SCANNED ON 3/26/2013

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

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Sharon Baiocco, Et Al.

- v -

A.C.& S., Inc., Et Al.

INDEX NO. 114562/02

MOTION DATE

MOTION SEQ. NO. 1

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAR 26 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 20 2013

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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This Document Relates To:

Index No. 114562/02

SHARON BAIOCCO, Individually and as Executrix for the Estate of ROBERT A. BAIOCCO, SR., *et al.*,

Subm.: 3/14/13

Plaintiffs,

DECISION AND ORDER

- against -

A.C. & S., INC., *et al.*,

Defendants.

----------x

BARBARA JAFFE, J.:

FILED
MAR 26 2013
NEW YORK
COUNTY CLERK'S OFFICE

For plaintiffs:
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For joint defendants:
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For defendant Mack Trucks Inc.:
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Maimone & Assocs. PLLC
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Mineola, NY 11501
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For defendant Puget Sound:
Jessica Mullery, Esq.
Wilson, Elser *et al.*
150 E. 42nd St.
New York, NY 10017-5693
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By order to show cause dated February 17, 2013, plaintiffs move pursuant to CPLR 602 for an order consolidating their cases for trial. Defendants jointly oppose, with supplemental opposition submitted by defendants Mack Trucks, Inc. and Puget Sound Commerce Center, Inc.

I. APPLICABLE LAW

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court.

(*See Rodgers v Worrell*, 214 AD2d 553 [2d Dept 1995]). Generally, in order to join actions for trial, there must be a "plain identity between the issues involved in the [ ]two controversies." (*Viggo S.S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157 [1970]). A motion for a joint trial should be granted unless the opposing party demonstrates prejudice to a substantial right. (*See Fransen v Maniscalco*, 256 AD2d 305 [2nd Dept 1998]; *see In re New York City Asbestos Litigation [Bernard]*, 99 AD3d 410 [1st Dept 2012] [court providently exercised discretion in consolidating actions for joint trial as they involved common questions of law and fact and defendant did not establish prejudice])

In determining whether to consolidate individual plaintiff's cases for a joint trial where the plaintiffs allege exposure to asbestos, courts consider the factors set forth in *Malcolm v Ntl. Gypsum Co.*, 995 F2d 346 (2d Cir 1993):

(1) whether the plaintiffs worked at a common worksite, not necessarily the same work location but a similar kind of worksite;

(2) whether the plaintiffs had similar occupations, as a "worker's exposure to asbestos must depend mainly on his occupation," such as those who worked directly with materials containing asbestos as opposed to those who were exposed to asbestos as bystanders;

(3) whether the plaintiffs were exposed to asbestos over a similar period of time;

(4) whether the plaintiffs suffer or suffered from a similar type of disease, as the jury will hear evidence about the etiology and pathology of each disease, and there is an opportunity for prejudice as asbestosis sufferers may have close to normal life spans while others may have terminal cancers;

(5) whether the plaintiffs are alive; "dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living";

(6) the status of discovery in each case;

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(7) whether the plaintiffs are represented by the same counsel; and

(8) whether the plaintiffs suffer from the same type of cancer, as each cancer type requires "distinct testimony regarding etiology, pathology, and consequences."

(*Malcolm*, 995 F2d at 350-353).

Another factor to be considered is the number of defendants named in each case.

II. PLAINTIFFS' INFORMATION

Plaintiffs seek to consolidate their eight cases into two groups, with Group One consisting of plaintiffs Balducci, Byrnes, Cayen, Dell'Arciprete, Kornacki, and Latzer, and Group Two consisting of plaintiffs Baiocco and Blank.

A. *Roger Balducci*

Balducci died on March 2, 2004 from lung cancer. He was allegedly exposed to asbestos beginning in the 1950s and ending in the 1970s while serving as a Seaman in the United States Coast Guard and while working as a brake installer and automotive mechanic at an auto garage, thereby being exposed to products containing asbestos such as brakes and clutches. The defendants remaining in his action are Borg Warner, Lipe Rollwa, Mack, and Maremont.

