposed to asbestos in largely overlapping time frames, with a range of exposures between the 1940s through the 1980s; (4) the cases share common defendants, including general Electric, IMO Industries, J.H. France, Buffalo Pumps, FMC Corp., Georgia-Pacific, Goulds Pumps, Inc., Union Carbide and Honeywell; (5) all plaintiffs are represented by the same counsel; (6) plaintiff share similar expert witnesses; and (7) six of the seven plaintiffs in the group suffer from or did suffer from mesothelioma. Plaintiffs argue that these commonalities suggest that having one jury learn the medical science behind asbestos-related diseases, the causes of these diseases the effect of these diseases on plaintiffs will promote judicial efficiency and economy.

In opposition, defendants Union Carbide Corporation and CertainTeed Corporation, on behalf of all defendants in the In Extremis Group, argue that joining the above seven cases for trial would not promote judicial economy but would instead result in the introduction of voluminous evidence that would be irrelevant to the majority of defendants and would, consequently, confuse a jury. Defendants contend that this confusion would prejudice them by depriving them of a fair and impartial trial. Moreover, defendants argue that any single plaintiff's case will be improperly bolstered by the other plaintiffs' evidence if the seven cases are tried jointly and that defendants will be prejudiced by their inability to cross-exam witnesses in cases to which they are not parties.

Defendants argue that joinder is inappropriate because the seven cases lack sufficient commonality to justify joining them for trial. Specifically, defendants contend that the plaintiffs' worksite are numerous and dissimilar; (2) that plaintiffs' respective occupations are too dissimilar to merit joint trial; (3) the types of products and equipment vary overwhelmingly; (4) the combination of remaining defendants in each case is unique and diverse; (5) the type of exposure is not uniform; (6) none of the seven cases involve the same relevant time period or duration of exposure; (7) the types of diseases are not the same; and (8) the proposed trial group contain both living and deceased plaintiffs. In addition, defendants claim that asbestos cases that are jointly tried typically last between sixty and ninety days whereas trials of individual asbestos cases typically last five to twelve days.

With respect to plaintiff Krekora, defendants argue that joint trial is inappropriate because Krekora resided in Poland for the first thirty years of his life where, defendants claim, he was exposed to asbestos-containing materials while attending school and asbestos-based atmospheric pollution. Defendants argue that these facts provide them with an alternate exposure defense that is unique to Krekora's case.

Defendant Ingersoll Rand ("Ingersoll") argues separately that it is only a defendant in the Lightsy case and, as such, should not have to bear the costs and delays that would accrue if the seven cases are jointly tried. Ingersoll also argues that it should not have to be exposed to evidence that has no relevance or probative value to the Lightsy action and contends that joinder is inappropriate because the seven plaintiffs' alleged asbestos exposure took place over varying periods and lengths time. Ingersoll also argues that it would be prejudiced by the introduction of state of the art evidence that is both inadmissible and irrelevant to Lightsy's claim against it; that Lightsy did not work a the same sites or perform any of the same jobs as any of the other six plaintiffs in the In Extremis Group; and that the plaintiffs' life expectancies are different given their different ages. Ingersoll further contends that the mesothelioma and lung cancer plaintiff should not be tried together because of the distinct etiologies of the diseases.

Defendant Georgia Pacific LLC ("Georgia Pacific") argues that the Fishbein and Frieder matters should be tried separately because they are fundamentally different from the other cases. Specifically, Georgia Pacific contends that the greater part of Fishbein's alleged asbestos exposure occurred when he was a dentist and worked with asbestos-containing dental products. Because Fishbein is the only dentist in the seven plaintiff group, Georgia Pacific argues that he does not share a common occupation,

worksite or exposure scenario with the other plaintiffs. Georgia Pacific argues that Frieder's claim that he exposed to asbestos as a bystander working in a diner that served Long Island Rail Road workers, warrants a separate trial because he too does not share a common occupation, worksite or exposure scenario with the other plaintiffs.

