SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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ELSENE A. BARTLETT,

Plaintiff,

- v -

A.C. and S., INC. (ARMSTRONG CONTRACTING & SUPPLY), *et al.*,

Defendants.

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INDEX NO. 107404/02

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

HON. BARBARA JAFFE:

By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating certain active docket cases for trial. Following the recent revision of the Case Management Order (CMO), plaintiffs were directed to submit an amended application to conform therewith.

By letter dated June 23, 2017, plaintiffs ask that the following cases be tried together: (1) Stanley Hobish, Index No. 190389/13, with Allan Mizrahi, Index No. 190071/13; (2) James Del Universita, Index No. 190316/13, with Claudius Eastman, Index No. 190568/12; (3) Gerald Castagliola, Index Nos. 115785/96, 113279/97, 111062/98, and 108752/99, with Thomas Fitzgerald, Index No. 190314/12; (4) Robert McIntyre, Index No. 17480/92, with Fred Volz, Index No. 108707/97; (5) Herman Bressel, Index Nos. 190112/10 and190046/13, with Armond Capogna, Index Nos. 125799/99 and 104329/00; (6) Morton Einhorn, Index No. 10246/93, with

Robert Farrell, Index No. 111455/93; and (7) Elsene Bartlett, Index Nos. 107404/02, and 11432/02, with Charles Bona, Index No. 190562/12.

I do not address the motion as to plaintiff Henry McKeown, Index Nos. 104245/97, 113280/97, and 111035/98, as his case is fully settled, and I address only those cases set forth in plaintiffs' letter dated June 23, 2017.

Defendants jointly oppose all consolidations. Union Carbide Corporation opposes in the Bona, Del Universita, Eastman, Fitzgerald, and Mizrahi cases; and The Goodyear Tire & Rubber Company opposes in the Bona case.

I. APPLICABLE LAW

A motion for a joint trial rests in the discretion of the trial court. (CPLR 602[a]; *Matter of New York City Asbestos Litigation [Konstantin],* 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). The party seeking consolidation bears the burden of demonstrating common issues. Once shown, the opposing party bears the burden of demonstrating "prejudice to a substantial right." (Vincent C. Alexander, Practice Commentaries, McKinneys Consol Law of New York, CPLR 602, C602-1). Allegations of prejudice must be specific (*Konstantin*, 121 AD3d at 245), although alleged prejudice to defendants in consolidated cases and potential juror confusion may be reduced by providing "limiting, explanatory and curative instructions," giving notebooks to jurors to "assist them in recording and distinguishing the evidence in each case," and presenting the jurors with plaintiff-specific verdict questions and sheets. (*Id.*).

While judicial economy and efficiency should be considered in determining whether to

consolidate, those interests "must yield to a paramount concern for a fair and impartial trial." (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). Thus, for actions to be consolidated for a joint trial, there must be a "plain identity" of issues. (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]). In determining whether there is a plain identity of issues, courts consider a standard set of factors: (1) common worksites, (2) similar occupations, (3) similar time of exposures, (4) the type of disease suffered by the plaintiffs, (5) their status as alive or deceased, (6) the status of discovery, (7) whether all plaintiffs share counsel, and (8) the type of cancer alleged. (*Malcolm v Ntl. Gypsum Co.*, 995 F2d 346, 350-351 [2d Cir 1993]; *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* 27 NY3d 1172 [2016] [citing *Malcolm*]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1st Dept 2013] [same]; *Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012] [same]).

Although not all of the factors need be demonstrated to establish a sufficient commonality among or between plaintiffs, "consolidation is appropriate so long as 'individual issues do not predominate over the common questions of law and fact.'" (*Konstantin*, 121 AD3d 230, 242, quoting *Bernard*, 99 AD3d 410, 411). Moreover, a shared mechanism of exposure or product may render insignificant certain differences among worksites and occupations unless the differences impacted on the manner of exposure such that the evidence should be heard separately. (*Konstantin*, 121 AD3d 230 at 242; *Matter of Ballard*, Sup Ct, New York County, Sept. 10, 2009, Feinman, J., index No. 190102/2008; *see Matter of Landry*, Sup Ct, New York County, Jan. 21, 2010, Feinman, J., index No. 111058/2003).

