MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

PRESENT: Hon. Peter H. Moulton PART 50
Justice

RANDALL F. BRAHE, *et al.*

Plaintiffs

v.

COLUMBUS McKINNON CHAIN CORP., *et al.*

Defendants

INDEX NO. 190422/2014

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

This motion is decided in accordance with the attached written decision.

Dated: March 21, 2016
New York, New York

HON. PETER H. MOULTON
J.S.C.

1. Check one: ..... ☐ Case Disposed ■ Non-Final Disposition

2. Check as Appropriate: ..... Motion is: ■ Granted ☐ Denied ☐ Granted in Part ☐ Other

SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190422/2014
Motion Seq. 006

BRAHE, RANDALL F., et al.

Plaintiffs

DECISION & ORDER

-against-

COLUMBUS McKINNON CHAIN CORP., et al.

Defendants

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PETER H. MOULTON, J.S.C.:

In this motion, the Early Law Firm, counsel for plaintiffs, seek to consolidate for joint trial the following nine (9) in extremis cases that have all been assigned to this part for trial pursuant to the New York City Asbestos Litigation Amended Case Management Order's in extremis cluster provisions: Randall Brahe, 190422/2014; Richard Byrnes, 190003/2014; Frederick Evans, Jr., 190109/2015; Jeffrey Kahn, 190023/2015 & 190024/2015; Pablo Laviera, 190118/2015; Olaf Lyberg, 190057/2015 & 190059/2015; Donald Miller, 190112/2014; Jesus Sierra-Guzman, 190086/2015 & 190087/2015; James Sudimack, M.D., 190045/2014. Plaintiffs propose to join these cases into six trial groups.

Plaintiffs' motion is made pursuant to CPLR 602(a) on the grounds that common issues of law and fact exist warranting a joint trial. Malaby & Bradley, LLC submit opposition to plaintiffs' motion on behalf of all defendants (the "Joint Opposition"). Cleaver-Brooks, Inc. ("Cleaver-Brooks"), Carrier Corporation ("Carrier") and Metro-North Railroad ("Metro-North") submit supplementary opposition.

Plaintiffs propose the following groupings for six trials:

GROUP 1 - Individual plaintiff James Sudimack, M.D., 190045/2014 (Currently 59 years old and is living with mesothelioma; allegedly exposed to asbestos-laden dust from his work with asbestos paints and beads as a highway worker in the 1970s; allegedly exposed to asbestos-laden dust from work of other tradesman working with gaskets, traps, and valves; also allegedly exposed to pads, gloves and mittens).

GROUP 2 - Jeffrey Kahn, 190023/2015 & 190024/2015 and Jesus Sierra-Guzman, 190086/2015 & 190087/2015 (74 and 78 years old, respectively; living with mesothelioma; were allegedly exposed as naval workers; Sierra-Guzman also was allegedly exposed from removing and installing automotive brakes and clutches).

GROUP 3 - Randall Brahe, 190422/2014 and Olaf Lyberg, 190057/2015 & 190059/2015 (80 and 90 respectively; were exposed as navel workers; Brahe was also allegedly exposed to asbestos-laden dust from joint compound during his home renovation work in the 1960s; Lyberg was allegedly exposed to asbestos from his brother who was working with caulk, sheetrock, joint compound, and floor tiles in the 1950s and 1960s).

GROUP 4 - Individual plaintiff Pablo Laviera, 190118/2015 (63 years old, living mesothelioma; allegedly exposed to joint compound, sheetrock, and floor tile at commercial sites; also exposed from working on the sanding of automobile brake lining).

GROUP 5 - Individual plaintiff Frederick Evans, Jr., 190109/2015 (died at age 87 from mesothelioma; worked as an HVAC mechanic and installer; was allegedly exposed to asbestos-laden dust from replacing gaskets and packing on air conditioning units).

GROUP 6 - Richard Byrnes, 190003/2014 and Donald Miller, 190112/2014 (Byrnes died at age 57 from lung cancer; worked as a stationary engineer for Metro-North Railroad at Grand Central Station in 1990s; Miller died at age 72, worked as a pipefitter for Metro-North Railroad at Grand Central Station in the 1980s and 1990s).

Plaintiffs submit that the proposed groupings (which are either individual plaintiff cases or cases with a maximum of two plaintiffs) are fair and reasonable, and will ensure fair and efficient trials.