Defendant American Biltrite, Inc. ("American Biltrite") argues that plaintiffs' order to show cause should be denied because the occupations, work, job sites and type of exposure alleged by the seven plaintiffs diverge greatly and the introduction of irrelevant evidence relating to asbestos-containing products and materials would only serve to prejudice it. Further, American Biltrite contends that because it is a only a defendant in the Perez matter, it would be prejudiced by the introduction of state-of-the art testimony and industrial hygiene evidence for a time period that is substantially greater than the time period during which Perez alleges he was exposed. Moreover, American Biltrite argues that because Perez is the only plaintiff diagnosed with lung cancer, and because expert testimony regarding the etiology and pathology of lung cancer and mesothelioma differs greatly, there is a great likelihood of juror confusion and prejudice in a joint trial.

Defendant Carrier Corporation ("Carrier") argues the Ryan matter, the only case in which Carrier is a defendant, should be tried separately because Ryan is the only plaintiff that served in the Navy and alleges asbestos exposure on a naval vessel.

Defendant Kerr Corporation ("Kerr"), a defendant in the Fishbein case only, argues that the Fishbein case should be tried separately because Fishbein's unique occupation as a dentist will necessitate evidence on the intricate methodology involved in the lost wax method of making false teeth. Kerr claims it would be unfairly prejudiced and the jury would be confused if it were asked to understand the lost wax method as well as the trades of the other six plaintiffs. Kerr also claims that because the times during which the seven plaintiffs were allegedly exposed to asbestos varies greatly from plaintiff to plaintiff, a jury in a joint trial would be confused if it were subjected to the corresponding state-of-the art evidence.

Defendants The Long Island Rail Road ("LIRR") and Metropolitan Transportation Authority ("MTA") argue that Frieder's case should not be tried jointly because his secondhand exposure to asbestos differs from the method of expose alleged by the other plaintiff, who allege either direct or bystander exposures. LIRR and MTA argue that differing theories of exposure is a commonly coted basis for not consolidating a case with other trial ready asbestos cases.

Analysis

CPLR § 602 [a] permits a court to join actions involving common questions of law or fact; joinder of common matters 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 AD2d 824, 826 [1st Dept 1984]). The courts are given "great deference" in the decision to join matters *(Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, 10 AD3d 518, 519 [1st Dept 2004]). The chief policy considerations behind consolidation or joinder are efficiency and the conservation of judicial resources (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 73-74 [1st Dept 2002]; *Matter of New York City Asbestos Litigation*, 188 AD2d 214, 225 [1st Dept 1993], *affd* 82 NY2d 821, 625 NE2d 588, 605 NYS2d 3 [1993]). Yet, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial" (*Johnson v Celotex Corp.*, 899 F2d 1281, 1284 [2d Cir 1990]). Joint trials are not appropriate when "individual issues predominate, concerning particular circumstances applicable to each plaintiff" (*Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983]). Thus, although a joint trial has the potential to "reduce the cost of litigation, make more economical use of the trial Court's time, and speed the disposition of cases as well as [] encourage settlements" (*Malcolm v National Gypsum Co.*, 995 F2d 346, 354 [2d Cir 1993]), it is "possible to go too far in the interests of expediency and to sacrifice basic fairness in the process" of joinder, and joint trial should be denied where (1) individual issues predominate over common issues in the cases sought to be joined, or

(2) the party opposing the joint trial demonstrates substantial prejudice" (*Ballard v Armstrong World Industries*, 191 Misc2d 625, 627-28 [Sup Ct Monroe Cty 2002]).

To decide whether a joint trial is proper in the context of asbestos-related personal injury and wrongful death actions, courts consider the factors set forth in *Malcolm v National Gypsum Co.*, 995 F2d 346, 351-352 (2d Cir 1993). Specifically, courts look at "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs [a]re living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged" (*id.* at 351 [quotations and citations omitted]). The party moving for joinder bears the initial burden of demonstrating the commonality of the issues, at which point the burden shifts to the opponent to establish prejudice and potential jury confusion (*Bender*, 93 AD2d at 748).

Applying the *Malcolm* factors, the court finds that plaintiff Fishbein's action should be tried separately. Fishbein is the only plaintiff in the group who alleges that most of his exposure to asbestos-containing material occurred through his work as a dentist using asbestos dental strips. Fishbein's unique occupation necessitates a separate trial because of the anticipated introduction of voluminous evidence that will be wholly irrelevant to the other cases and will likely cause jury confusion.