Many of the concerns about the consolidation of numerous cases for trial are no longer

pertinent given the recently revised CMO provision. As of July 20, 2017, two cases may be joined for trial where a plaintiff demonstrates that joinder is warranted under *Malcolm* and New York State cases interpreting *Malcolm*. A maximum of three cases may be joined for trial, upon good cause shown and if three or more of the *Malcolm* factors are present and all three plaintiffs suffer(ed) from one of the following diseases: pleural mesothelioma, non-pleural mesothelioma, lung cancer, or other cancers.

II. ANALYSIS

A. Stanley Hobish and Allan Mizrahi

Hobish was diagnosed with asbestosis and lung cancer and died at 89. Between 1948 and 1968, he worked as an electrician at commercial and residential sites, and was allegedly exposed to asbestos while working with switches, switch gears, arc chutes, bakelite, panel boxes, boards, and controls, and while wiring boilers, pumps, and valves. His work included removing and replacing asbestos-containing insulation, refractory cement, pipe covering, gaskets and packing, which alegedly disturbed the asbestos. Hobish was also present when tapers and sanders applied asbestos-containing joint compound and sanded sheetrock, and was exposed to asbestos contained in or used with cement, firebrick, tape, floor tiles, and ceiling tiles.

Mizrahi suffers from lung cancer. Between 1969 and 1975, he worked as an electrician apprentice at commercial, industrial and residential sites, drilled into asbestos-containing bakelite located inside panel boards and circuit breakers, and connected wiring to asbestos-insulated pumps, switches, receptacles and fixtures. He also worked with or was in the vicinity of others working with asbestos contained in or used with boilers, turbines, valves, generators, fire doors, fireproofing spray, gaskets, packing, joint sealing materials, raw asbestos fiber, cement, drywall,

cement board, pipe covering, cloth, insulation, floor tiles, ceiling tiles, sheetrock, joint compound, wallboard, roofing materials, switches, switchboards and arc chutes.

There are 11 remaining defendants in Hobish's case, while eight remain in Mizrahi's, with four defendants in common.

Defendants offer statistics to support their argument that consolidation of cases for trial in the asbestos context prejudices them, violates their rights, and produces unfair results. They otherwise argue that there are insufficient commonalities between the work of Hobish and Mizrahi, as their work did not overlap and they never worked at a single common worksite. Moreover, they allege that Hobish smoked cigarettes for over 40 years, while Mizrahi smoked for over 25. Union Carbide, a defendant only in the Mizrahi case, argues that as Mizrahi was diagnosed only with lung cancer whereas Hobish was also diagnosed with asbestosis, the evidence at trial in each case will be substantially dissimilar, and that joining a deceased plaintiff with a living one is prejudicial.

To date, no New York appellate court has considered the statistics cited by defendants. In any event, they are too anecdotal. (*See Hudson v Merrill Lynch Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [plaintiffs' reliance on statistics as evidence of pretext or bias unavailing, as sample sizes "too small to support an inference of discrimination]). Moreover, recent experience reveals that even single-plaintiff case takes an inordinate amount of time for jury selection.

While Hobish is deceased and Mizrahi is alive does not warrant the denial of joinder, in and of itself, the commonalities in their cases do not outweigh the differences: there is no overlap in their exposure history as Hobish was exposed from the 1940s to the 1968 and Mizrahi's exposure began in 1969 and ended in 1975, thereby requiring different state-of-the-art

evidence; only Hobish was diagnosed with asbestosis; and although they were allegedly exposed to some of the same products, Mizrahi was additionally exposed to circuit breakers, receptacles and fixtures, turbines, generators, fire doors, fireproofing spray, joint sealing materials, raw asbestos fiber, drywall, cement board, wallboard, cloth, roofing materials, and switchboards. And of the 15 defendants remaining in both cases, only four are in both. Joinder is not warranted.

B. James Del Universita and Claudius Eastman

Del Universita suffers from lung cancer. Between 1965 to 1979, he was allegedly exposed to asbestos while working as a home renovator, automotive mechanic, deli manager, and laborer at residential and commercial sites in and around New York City and Philadelphia. His home renovation work included cutting and sanding floor tiles, wallboard, siding, and roofing while using joint compound and sheetrock and removing insulation from within the walls and renovating the electrical drilling system inside the control panel. As a mechanic, Del Universita removed and installed brakes and drums, and maintained vehicles, and while working as a deli manager, he maintained refrigeration units and compressors, including cleaning equipment using compressed air which allegedly created asbestos-filled dust which he inhaled. When he worked as a laborer from 1978 to 1979, he was allegedly exposed to asbestos-containing brake dust, and was generally exposed to asbestos contained in or used with boilers, joint compound, floor tile, HVAC equipment, electrical equipment, pumps, tape, pipe covering, sheetrock, insulation, cement, drywall, wallboard, roofing, shingles, brakes, brake assemblies, pads, rotors, clutches, and gaskets.

