SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Anderson,

-v-

Advance Auto Parts Inc.,

INDEX NO. 190085/15

MOTION DATE ______

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for Consolidation

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 7/27/16

______, J.S.C.
HON. BARBARA JAFFE

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

---x

HERMAN ANDERSON AND DONNA ANDERSON, INDIVIDUALLY AND AS HUSBAND AND WIFE,

Plaintiffs,

- against -

ADVANCE AUTO PARTS INC., *et al.*,

Defendants.

---x

Index No. 190085/15

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, plaintiffs move pursuant to CPLR 602 for an order consolidating the following *in extremis* cases for a joint trial: (1) Herman Anderson, Index No. 190085/15; (2) Mercedes Abreu, Index No. 190133/14; (3) Patrick Demartino, Index No. 190128/14; and (4) Mario Scalera, Index No. 190398/13. Defendant Ford opposes consolidation in all the

matters. In addition to joining Ford's opposition, defendants Ingersoll Rand Co. and Aurora Pump Co. oppose in the Demartino matter, Weil-McClain opposes in the Abreu matter, Genuine Parts Co. and ArvinMeritor, Inc. oppose in the Anderson matter, and Pneumo Abex Corp. and Maremont Corp. oppose in the Anderson and Demartino matters.

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 [Dummit]*, 121 AD3d 230 [1st Dept 2014], *affd on other grounds* __ NY3d __, 2016 WL 3495179, 2016 NY Slip Op 05064; *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]). That discretion is informed by several considerations.

Generally, in order for actions to be joined 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]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]). If, however, individual issues "predominate over common issues," actions should not be joined. (*Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012]).

Joinder is also inappropriate when the opposing party demonstrates prejudice to a substantial right. (*Id.*). Allegations of prejudice, however, must be specific and not conclusory. (*Dummitt*, 121 AD3d at 245). To minimize any alleged prejudice to defendants in consolidated cases, and to reduce juror confusion, the court may use techniques such as 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.*).

In determining whether to consolidate asbestos cases for trial, courts consider the factors set forth in *Malcolm v Ntl. Gypsum Co.*, 995 F2d 346 (2d Cir 1993), which follow, in pertinent part: (1) whether the plaintiffs worked at similar worksites; (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 during the same period of time; (4) whether the plaintiffs suffer or suffered from the same disease, as the jury at a consolidated trial will hear evidence concerning different etiologies and pathologies, and prejudice may result where the evidence shows that one disease engenders greater suffering and affords a shorter life span than other diseases in issue; (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"; and (6) the number of defendants in each case. (*Malcolm*, 995 F2d at 350-353).

In contrast to the trend in New York County of consolidating asbestos trial (*see Matter of New York City Asbestos Litig. [Dummit]*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U] [Sup Ct, New York County 2012] [in New York County, asbestos cases have historically been consolidated for trial], *affd* 121 AD3d 230 [1st Dept 2014] [in asbestos cases, it has been routine to join cases together]), some state courts do not consolidate asbestos trials absent the consent of all parties (Ohio R Civ P 42[A][2]; Tex Civ Prac & Rem Code Ann § 90.009; Kan Stat Ann § 60-4902[j]; GA Code Ann § 51-14-10; Mich Admin Order No. 2006-6).

While judicial economy and efficiency are relevant considerations in determining whether to consolidate, they "must yield to a paramount concern for a fair and impartial trial." (*Johnson v Celotex Corp.*, 899 F2d 1281 [2d Cir 1990]). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's - and defendant's - cause not be lost in the shadow of a towering mass litigation." (*Matter of Brooklyn Navy Yard Asbestos Litig.*, 971 F2d 831 [2d Cir 1992]; *see also Malcolm*, 995 F2d at 350 ["benefits of efficiency can never be purchased at the cost of fairness"]). Asbestos matters ought not be consolidated for trial "simply because doing so has been the routine, nor should the terms 'efficiency' and 'judicial economy' be used to justify consolidation where experience has shown that [it] generally does not advance these lofty goals." (*Matter of New York City Asbestos Litig. [Bova]*, 2014 WL 4446457, 2014 NY Slip Op 32336[U] [Sup Ct, New York County 2014]). And although the consolidation of somewhat diverse cases may not result in prejudice to a defendant's right to a fair trial (*Baruch*, 111 AD3d 574), it does not necessarily yield greater efficiency, as state of the art evidence may vary according to occupation, industry, and/or product. (*See Curry v Am. Standard*, 2010 WL 6501559 [SD NY 2010] [differences in degree and duration of plaintiffs' asbestos exposure would likely require presentation of different complex state-of-art evidence in each case, further decreasing potential efficiency of consolidation]). Even though medical evidence pertaining to mesothelioma in general may be elicited in each separate trial, such evidence takes less trial time than that spent on each plaintiff's specific medical history. (*See Malcolm*, 995 F2d at 351 [plaintiff's occupation significant factor in considering consolidation as asbestos exposure depends mostly on occupation, and observing that there "detailed history for each victim was