B. *John Byrnes*

Byrnes passed away from lung cancer on September 27, 2002. He worked as a roofer and waterproofer at various commercial and industrial/powerhouse sites from the 1960s to the 1980s. He was allegedly exposed to asbestos-containing cement, felt, mastics, sealant and insulation used in connection with equipment such as pipes and pumps. The remaining defendants in his action are Certainteed, Foster Wheeler, Goulds Pumps, Karnak, and Westinghouse.

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C. *Horace Leo Cayen*

Cayen passed away from lung cancer on March 21, 2002. He worked as a carpenter, electrician, machinist, and painter at various residential and commercial sites in and around Syracuse, New York, from the 1940s to the 1990s. He was allegedly exposed to asbestos contained in sheetrock, tile, gaskets, and insulation used in equipment such as boilers, pipes, and pumps. The remaining defendants in his action are American Standard and Goulds Pumps.

D. *Albert Dell'Arciprete*

Dell'Arciprete died of mesothelioma on May 27, 2003. He performed home renovations, served as Boatswain's Mate in the United States Navy and thereafter worked in the same capacity and as a fire control mechanic at various shipyards, and worked as a signalman for the Boston & Maine Railroad in Massachusetts, all between the 1950s and 1980s. He was allegedly exposed to asbestos in brakes, tiles, sheetrock, and insulation used in connection with equipment such as pipes and pumps. The remaining defendants in his action are Foster Wheeler and Westinghouse.

E. *Andrew Kornacki*

Kornacki died on December 14, 2002 from lung cancer. He worked as a Pipe Coverer in the United States Navy and as a winder at General Electric in Schenectady, New York, both from the 1950s to the 1980s. He was allegedly exposed to asbestos contained in blankets, cloth, and insulation used in connection with equipment such as generators and pumps. The remaining defendants in his action are Foster Wheeler and Goulds Pumps.

F. *Nicholas Latzer*

Latzer passed away on November 22, 2002 from lung cancer. He worked as a bricklayer at various factories and churches, schools, hospitals, and residences from the 1950s to the 1980s.

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He was allegedly exposed to asbestos contained within blocks, cement, firebrick, and insulation used in connection with equipment such as boilers, pipes, and valves. The remaining defendants in his action are Foster Wheeler and Westinghouse.

G. *Robert Baiocco*

Baiocco died on September 13, 2001 from lung cancer. He worked as a carpenter and construction worker at various residential, commercial, and industrial sites in Buffalo, New York from the 1960s to the 1980s. He was allegedly exposed to asbestos contained in joint compound, sheetrock, and tile. The remaining defendant in his action is Georgia Pacific.

H. *Ralph Blank*

Blank died from lung cancer on August 22, 2007. He worked as a carpenter at shipyards in Brooklyn, New York and at various residential and commercial sites in New York City from the 1940s to the 1970s. He was allegedly exposed to asbestos in joint compound, sheetrock, and tape. The remaining defendant in his action is Georgia Pacific.

III. ANALYSIS

Based on an analysis of the *Malcolm* factors and relevant caselaw, the *Byrnes*, *Cayen*, and *Latzer* cases should be consolidated for trial in one group, the *Dell'Arciprete* and *Kornacki* cases should be consolidated in another group, the *Baiocco* and *Blank* cases consolidated in a third group, and the *Balducci* case should be tried separately. My reasoning follows:

A. *Byrnes, Cayen, Latzer*

All three plaintiffs performed construction work and/or worked at residential, commercial, and industrial sites, and were thereby exposed to asbestos both directly and as bystanders. All of them were exposed to asbestos contained within cement, insulation, boilers,

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and pumps. (*See In the Matter of New York City Asbestos Litigation [Dummitt]*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U] [Sup Ct, New York County 2012] [finding sufficient similarity of occupations as both plaintiffs alleged exposure from work, including equipment repair and maintenance and construction work, and nature of exposure also similar]). While plaintiffs worked at different sites, a well-organized trial presentation, including materials for the jurors to use in organizing their deliberations, will reduce any confusion.