Eastman also suffers from lung cancer. From 1974 to 2011, he worked as a painter and plasterer's helper at various housing projects and buildings, when he was allegedly exposed to asbestos while painting over pipes, gaskets, pumps, valves, and boilers, from disturbing

asbestos-containing insulation by scraping it off and dusting the pipes before painting. The dust created by his work allegedly contained asbestos and fell onto painting drop cloths, which were then shaken off and reused. Eastman also used asbestos-containing tapes and joint compounds on asbestos-containing wallboards, which were later sanded. While in the presence of other trades, he was allegedly exposed to asbestos when workers used sledgehammers to remove asbestos-containing floor tiles, used asbestos-containing cements, and installed asbestos-containing firebricks in boilers. He personally handled, and worked with trades who were handling, asbestos contained in and used with boilers, pipes, pipe covering, insulation, gaskets, pumps, valves, tapes, wallboards, joint compounds, drywall, plaster, firebricks, cements, and ceiling and floor tiles.

Two defendants remain in Del Universita's case; three remain in Eastman's. There is one defendant in common.

Defendants argue that their occupations and worksites are dissimilar as only Eastman alleges exposure from working as a plasterer and painter, while Del Universita was exposed to refrigeration units and they did not work at a common site. Del Universita also smoked for approximately 40 years. Union Carbide asserts that joinder is inappropriate as Del Universita was uniquely exposed to automotive and friction products.

Del Universita's alleged exposure to asbestos began in the 1960s and ended in 1979, while Eastman's began in 1974 and ended in 2011. Thus their exposures briefly overlapped out of an approximate 60 years of exposure. Eastman had one occupation during his career and was exposed through his work and others' work in construction and renovation, whereas Del Universita was allegedly exposed to asbestos from his work in four distinct occupations. Moreover, the mechanisms of his work, and resulting exposure as an automotive mechanic and

deli manager differ from Eastman's, and there is only one common defendant among the four remaining defendants in both cases. Joinder is not warranted.

C. Gerald Castagliola and Thomas Fitzgerald

Castagliola died of mesothelioma at 75. Between 1955 and 1958, he was allegedly exposed to asbestos when he served in the Navy as a shipboard engine man. From 1962 to 1999, he worked in maintenance man and as an HVAC mechanic, when he was allegedly exposed to asbestos while removing and replacing packing on pumps, changing steam traps, cutting gaskets, manually mixing cement, and repairing valves, and working with insulation on piping in building units and fan and engine rooms. It is also alleged that he used a hacksaw to remove asbestos insulation from equipment and cut walls to work on valves behind them, and plaster to repair and sand the walls. He allegedly worked with and around others working with asbestos contained in or used with boilers, boiler coating, firebrick, block, turbines, generators, valves, pumps, steam traps, gaskets, piping, pipe covering, floor tiles, insulation, cloth, fire-proofing spray, joint compound, wallboard, cement, drywall, sheetrock and joint sealing materials.

Fitzgerald passed away from mesothelioma at 86. From 1947 to 1979, he worked as an engineer, fireman, HVAC mechanic, and supervisor of mechanical maintenance at various plants and buildings, when he was allegedly exposed to asbestos by working in the presence of other workers mixing raw asbestos in hoppers to make tiles, and by opening, repairing, replacing, and maintaining pipes wrapped with asbestos insulation in refrigeration units. He also is alleged to have been exposed to fireproofing spray and to asbestos contained in or used with boilers, pipe covering, raw asbestos fiber, insulation, and spray.

There are three remaining defendants in Castagliola's case, and one in Fitzgerald's case, with none in common.

Defendants assert that the plaintiffs' work histories and occupations are dissimilar, as are the mechanism of their exposures, as Castagliola worked as an HVAC mechanic in a commercial building while Fitzgerald worked as a refrigeration mechanic in a plant that produced floor tiles using raw asbestos fibers. Moreover, their periods of exposure differ. Union Carbide maintains that Castagliola's naval service and exposure differentiates his case from Fitzgerald's as he never served in the Navy, and that their periods of exposure do not overlap.