With respect to Trial Group 2, plaintiffs submit that the Kahn and Sierra-Guzman cases should be joined for trial as their matters share substantial commonality of fact and law. Plaintiffs

argue as follows:

- Mr. Kahn and Mr. Sierra-Guzman were both diagnosed with mesothelioma, thus sharing a common illness.
- Mr. Kahn and Mr. Sierra-Guzman share substantial overlap in their alleged temporal exposure to asbestos. Both plaintiffs allegedly share exposure to asbestos from work with the U.S. Navy in the 1960s. As a civilian trainee with the U.S. Navy, Mr. Kahn was exposed to asbestos in the 1950s and 1960s. Mr. Sierra-Guzman was exposed to asbestos during his service in the United States Navy in the 1960s and 1970s.
- Additionally, Mr. Kahn and Mr. Sierra-Guzman both alleged they were exposed to asbestos from work with friction products in the 1960s and 1970s. Mr. Sierra-Guzman was also allegedly exposed to asbestos from working with friction products in the 1950s.
- Mr. Kahn and Mr. Sierra-Guzman share substantial overlap in their worksites as both were allegedly exposed to asbestos at naval shipyards and on naval ships to similar types of asbestos-containing naval equipment.
- Mr. Sierra- Guzman is living and Mr. Kahn is deceased. However, plaintiffs argue that this should not prevent these cases from being joined for trial, citing the fact that it has been held in prior asbestos consolidation rulings that "the death of some plaintiffs will not prejudice the jury against the defendants, vis-a-vis, the living Plaintiffs' because they are suffering from the same terminal illness and will suffer the same fate" (*Matter of New York City Asbestos Litigation* (Altholz). 11 Misc. 3d 1063(A), at *3 (Shulman, J, Sup Ct NY Co 2006).

With respect to Trial Group 3, plaintiffs submit that the Brahe and Lyberg cases should be joined for trial as their matters share substantial commonality of fact and law. Plaintiffs argue as follows:

- Mr. Brahe and Mr. Lyberg were both diagnosed with mesothelioma and are both living, thus sharing a common illness and similar need to proceed to trial on an expedited basis.
- Mr. Brahe and Mr. Lyberg share substantial overlap in the time of their alleged exposure to asbestos. Both plaintiffs allege they were exposed to asbestos during their service in the United States Navy in the 1950s. Mr. Brahe served in the U.S. Navy in the 1950s. Mr. Lyberg served in the U.S. Navy in the 1940s and 1950s.
- Additionally, both plaintiffs allege they were similarly exposed to asbestos from joint compound in the 1960s. Mr. Brahe performed home renovation work using joint compound in the 1960s. Mr. Lyberg alleges he was exposed to asbestos-laden dust from living with his brother who worked with joint compound, caulk, sheet rock, and floor tiles in the 1950s and 1960s.
- For worksites, both Mr. Brahe and Mr. Lyberg allege they were exposed to asbestos at naval shipyards and on naval ships to similar types of asbestos-containing naval equipment. Similarly Mr. Brahe and Mr. Lyberg shared common occupations as both were U.S. Navy

sailors with the job title of seaman.

With respect to Trial Group 6, plaintiffs submit that the Byrnes and Miller cases should be joined for trial as their matters share substantial commonality of fact and law. Plaintiffs argue as follows:

- Mr. Byrnes and Mr. Miller were both diagnosed with asbestos-related lung cancer. Furthermore, both plaintiffs have a history of cigarette smoking. It is likely that both plaintiffs and defendants will present expert testimony in each case as to the relevance of their respective tobacco smoking histories in causing their disease.
- Mr. Byrnes and Mr. Miller are both deceased.
- Mr. Byrnes and Mr. Miller share substantial overlap in the type of exposure. Mr. Byrnes and Mr. Miller were both railroad workers, were working for the same employer, and were exposed to asbestos at the same railroad worksite: Grand Central Station in New York. Both plaintiffs allege they were exposed to asbestos from substantially similar types of railroad station equipment such as insulation and gaskets from pumps and piping.
- Mr. Byrnes and Mr. Miller share substantial overlap in the time of their exposure. Mr. Byrnes worked at this site from 1993 to 2015. Mr. Miller was a worker at this site from 1985 to 2003. Both plaintiffs share overlap in time of exposure as both were exposed to asbestos at Grand Central in the 1990s.