necessary concerning his degree of impairment, specific medical history, emotional state, and medical prognosis . . . [and] the jury had to sift through each victim's medical history to determine whether factors other than asbestos, such as smoking, were responsible" for victim's medical condition]). Thus, trial length often depends on the plaintiffs' occupations and medical histories. (*Id.*).

Also militating against consolidation is the difficulty inhering in selecting a jury for a multi-plaintiff trial (*see* "Management Issues in Toxic Tort Litigation," ALI-ABA, June 26, 1995 [trial convenience and administration economy best served by not consolidating cases as "(v)oir dire and jury selection problems arise in finding a group of people who can sit on a jury for an extended length of time."]), a consideration no less pertinent today.

II. UNDISPUTED FACTS

A. Herman Anderson

From the 1950s to the 1980s, Anderson worked as a mechanic and was allegedly exposed to asbestos while working on and assisting with work on asbestos-containing brakes, clutches, and gaskets, and from others around him who were working on the same materials. He died from pleural mesothelioma at the age of 75.

Seven defendants remain in Anderson's action: Arvinmeritor, Inc. (as successor in interest to Rockwell International Corp.), Maremont Corp., Ford, Genuine Parts, Honeywell International Inc. f/k/a Allied Signal Inc., Bendix (as successor in interest to the Bendix Corp.), and Pneumo Abex (individually and as successor in interest to Abex Corp.).

Ford observes that before Anderson was diagnosed with mesothelioma in 2015, he was diagnosed in 2000 with prostrate cancer and in 2010 with esophageal cancer, and he was treated

for both with radiation and chemotherapy. Based on that evidence, defendants' experts opine that the most likely cause of Anderson's mesothelioma was his exposure to radiation. Ford also contends that Anderson was mostly exposed to asbestos in Jamaica, WI, where he worked as a mechanic from 1955 to 1961, and in England, where he worked from 1961 to 1973, and that he was exposed in the United States when he worked as a mechanic from 1973 to 1974 and when between 1975 and 1984, when he owned two gas stations where he occasionally assisted mechanics.

Pneumo argues that Anderson is the only plaintiff who worked as a mechanic or performed a brake job, and that he did not work at any site where other plaintiffs worked. (NYSCEF 172).

B. Patrick Demartino

In the 1970s, Demartino worked at an automotive repair business where he was allegedly exposed to asbestos contained in brakes and clutches, and from gaskets on pumps while he worked in maintenance for approximately three years. He alleges that he was exposed to asbestos in insulation on and within hot-typesetting machines. The sole living plaintiff, Demartino is 56 years old and suffers from well-differentiated papillary mesothelioma of the peritoneum.

The nine defendants remaining in his action are: Aurora Pump Co., Goulds Pumps, Inc., Heidelberg USA, Inc. (individually and as successor in interest to Mergenthaler Linotype Co.), Maremont, Honeywell, Bendix, Ingersoll-Rand Co., Viking Pump, Inc., and Pneumo Abex.

Ford contends that Demartino was primarily exposed to asbestos contained in printing presses, linotype machines, pumps, valves, motors, and air compressors when he worked in

maintenance and production for a printing company, and as a photographer's apprentice and journeyman photographer. It observes that Demartino alleges exposure to automotive parts for two to three months during 1972 or 1973 when he worked at his friend's repair shop, and that plaintiff admits that he never personally replaced any brakes. (NYSCEF 131).

Ingersoll argues that trying Demartino's case with the others is inappropriate given the uniqueness of his case: it is a defendant only in Demartino's case, Demartino is the sole living plaintiff, his disease differs from the others', his printing work differs from the others' work, and the gaskets to which he was exposed in the printing industry are different from automotive gaskets. (NYSCEF 129).