Fitzgerald's exposure ended approximately twenty years before Castagliola's; Castagliola served in the Navy while Fitzgerald did not; of the many products to which they were allegedly exposed, they have only three in common; only Fitzgerald was exposed to raw asbestos fibers; and there are no defendants in common. Joinder is not warranted.

D. Morton Einhorn and Robert Farrell

Einhorn died of mesothelioma at 64. From 1947 to 1992, he was allegedly exposed to asbestos through his work as a demolition worker and inspector at commercial jobsites and as a steel pipe "Burner" who used acetylene torches in his work. He was also allegedly exposed to asbestos while working in the vicinity of welders, shipfitters, pipefitters, pipe chippers and snappers, insulation, or decks to get to the pipes, and the products through which he was exposed included boilers, pumps, valves, pipe covering, joint compound, sheetrock, cement, block, fireproofing spray, tiles, blankets, and insulation.

Farrell died of mesothelioma at 66. From 1958 to 1993, he worked as a boilermaker for various contractors at powerhouses, where he was allegedly exposed to asbestos while welding, burning, fitting, and helping to install boilers during new construction. He reassembled boilers and worked inside of them, and was present when others applied to them asbestos-containing insulation. He wrapped asbestos over piping and around tubes, and wrapped boilers with plaster

boards and sheets.]\, and cut and ripped out asbestos-containing insulation during installations and repairs, allegedly exposing him to asbestos contained in or used with boilers, pipe covering, block, cement, cloth, fireproofing spray, gaskets, wire, and cable.

The same two defendants remain in each case.

Defendants again rely on the plaintiffs' different occupations and lack of a common worksite in arguing that joinder is inappropriate.

Both plaintiffs died of mesothelioma, their exposure periods overlap from the 1950s to the 1990s, they were both exposed to pipes, insulation, pipe covering, block, cement, cloth, and fireproofing spray and the mechanism of their exposures is similar, and the same two defendants remain in both cases. Joinder is warranted.

E. Robert McIntyre and Fred Volz

McIntyre died of mesothelioma at 65. From 1946 to 1951, he served in the Navy as a pipefitter and shipfitter aboard various vessels, when he was allegedly exposed to asbestos while the vessels were dry-docked for refitting, at which time he repaired broken valves and steam lines throughout the ships, and worked with other trades who mixed asbestos cement for pipe covering. Between 1955 and 1962, he worked as a telephone repairman, rewiring phones and repairing dusty teletype machines, and was allegedly exposed to asbestos contained in or used with boilers, turbines, generators, valves, gaskets, sealing materials, wires, insulation, packing, pumps, pipes, pipe covering, steam lines, cement, sheetrock, compound, board, tiles, firebrick, and fireproofing spray.

Volz died of mesothelioma at 84. He was allegedly exposed to asbestos while working as a laborer and packer at commercial sites from 1932 to 1942, as a radio operator for the Navy aboard a ship from 1942 to 1945, and as a member of a carpenter's union, he worked at

commercial and residential sites in and around the upstate New York area from 1946 to 1975. Volz was allegedly exposed to asbestos contained in materials and dust while ripping out and cutting insulation, boards, shingles, roofing, and siding, and to asbestos contained in or used with boilers, turbines, generators, valves, packing, gaskets, pipes, pipe covering, asbestos paper, insulation, cements, blocks, cloth, mastics, sheetrock, joint compound, drywall, wallboard, and ceiling and floor tiles.

One of the two defendants remaining in McIntyre's case is the sole remaining defendant in Volz's case.

These plaintiffs died of mesothelioma, served in the Navy in the 1940s, were allegedly exposed to asbestos during an overlapping four decades, and were exposed to many of the same products. One of the two remaining defendants is a defendant in both cases. Joinder is warranted.

F. Herman Bressel and Armond Capogna

Bressel died of asbestosis and lung cancer at 75. From 1955 to 1975, he was allegedly exposed to asbestos while serving in the Navy as a seaman and chief radioman aboard ships and when the ships were dry docked at shipyards for overhauls, when he inhaled asbestos-filled dust released in the air by other workers taking apart machinery and chiseling, scraping, and ripping insulation from equipment in the engine room, on the main deck, and on the pier. Other trades also dismantled valves and pumps and removed insulation, and when guns were fired while at sea, the resulting vibration released asbestos-containing insulation from walls, pipes, and other equipment, which fell on his skin, clothes, and bed. Bressel was also exposed to asbestos contained in or used with boilers, engines, turbines, pumps, valves, insulation, gaskets, steam lines, ceiling tiles, wallboard, sheetrock, pipe covering, and radio equipment.