Joint Opposition

Defendants make the policy argument that joint trials in asbestos cases are like "a traveling circus." Using data from results in 21 NYCAL cases since 2011, defendants assert that defendants in NYCAL are prejudiced by joint trials, which violated their due process and equal protection rights under New York State and the United States Constitutions. Defendants contend that their evidence reflects that juries in a single-plaintiff case are more likely to award a defense verdict than in a consolidated case and, in those cases where there is a plaintiff verdict, a single plaintiff recovers the average of 9.1 million dollars whereas in jointly tried cases, each plaintiff recovers the average of 20.0 million dollars. They further contend that awards for future pain and suffering are approximately 40 percent higher when cases are tried jointly. This can be explained, defendants

assert, because the juries are confused in joint trials and rely on testimony in one action to improperly bolster their determination in another action. Defendants also complain that they are deprived of the right to cross examine the witness in the case where the defendant is not a party, but that the jury will nevertheless use that witness' testimony against that defendant. Even though juries are not instructed on what constitutes reasonable compensation, defendants also fault juries for requiring judges to consider lengthy remittitur of motions based on the standard of material deviation from reasonable compensation. Consolidation increases the length of the trial, defendants point out, which results in the loss of "the hope of a fair cross section of jurors" as many prospective jurors drop out when they hear a trial will be 8-12 weeks.

Defendants point out that some courts and certain states have prohibited consolidation.[1] They assert that consolidation is only meant for litigants "in nearly identical matters." Defendants generally point to differences in occupation, time frames, living versus dead plaintiffs, medical evidence, types of products, manufacturers, and varied asbestos content. In Group 2, one plaintiff worked in a Navy shipyard while the other plaintiff worked as a Navy Engineman. In Group 3, one plaintiff worked as a U.S. Navy signalman while one plaintiff worked as a U.S. Navy Electrician. In Group 6, only one plaintiff worked in the Navy implicating federal maritime law (however, that plaintiff asserts that he has made no claims against the Navy or any bankrupt entities connected to the Navy). Additionally, defendants complain that the lack of complete identity of common

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[1]For example, defendants note that in July 2005, the Ohio Supreme Court amended the Ohio rules of civil procedure to preclude joinder of pending asbestos actions. Additionally, in August 2006, the Michigan Supreme Court adopted an administrative order that precludes bundling of asbestos cases for trial (attached as Exhibit B to the Joint Opposition). Defendants point to Georgia, Kansas and Texas laws enacted in 2005 and 2006 which generally preclude joinder of asbestos cases at trial (*id.*).

defendants in Groups 2 and Group 3 forces many defendants to sit through dozens of witnesses and evidence for a case that does not involve them.

Cleaver-Brooks' Opposition

Cleaver-Brooks opposes a joint trial for Group 3. Cleaver-Brooks is a defendant in only one action in Group 3 (the Lyberg case). Cleaver-Brooks argues:

- The cases do not arise out of the same facts, same worksites, same periods of exposure, or same defendants.
- The mere fact that the plaintiffs in Group 3 may have had similar diseases and may have been in the presence of different products that may or may not have contained respirable asbestos fibers does not mean the cases will not prejudice defendants' substantial right to fair trials.
- The fact that both plaintiffs served in the U.S. Navy is not sufficient to establish a common work site, because, for instance, the Lyberg plaintiff alleges that a portion of his exposure to asbestos occurred while he was stationed at the naval facility in Green Cove Springs Florida during recommissioning of the USS Chloris, while the Brahe plaintiff alleges exposure occurred aboard the USS Saratoga while at sea; thus one ship was "fully operational and seaworthy, and the other laid up in dry dock."
- The Lyberg plaintiff's role aboard the USS Chloris was supervisory while the Brahe plaintiff was directly charged with cleaning duties aboard the USS Saratoga.
- The Lyberg plaintiff also alleges take-home exposure from living with his brother who worked with joint compound, caulk, sheet rock, and floor tiles in the 1950s and 1960s. The Brahe plaintiff does not allege any kind of second-hand exposure.
- Regarding Navy work, the Lyberg plaintiff alleged exposure between 1950 and 1951, while the Brahe plaintiff alleged exposure between 1955-1959. The Lyberg plaintiff alleges take -home exposure over 17 years.

