Santos v 3M Company
2015 NY Slip Op 31399(U)
July 27, 2015
Supreme Court, New York County
Docket Number: 190043/2014
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 11

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IN RE NEW YORK CITY
ASBESTOS LITIGATION

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GWENDOLINE SANTOS, as Executrix of the Estate of ROBERT FLAHIVE, as deceased, et al.

Index No. 190043/2014

Plaintiffs,

-against-

3M COMPANY, Individually and as Successor to Minnesota Mining and Manufacturing Company, et al,

Defendants.

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HON JOAN A. MADDEN, J.

In this motion, with respect to the seven actions from the October 2013 In Extremis Clusters, transferred to this court for trial, Belluck and Fox, counsel for plaintiffs, originally sought consolidation for joint trial of the seven actions into two trial groups. The actions are: Donald Joseph Izbicki, index number 190139/13, 190140/13; Zbigniew Thomas Jalowski, index number 190474/12; Teodosio V. Patino-Bernal, index number 190099/13; Robert Teague index number 190131/13; Frances S. Valensi, index number 190340/12; Robert Flahive, index number 190135/13; Robert Germain, Sr., index number 190281/12. I ordered two actions, those involving Mr. Teague and Mr. Patino-Bernal, where plaintiffs were living, tried in 2014, and these two actions have been resolved. As to the remaining five actions, I grant the motion to consolidate to the extent of consolidating for trial in Trial Group 1 the actions involving Mr. Flahive and Mr. Germain, and consolidating into Trial Group 2, the actions involving Mr. Izbicki and Mr. Jalowski. The action involving Ms. Valensi will be tried separately.

Pursuant to controlling NYCAL precedent, defendant designated a lead counsel to submit joint opposition, and various defendants have submitted supplemental papers opposing the motion. This motion is made pursuant to CPLR 602(a) on the grounds that common issues of law and fact exist warranting a joint trial. Defendants oppose consolidation arguing, inter alia, that differences predominate over common factors, and a jury will be unable to fairly assess the issues and evidence as to the individual defendants, when the differences are considered in the context of the particulars of the individual actions, together with the number of plaintiffs and defendants.

Pursuant to CPLR 602(a), the Court has discretion to order joint trials where common questions of law and fact exist. In asbestos litigation, it has been stated that, "[t]he joint trial format has potential to reduce the costs of litigation, make more economical use of the trial court's time and speed the disposition of cases (see Matter of City of Rochester, 57 A.D.2d 700, 701) as well as to encourage settlements (see In re: Joint E&S Dist. Asbestos Litig. [Findley v.Blinken], 129 Bankruptcy 710, 815)." In re New York City Asbestos Litigation Brooklyn Naval Yard Shipyard Cases, 188 A.D.2d 214, 224 (1st Dept 1983). However, actions should not be joined for trial where joinder would prejudice or deny a party a fair trial. (see e.g. Johnson v. Celetex Corp., 899 F.2d 1281 (2d Cir 1990), cert denied, 498 U.S. 920 (1990), or where individual issues predominate (see.eg. Bender v. Underwood, 93 A.D.2d 747, 748 (1st Dept.1983). Recently, in its decision in In re New York City Asbestos Litigation (Konstantin/ Dummit), 121 A.D.3d 230, 242, (1st Dept 2014), the First Department acknowledged that courts generally consider the following set of criteria as guidelines, as articulated in Malcolm v. National Gypsum Co., 995 F.2d, 346, 350-351 (2nd Cir 1993), in deciding whether to consolidate cases: (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4)

type of disease; (5) whether plaintiffs were 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. "Not all of the factors need to be present; consolidation is proper so long as 'individual issues do not predominate over common questions of law and fact.'" Id. citing In re New York City Asbestos Litigation, 99 A.D.3d 410, 411 (1st Dept. 2012).

At the outset, I note, that in NYCAL "[i]t has been routine to join cases together for a single trial." Konstantin/Dummit, supra at 242 (internal citation omitted). See e.g., Baruch v. Baxter Healthcare Corp., 111 A.D.3d 574 (1st Dept. 2013)(affirming a trial court decision consolidating three asbestos cases for joint trial where plaintiffs were exposed to asbestos during an overlapping period of 40 years, even though there were differences among plaintiffs, including that one plaintiff had mesothelioma while two other plaintiffs had lung cancer); In re New York City Asbestos Litigation, 2011 New York Misc LEXIS 2248 (Gische, J, Sup Ct N Y Co, 2011) (consolidation of eight asbestos cases for joint trial where plaintiffs claimed exposure to asbestos from similar products and equipment and in similar ways, while engaged in a variety of occupations and at a variety of work sites, and where one plaintiff was living and seven were deceased); In re New York City Asbestos Litigation (Ballard), 2009 WL 2996083 (Feinman, J, Sup Ct NY Co) (consolidating nine asbestos cases for joint trial where six plaintiffs were living and three were deceased, and plaintiffs alleged that their exposure to asbestos occurred while they were engaged in occupations related to maintenance, inspection and repair.) Most recently, in a December 3, 2014 decision, with respect to 15 cases in the Weitz and Luxenberg April 2014 In Extremis group, I consolidated the cases for joint trial into four trial groups, consisting of two to three cases in each group, with four cases to be tried separately.