Capogna died of asbestosis and lung cancer at 81. From 1951 to 1953, he was allegedly exposed to asbestos while working as an assembler, and from 1955 and 1956 as a newspaper printer. Most of his exposure occurred during his service in the Navy from 1953 to 1955 aboard ships, where he worked as a boiler tender, repairing boilers and covering pipes with asbestos insulation. Capogna also worked with and around others who worked with asbestos contained in boilers, boiler coating, firebrick, block, turbines, generators, valves, pumps, gaskets, piping, pipe covering, floor tiles, insulation, cloth, joint compound, wallboard, cement, cement board, drywall, sheetrock, joint sealing materials, raw asbestos fiber, asbestos gloves, resistors, and wiring.

Three defendants remain in Bressel's case, and one of the two remaining defendants in Capogna's case is also in Bressel's.

Defendants observe that these plaintiffs had different occupations while in the Navy, and that Capogna's exposure allegedly continued after his naval service. Only Bressel smoked cigarettes.

While both plaintiffs died of asbestosis and mesothelioma and served in the Navy, Capogna's naval exposure lasted for two years in the 1950s, while Bressel's continued for 20 years and constitutes his sole exposure to asbestos. Bressel's total exposure lasted five years, and Capogna's lasted 20 years. Bressel's exposure was secondhand, while Capogna's was firsthand and secondhand. Bressel smoked cigarettes; Capogna did not. And of the four remaining defendants in both cases, only one is common to both. Joinder is not warranted.

G. Elsene Bartlett and Charles Bona

Bartlett suffers from asbestosis and primary gastric cancer. From 1966 to 2002, she worked as a laborer for Corning, Inc., performing construction, maintenance, and asbestos

removal using equipment and products such as boilers, pumps, compressors, water heaters, motors, HVAC units, pipe covering, joint compound, sheetrock, vinyl asbestos floor tiles, asbestos gloves, asbestos shields, and ovens. Bartlett also had direct contact with asbestos contained in or used with furnaces, insulation, cement, and blankets, she installed and swept the inside of asbestos-containing boilers, and cleaned up asbestos-containing pipe insulation as it was removed by other trades in her presence.

Bona suffers from asbetosis. From 1963 to 1982, he worked as a carpenter at multiple commercial jobsites, where he was allegedly exposed to asbestos while working on drywall, sheetrock, and ceiling and floor tile, and hanging and drilling fire doors. He often worked in boiler rooms when other trades were applying and removing asbestos from boilers, pumps, valves and joint compound, and when they applied insulation from "asbestos bags" onto the equipment and applied pre-formed cast-like molding or pipe covering, cut the molding or covering, and cleaned up while others applied asbestos-containing spray.

Two defendants remain in Bartlett's case, and eight in Bona's, with one in common.

Defendants maintain that Bartlett's work in an industrial factory setting is not comparable to Bona's work as a carpenter in commercial settings, and that Bartlett's diagnosis of gastric cancer along with her long-term smoking history will require extensive and specific evidence that is irrelevant to Bona's case. In arguing against consolidation, Union Carbide also focuses on Bartlett's gastric cancer diagnosis, along with the fact that only she alleged exposure to ovens and shields, while Bona's exposure involved asbestos abatement work. Goodyear observes that these plaintiffs have no common worksite and occupation, and thus their exposure to asbestos differs.

While both plaintiffs' exposure began in the 1960s, Bartlett's continued another 20 years after Bona's ended. Moreover, Bartlett uniquely suffers from gastric cancer and smoked cigarettes, and only she was exposed to asbestos-containing water heaters, motors, HVAC units, gloves, shields, and ovens. There are nine remaining defendants in both cases, but only one in common. Joinder is not warranted.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to join certain cases for trial is granted to the extent specified above. Given the numerous cases at issue in this motion, plaintiffs are directed to submit a proposed order setting forth in which order they would like the trials to proceed in accordance with this decision, after which a supplemental order will be entered.

2/9/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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