Metro-North's Opposition

Metro-North opposes a joint trial in Group 6. Metro-North argues that:

- Plaintiffs' FELA causes of action require them to provide each decedent with a reasonably safe place to work. Metro-North argues that unlike products liability actions, these cases are uniquely fact-specific and based on job assignments and locations.
- Juror confusion is likely when discussing each decedent's particular job assignments and locations. That is particularly likely here where Byrnes and Miller are alleging different exposures during different time periods.

Carrier Corporation's Opposition

Carrier opposes a joint trial for Groups 2 and 3. Carrier asserts that while both plaintiffs in Group 2 worked on Navy ships, they did not work on the same ship. One plaintiff was a civilian trainee for the Navy for seven years while the other plaintiff was a Navy serviceman for twenty years. Moreover, concerning the post Navy careers of both pairs of plaintiffs in Groups 2 and 3, none shared the same worksite or occupation. Moreover, defendants would be prejudiced if the cases were joined in Group 2 because one plaintiff is living and the other is dead and because the years of exposure are not the same resulting in potentially differing evidence regarding the knowledge of the hazards of asbestos and OSHA regulations.

Plaintiffs' Reply

Plaintiffs point out that joint trials promote judicial economy and settlements and, contrary to defendants' position, are fair. Plaintiffs assert that defendants' empirical data is speculative and arbitrary. Defendants' analysis begins in 2011 and ignores prior years. Moreover, plaintiffs assert that their analysis does not account for mixed verdicts (i.e., a plaintiff's verdict in one case and a defendant's verdict in the other jointly tried case). Additionally, defendants cite to irrelevant cases which involve joint trials with 9 plaintiffs, 7 plaintiffs, 6 plaintiffs, 5 plaintiffs, 4 plaintiffs and 3 plaintiffs. Here, plaintiffs propose only joint trials with 2 plaintiffs. Plaintiffs observe that if you look at cases with 2 plaintiffs, such as the *Hillyer* trial, the trial lasted 4 weeks. Single plaintiff trials during that period lasted 1-5 weeks.

Additionally, plaintiffs argue that defendants exaggerate their complaint about lack of common defendants in Guzman/Kahn (where there are 12 common defendants) and Brahe/Lyberg

(where there are 6 common defendants). Many defendants settle before trial. In any event, in single plaintiff trials, the jury still must hear complex evidence, including evidence regarding numerous settling defendants and non-parties. Additionally, the use of notebooks and special verdict sheets can be employed to assist the jury. Regardless of defendants' argument that plaintiffs in Group 6 had different job titles, their exposure was from similar types of asbestos-containing products and equipment. Moreover, although plaintiffs had separate periods of employment in 1980s and 2000s, they had an overlap of employment in 1990s. Plaintiffs maintain that defendants' argument concerning federal law is misplaced because no plaintiff in Group 6 is making a claim involving the Navy or has collected from bankrupt entities related to Navy service.

Discussion

One flaw in defendants' argument is their position that consolidation is only meant for litigants "in nearly identical matters." Pursuant to CPLR section 602 (a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Trial courts have the authority to consolidate asbestos cases pursuant to CPLR 602 (a) where they involve common questions of law and fact (*Matter of New York City Asbestos Litig. (Dummitt)* 121 AD3d 230 [1st Dept 2014]). Moreover, "there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.)*, 10 AD3d 518 [1st Dept 2004]). While defendants assert that their substantial rights are prejudiced by joinder in asbestos cases, they have

not demonstrated that such prejudice will occur in the proposed two-plaintiff trials proposed herein.

In determining whether to consolidate asbestos cases for trial, courts look at the so-called *Malcolm* factors: "(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" (*Malcolm v National Gypsum Co.*, 995 F2d 346, 350-351 [2d Cir 1993]). No single factor controls.

As to the three groups being jointly tried, this court finds that the trials in each of the groups involve common questions of law and fact and that consolidation of these cases into the three groups will not prejudice a substantial right of defendants. As to the three groups, all of the plaintiffs are represented by the same law firm and are in the same phase of discovery as they have all been assigned to this part for trial. Moreover, in all of the groups, plaintiffs allege the same type of cancer. All of the plaintiffs have mesothelioma except for Group 6, where both plaintiffs have lung cancer. Although some of the groups have living and deceased plaintiffs, "the death of some plaintiffs will not prejudice the jury against the defendants, vis-a-vis, the living Plaintiffs' because they are suffering from the same terminal illness and will suffer the same fate" (*Matter of New York City Asbestos Litigation* (Altholz) 11 Misc. 3d 1063(A), at *3 (Shulman, J, Sup Ct NY Co 2006]).