These three plaintiffs were exposed to asbestos during an overlapping period of at least two decades. Thus, any "state of the art" evidence will overlap. (*See eg In re New York City Asbestos Litigation [Capozio]*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50072[U] [Sup Ct, New York County 2009] [similarities in manner in which almost all plaintiffs performed tasks in construction trades which exposed them to asbestos during overlapping periods from 1940s to 1990s; state of art and other expert testimony also would be substantially common]).

All of these plaintiffs are deceased and they suffered from lung cancer, and thus the same medical evidence will be presented. They are also represented by the same attorney, and discovery is complete. Finally, of the six defendants remaining in these cases, Foster Wheeler, Goulds Pumps, and Westinghouse are defendants in two of the three cases, while the other three defendants are in only one of the cases (Certainteed, Karnak, and American Standard). Thus, there are defendants in common.

For these reasons, there are common issues that predominate over individual issues in these three cases, and defendants have not established that any undue prejudice will result, or that their fourteenth amendment right to due process will be violated.

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B. *Dell'Arciprete, Kornacki*

These plaintiffs worked in the armed services, and thus, may have been exposed to materials not common to the other plaintiffs, such as brakes, clutches, blankets, cloth, and generators, and federal law may uniquely apply to their actions. (*Dummitt*, 22 Misc 3d at 4 [as one plaintiff worked for Navy, federal law could be implicated and cause jury confusion if case consolidated with those not involving federal law]; *In the Matter of New York City Asbestos Litigation [Altholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[U] [Sup Ct, New York County 2006] [severing for trial case where that plaintiff was only one exposed while working on ship at sea, which could involve federal maritime law and confuse jury]).

They also were exposed from the 1950s to the 1980s. While Kornacki died of lung cancer and Dell'Arciprete died of mesothelioma, the level of toxicity of their diseases is the same, and much of the same medical evidence will be presented. Any repetitive or redundant medical testimony may be limited to reduce the length of the trial. (*See Altholz*, 11 Misc 3d at 1063[A] [while most plaintiffs had mesothelioma and one had lung cancer, evidence as to both cancers would not generally cause undue delay or jury confusion as diseases shared comparable etiology and pathology]).

Moreover, of the three defendants in these actions, one is a defendant in both actions, and again, defendants have not demonstrated undue prejudice or the violation of their right to due process.

C. *Balducci*

While Balducci was allegedly exposed while he worked in the Coast Guard, plaintiffs assert that they have no claims related to that exposure against the remaining defendants in his

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case. Thus, the issue of the applicability of federal law is not a factor here. Moreover, Balducci is the only plaintiff who worked as an auto mechanic and in auto garages, he was exposed only to asbestos in brakes and clutches, and the four remaining defendants in his case are not defendants in any of the other cases. Thus, plaintiffs have not shown that his case has issues in common with the other plaintiffs such that consolidation is warranted.

D. *Baiocco, Blank*

Absent any opposition to the consolidation of these two cases, I find that it is warranted, especially as there is only one, and the same, defendant remaining in each case, each plaintiff died of lung cancer and worked in construction at similar worksites and was exposed to the same materials during overlapping periods of time between the 1940s and 1990s.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to consolidate is granted to the extent of consolidating the following cases for a joint trial:

(1) Group One - (a) John Byrnes, Index No. 119504/02, (b) Horace Leo Cayen, Index No. 123161/02, and (c) Nicholas Latzer, Index No. 125211/02;

(2) Group Two - (a) Albert Dell'Arciprete, Index No. 121607/02, and (b) Andrew Kornacki, Index No. 121910/02;

(3) Group Three - (a) Robert Baiocco, Index No. 114562/02, and (b) Ralph Blank, Index No. 125260/02; it is further

ORDERED, that the Roger Balducci action, Index No. 119783/02, shall be tried separately; and it is further

ORDERED, that the parties in all of these actions shall appear for a final settlement

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conference/pre-trial conference at 2:30 pm on April 17, 2012 in room 279, 80 Centre Street, New York, New York. The defendants are directed to bring their insurance carriers, if any, to the conference and to appear with settlement authority.

ENTER:

Barbara Jaffe, JSC

DATED: March 20, 2013
New York, New York

FILED
MAR 26 2013
NEW YORK
COUNTY CLERK'S OFFICE

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