Plaintiff Frieder's case will be tried separately as well. Unlike the other plaintiff's in the group, all of whom allege either direct or bystander exposure to asbestos-containing materials, Frieder alleges that he was exposed to asbestos on LIRR workers' clothes, skin and hair. Since Frieder's claim of exposure is distinctly different from the other plaintiffs, his case will present both legal and factual issues that are unique to him (*Assenzio v A.O. Smith Water Prods.*, 2013 NY Slip Op 30801[U] [Sup Ct, NY County]).

Plaintiff Perez's case is to be tried separately. Perez is the only plaintiff who was diagnosed with lung cancer. Different court have reached different conclusions regarding the etiology and pathology of lung cancer and mesothelioma. One court has found that the pathology and etiology of lung cancer is substantively different than that of mesothelioma (*In re New York City Asbestos Litig.*, 2012 NY Slip Op 32097[U] [Sup Ct, NY County] [Feinman, J.]) whereas another has held that the diseases do in fact share a comparable etiology and pathology (*Matter of New York City Asbestos Litig.*, 11 Misc3d 1063[A] [Sup Ct, NY County 2006] [Shulman, J.]). Since it appears from the parties' submissions that Perez is the only plaintiff in the group who smoked one can reasonably anticipate that defendants in the Perez case will attempt to establish that Perez's lung cancer is causally linked to smoking cigarettes, a factor that is not implicated with the other mesothelioma plaintiffs. Therefore, regardless of whether lung cancer and mesothelioma share a common etiology and pathology, Perez's case should be tried separately.

Plaintiff Ryan's case will also be tried separately as Ryan is the only plaintiff alleging exposure to asbestos-containing material during his service in the Navy. This allegation may very well implicate the application of federal law and could cause jury confusion if it is consolidated with cases that do not involve federal law (*Matter of New York City Asbestos*, 2013 NY Slip Op 30954[U] [Sup Ct, New York County]).

The remaining plaintiffs' cases, Carlucci, Krekora and Lightsy, will be tried jointly as plaintiffs have established sufficient commonalities among these three plaintiffs. All three plaintiffs are represented by the same counsel. While Carlucci is the only plaintiff of the three who is still alive, since it is commonly understood that mesothelioma ultimately leads to death, it is of little import whether the plaintiffs are alive or deceased. Therefore, "different life status will not serve as a factor that will prohibit consolidation . . . " (*In re New York City Asbestos Litig.* 2012 NY Slip Op 32097[U]). Defendants point to no discovery issues that would warrant not joining these three cases for trial. More importantly, while Carlucci, Krekora, Lightsy and Ryan did not share a common worksite or engage in similar occupations, each plaintiff alleges exposure from the same or similar products, namely boilers, valves and pumps. Testimony and evidence regarding most of these products and the type of asbestos exposure that could result from them will be nearly identical in each case. Further, these four plaintiffs allege that their exposure to asbestos-containing products occurred during the time period beginning in

the 1950s and ending in the late 1980s. Thus, the state-of-the art testimony will be substantially common to all three plaintiffs. To the extent defendants will attempt to prove that Krekora's disease was caused by his exposure to asbestos in Poland, "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 plaintiffs" (*Matter of new York City Asbestos Litig. v. Durez Corp.*, 2013 NY Slip Op 31064[U] [Sup Ct, NY County]).

Accordingly, it is hereby

ORDERED that plaintiffs' order to show cause is granted to the extent that Carlucci, Index No. 190486-2011, Krekora, Index No. 190395-2011 and Lightsy, Index No. are to be tried jointly; and it is further

ORDERED that Fishbein, Index No. 190160-2012, Frieder, Index No. 190212-2012 Perez and Index No. 190422-2011 and 190518-2011 and Ryan, Index No. Index No. 190493-2011 re to be tried separately; and it further

ORDERED that all parties are to appear for a pre-trial conference on October 29, 2013 at 9:30 am in Room 422 of the courthouse located at 60 Centre Street, New York, New York 10007. Parties are to know the availability of their expert witnesses so that jury selection and trial dates can be scheduled.

Dated: OCT 17 2013
New York County

FILED
OCT 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

George J. Silver, J.S.C.

GEORGE J SILVER