Additionally, there are sufficient similarities in work site, occupation, and time of exposure. The law does not require congruent work histories in determining whether consolidation is appropriate. The First Department has held that it is not improper to grant a joint trial where the plaintiffs worked at different sites and had disparate occupations (see *Matter of New York City Asbestos Litig. (Dummitt)* 121 AD3d 230 [1st Dept 2014] [although "a shipboard boiler room is a different physical environment than a building under construction, and that the work performed by

the two plaintiffs' decedents was somewhat different... Konstantin and Dummitt were both exposed to asbestos in a similar manner, which was by being in the immediate presence of dust that was released at the same time as they were performing their work. TLC has failed to articulate why the differences in the environments and job duties had such an impact on the manner of exposure"]). It is also not improper to grant a joint trial where the periods of employment do not completely overlap, if there is sufficient commonality *(id.)*

Here, the plaintiffs in Group 2, 3 and 6 share similar occupations, work sites and exposures with the other plaintiff in that group. Defendants point to distinctions in the work performed by plaintiffs, but these distinctions do not outweigh the commonalities articulated by plaintiffs. For instance, Cleaver-Brooks complains that in Group 3, the Lyberg plaintiff's role aboard the USS Chloris was supervisory, while the Brahe plaintiff performed maintenance duties aboard the USS Saratoga, and, that one ship was "fully operational and seaworthy, and the other laid up in dry dock." However, the exhibit cited by Cleaver-Brooks (Exhibit C) evidences that the distinction is irrelevant. The document reflects that the Lyberg plaintiff supervised a crew scrapping and painting the USS Chloris in drydock, breathed in dust, and slept aboard the ship. Cleaver-Brooks has not shown why the Lyberg plaintiff's allegations of exposure on a ship on land is any different from the Brahe plaintiff's exposure on a ship at sea. Despite their job titles, both plaintiffs describe similar modes of exposure.

Moreover, although the plaintiffs in Groups 2, 3 and 6 do not allege exposure during the exact same years, many years do overlap. In Group 2 there is an overlap in the 1960s, in Group 3 there is an overlap in the 1950s (as to the Navy) and the 1960s (as to joint compound), and in Group 6 there is an overlap in the 1990s. The fact that plaintiffs have varied lengths of exposure does not

necessarily affect a causation analysis.

The other arguments raised by defendants, including their due process and equal protection arguments, are unpersuasive in the context of these nine cases. While fairness must not be sacrificed for efficiency, courts have an array of techniques at their disposal to avoid juror confusion and to ensure the differentiation of defendants in a joined action. Defendants' arguments regarding juror confusion carry more weight in the situations cited by defendants involving several plaintiffs. Here, plaintiffs proposed groupings involve only 1 or 2 plaintiffs. Even a single plaintiff asbestos trials can be complex, requiring jurors to deal with extensive evidence and multiple settling defendants and non-party defendants. The court must additionally consider its own limited resources and balance the rights of all parties.

It is hereby

ORDERED that the motion to consolidate the cases for joint trial is granted as proposed by plaintiffs; and it is further

ORDERED that the following occur: summary judgment motions for Group 1 must be filed no later than April 13, 2016 with opposition filed no later than April 22, 2016. Oral argument on those motions shall be held on April 26, 2016 at 10:30 am. Group 1 shall e-file a maximum five page letter outlining any *in limine* issues that need to be decided prior to jury selection, and a short list of witnesses by April 21, 2016. Any letter in opposition shall be limited to five pages and shall be e-filed by April 29, 2016. A pre-trial conference for Group 1 and oral argument on the *in limine* motions will be held on May 3, 2016 at 10:30 am. If any other issues arise the parties shall email afield@nycourts.gov. Jury selection in Group 1 will start May 9, 2016, with the jury trial to follow immediately thereafter. Group 2 shall be ready for trial on July 18, 2016. Summary judgment

motions for Group 2 must be filed no later than May 16, 2016, with opposition filed no later than June 17, 2016. Summary judgment motions for Groups 3-6 must be filed no later than May 31, 2016. The court shall make further scheduling orders for Groups 2-6 in the future.

This Constitutes the Decision and Order of the Court.

Dated: March 21, 2016

HON. PETER H. MOULTON
J.S.C.