Pneumo also maintains that Demartino's case is unique, as peritoneal mesothelioma affords a longer life expectancy and better prognosis than other forms of mesothelioma, and that it may require different treatment. It observes that Demartino has been living post-diagnosis for more than two years. (NYSCEF 172).

Aurora joins in Ford's and Pneumo's arguments, and observes that it is a defendant in only the Demartino matter. (NYSCEF 173).

C. Mario Scalera

Scalera is alleged to have been exposed to asbestos while performing brake and clutch work and while in the presence of such work when he worked in maintenance in the 1970s and 1980s. Scalera was also exposed to asbestos-containing insulation in his home boiler. He died of pleural mesothelioma at the age of 86. Three defendants remain in his action: Burnham, LLC (individually and as successor to Burnham Corp.), Honeywell, and Bendix.

D. Mercedes Abreu

Abreu claims exposure to asbestos in the 1980s when her son, who worked in the presence of others performing asbestos-containing insulation work on boilers, brought home his asbestos dust-laden work clothing home for his mother to launder. She died of mesothelioma at the age of 80. The only remaining defendant in her action is Weil-McLain (a division of the Marley-Wylain Co., a wholly-owned subsidiary of The Marley Co., LLC).

Ford observes that Abreu's son was allegedly exposed from approximately 1984 to 1986 and from 1989 to 1991. (NYSCEF 131). Weil-McLain opposes consolidation as it is a defendant only in Abreu's action, Abreu's secondary exposure not only differs from the others' but she was allegedly exposed after the other plaintiffs were exposed, and the type of insulation to which she was exposed differs from those to which the others were exposed. (NYSCEF 174).

III. CONTENTIONS

Plaintiffs argue that consolidating these cases will save time and lead to speedier and more efficient dispositions as the state of the art evidence and medical evidence will be the same at each trial, and that absent any predominant issues, consolidation is appropriate. They observe that mesothelioma is the illness common to all plaintiffs, and that Anderson, Demartino, and Scalera were exposed by working as or around automotive mechanics, that Abreu's and Scalera's exposures resulted from work on boiler insulation, that Demartino was also exposed to asbestos-containing insulation, that plaintiffs were all exposed to similar products, and that three of them were exposed during the 1970s and all four during the 1980s. That only one plaintiff is alive, they maintain, should not preclude consolidation. (NYSCEF 110).

Defendants offer the opinion of Ford's expert that a jury's "decision biases" increase with

the greater volume of evidence admitted, the number of parties in the case, case complexity, and the differences among the cases. Ford asserts that dissimilarities among the cases predominate, such as its defense based on foreign law in Anderson's case and Anderson's unique exposure to automotive parts, the unique issue of causation raised in Demartino's case, Scalera's and Abreu's exposures, and the plaintiffs' varying occupations and periods of exposure. Ford also denies that it is more efficient to consolidate asbestos cases for trial, arguing that historically, consolidated trials involved lengthier proceedings. (NYSCEF 131).

III. ANALYSIS

A. Anderson

Anderson is the sole plaintiff who claims to have been exposed to asbestos before the enactment of OSHA, and he is the only one whose alleged exposure lasted more than 30 years. Thus, the state of the art evidence offered in his case will differ from that of the other plaintiffs. (*See Malcolm*, 995 F2d at 351 [time frame was "enormous," beginning in the 1940s and ending in the 1970s, and while some plaintiffs were exposed for up to 30 years, others were exposed for much shorter periods, "undercutting the benefit of efficiency, and increasing the likelihood of prejudice, particularly concerning 'state-of-the-art' evidence"]).

Anderson's cancer history is also unique as is his defense on the issue of causation. Moreover, he is the only plaintiff whose case may require the application of foreign law. (*See eg, Dummit*, 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]).

Anderson was also the only plaintiff whose work as a mechanic included brake jobs, and he did not work at a site common with the other plaintiffs, nor does he allege exposure to asbestos-containing insulation. (*See eg Curry v Am. Standard*, 2010 WL 6501559 [SD NY 2010] [motion to consolidate denied even though both plaintiffs worked for Navy, as they were not employed at same worksite and did not perform same work]; *see also Altholz*, 11 Misc 3d at 1063[A][one case not consolidated with others absent overlap in exposure periods and as state of art evidence through 1990s could prejudice defendants]).