Applying the Malcolm factors, I conclude the cases are properly consolidated into Trial Group 1 and Trial Group 2, with the Valensi case to be tried separately. Valensi is distinguishable from the other cases, as it is the only case in which take home exposure and bystander exposure from friction products are alleged. Specifically, it is alleged that Ms. Valensi was exposed to asbestos while laundering her mother's work clothing, and while visiting her mother at her place of work, where Ms. Valensi watched laborers in a machine shop work on friction products.

There is sufficient commonality in Trail Groups 1and 2 to warrant consolidation. Plaintiffs in each group are represented by the same counsel, and in all cases discovery is complete. Moreover, plaintiffs in each group are deceased, and suffer from the same disease, either lung cancer or mesothelioma, and thus, the medical evidence as to the etiology and pathology of the disease will overlap.

As to Trial Group 1, Mr. Flahive and Mr. Germain, both allege exposure to asbestos containing products caused them to develop lung cancer, and both allege exposure during work in the 1960s and 1970s, so that the medical evidence and the state of the art evidence will overlap. While Mr. Flahive alleges exposure from work as a metal lather, and Mr. Germain as a consulting engineer, both allege exposure on construction sites and to various products used on such sites, so that the manner of exposure is similar.

As to Trial Group 2, Mr. Izbicki and Mr. Jalowski, both allege exposure to asbestos caused them to develop mesothelioma, and both allege exposure while working with boilers, valves, pumps insulation, gaskets and packing, Mr. Izbicki while working as a machinist's mate and Mr. Jalowski as a repairman. Thus, in this trial group, in addition to the medical evidence, the evidence as to the manner of exposure will overlap.

While there is not exact commonality of work sites or occupations, I conclude that exact commonality of worksites and occupation is not necessary for consolidation, and that consolidation should not be denied based on the number of asbestos containing products to which plaintiffs allege exposure. Such a strict construction would undermine the purpose of consolidation; that is, to conserve judicial resources and litigation expenses and to foster settlements. With the use of intelligent management techniques, including juror notebooks, explanatory and limiting instructions, and individualized verdict sheets and jury instructions in the final charge, the jury should be able to differentiate and evaluate the evidence as to each plaintiff and defendant, so as to prevent bolstering or other prejudice to the defendants. As noted above, within each trial group, the above conclusions are supported by the anticipated evidence which overlaps as to the manner of exposure, types of products and equipment, and types of work sites, so that there is sufficient commonality as to these factors to warrant consolidation.

This approach with respect to occupations, products, work sites and manner of exposure is supported by the previously discussed cases and by the First Department's holding in Konstantin/Dummit. In that case, in addressing consolidation, the court noted that, "some trial courts have rejected a narrow focus on specific locations of exposures and types of work in favor of an analysis that considers whether two or more plaintiffs were 'engaged' in an occupation related to maintenance, inspection and/or repair and were 'exposed to asbestos in the traditional way, that is, by working directly with material for years.' (see e.g. Matter of New York City Asbestos Litigation, 201 N Y Slip Opinion [U], *6 (Sup Ct NY Co 2010] (joining cases of residential drywaller, Navy pipefitter, home renovator, plant electrician, powerhouse worker, and Navy electrician for trial, where their injuries 'resulted from 'insulation exposure from boilers, valves, pumps, and other insulated equipment'). Other courts have focused on the types of

asbestos product to which the plaintiffs were exposed, and whether they were manufactured and distributed by different defendants (see e.g. Bishofsberger, 2012 New York Slip Opinion [U])." Konstantin/Dummit. supra at 242-243

As to the state of the art evidence in Trial group 2, while Mr. Izbicki alleges exposure in the 1950s through the 1970s, and Mr. Jalowski alleges exposure in the 1980s and 1990s, this difference does not warrant denying consolidation. While there is not exact commonality of periods of exposure, as noted in Konstantin/Dummitt, this need not defeat consolidation, as in "Malcolm, there was no commonality where exposures among plaintiffs began in the 1940s and ended in the 1970s, and some plaintiffs were exposed throughout that period but others were exposed for much shorter periods with it." Id., at 243. See e.g., In re New York City Asbestos Litigation (Ballard), supra, (in the nine cases consolidated for joint trial, plaintiffs alleged exposure between the 1950s and the1980s; there was an overlap of periods of exposure in the 1960s and the 1970s, as eight of the nine plaintiffs alleged exposure during this period; and one plaintiff alleged exposure between 1957 and1962).

Moreover, to the extent defendants' arguments regarding the multiplicity of, and lack of commonality of parties, work sites and products, relates to consolidation of seven cases into two groups, these arguments have been addressed with the division of this cluster into two trial groups, of two cases each, and one separate trial.

For the foregoing reasons, it is

ORDERED that plaintiff's motion to consolidate is granted to the extent of consolidating for joint trial into Trial Group 1, Robert Flahive Index No. 190135/2013 and Robert Germain, Index No. 190281/2012; and consolidating for joint trial into Trial Group 2, Donald Joseph Izbicki and Zbigniew Thomas Jalowski Index No. 190474/2014; and it is further

ORDERED that Frances Valensi Index No. 190340/2012 shall be tried separately.

DATED: July 27, 2015

J.S.C.
HON. JOAN A. MADDEN
J.S.C.