Moreover, of the seven remaining defendants in Anderson's action, three are not defendants in any of the other actions, and two are defendants in only one other action.

In light of the foregoing, the differences between Anderson's case and those of the other plaintiffs predominate over commonalities.

As court records reflect that Anderson's wife was appointed as executor of his estate in March 2016, Ford's motion for a stay is moot.

B. Demartino

While Demartino's status as the sole plaintiff who is not deceased does not preclude consolidating his case with the others', he is also the only plaintiff who is not diagnosed with pleural mesothelioma, a circumstance which likely requires different and unique medical evidence. (*See Malcolm*, 995 F2d at 346 [as plaintiffs suffered from three different diseases, there was no efficiency in hearing disparate medical evidence, and prejudice could arise where certain diseases permitted almost normal life spans while others were terminal]; *see also Matter of New*

York City Asbestos Litig. [Adler], 2012 WL 3276720, 2012 NY Slip Op 32097[U] [Sup Ct, New York County 2012] [peritoneal mesothelioma distinct from pleural mesothelioma]). His primary occupation and worksite also differ from the others', and the asbestos-containing parts and materials to which he was allegedly exposed in the printing process differ from those to which the other plaintiffs were allegedly exposed. Additionally, Demartino's two to three months working in a friend's automotive shop where he performed no brake jobs, is not sufficiently similar to Anderson's lengthy career as a mechanic performing brake jobs. And, of the nine defendants remaining in Demartino's action, five of them are not defendants in any other action. Thus, the commonalities are outweighed by the differences between his case and the others'.

C. Scalera

Scalera's alleged exposure to asbestos differs from the others both in the mechanics of exposure and the combination of alleged exposures. Scalera alleges exposure as a bystander to work on automotive parts performed by others and direct exposure from working on insulation on a boiler in his home. (*See Altholz*, 11 Misc 3d at 1063[A] [declining to consolidate case where plaintiff was only one exposed to asbestos primarily as bystander]). Of the three defendants remaining in his action, one is in no other action. Plaintiffs thus fail to show that the commonalities predominate over the differences in Scalera's case versus the other plaintiffs.

D. Abreu

Abreu is the only plaintiff claiming secondhand exposure through the work of another and the alleged exposure lasted one year. Absent any shared occupation, worksite or exposure, her case should be tried separately from the others. (*See Bischofsberger v AO Smith Water Prods.*, 2012 WL 4462393, 2012 NY Slip OP 32414[U] [Sup Ct, New York County] [denying

consolidation of two cases where one plaintiff's sole exposure was through laundering husband's work clothes]; *Altholz*, 11 Misc 3d 1063[A] [denying consolidation to one plaintiff as she experienced secondary exposure from dust brought home from husband]). Moreover, there is only one defendant remaining in her action and it is not a defendant in any other action. Thus, not only is Abreu's case different from the others, but there would be no economy in consolidating her case against one defendant with another or others involving many different defendants.

IV. CONCLUSION

Of the 14 remaining defendants in these cases, 10 are in only one case, two are in two cases, and two are in three cases; no defendant is named by all four plaintiffs. Consolidating these cases will result in 10 of the 14 defendants participating in a trial in which they are parties in only one case. Not only will the length of the trial be extended, but the jury will be required to sift through voluminous evidence in order to consider the varying claims and defenses. (*Altholz*, 11 Misc 3d 1063[A] [number of defendants in one case substantially greater than others and with minimal overlap; "parsing dissimilar, and potentially contradictory, defenses may result in considerable delay and jury confusion," thus lessening potential efficiency of consolidation]). Limiting instructions and notebooks will not likely alleviate that burden.

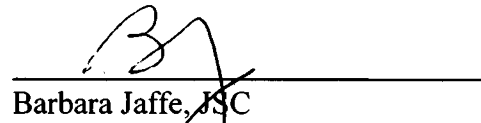
For all of the foregoing reasons, it is hereby

ORDERED, that plaintiffs' motion to consolidate is denied, and the cases will be tried individually in alphabetical order; and it is further

ORDERED, that the parties in all four actions are directed to contact chambers to

schedule a settlement conference with Justice Jaffe.

ENTER:



Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: July 27, 2016
New York, New York