

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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IN RE: NEW YORK CITY ASBESTOS LITIGATION
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JOHN CUZZOLINO AND CONCETTA CUZZOLINO,
Plaintiffs,

Index No.190270/2014

-against-

DECISION/ORDER

A.O. SMITH WATER PRODUCTS , et al.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

This court has been assigned eight asbestos actions for trial, comprising the Belluck & Fox In Extremis trial group. Plaintiffs have brought the present motion to consolidate these actions into three separate groups for joint trial, claiming that there are common questions of law and fact.

They have requested that there be three groups of trials as follows:

Group 1: John Cuzzolino and Ardeshir Ommani

Group 2: Vincent A. Geritano, Walter Hazard and John Negri

Group 3: Carlton Johnson, Michael Koulermos and Eli Petrovich

Pursuant to CPLR section 602 (a), a trial court has discretion to consolidate two or more actions for joint trial if they involve common questions of law or fact. 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.*, 10 A.D.3d 518 (1st Dept 2004).

There are certain criteria which the courts follow in determining whether to consolidate

asbestos cases for trial: “(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 F.2d 346, 350-351 (2d Cir. 1993). However, no single factor is dispositive. *In Re New York City Asbestos Litigation*, 2013 N.Y. Misc. Lexis 2080 (Sup Ct NY Co. 2013).

Considering all of these factors, the court grants the application of plaintiffs as follows. Group 1 will consist of John Cuzzolino and Ardeshir Ommani. Group 2 will consist of Vincent A. Geritano, Walter Hazard and John Negri. Group 3 will consist of Carlton Johnson, Michael Koulermos and Eli Petrovich. As to the three groups being consolidated, 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, the plaintiffs allege the same type of cancer. All of the plaintiffs in each of these cases have mesothelioma except for group 3 in which all of the plaintiffs have lung cancer. Although some of the groups have living and deceased plaintiffs, the death of some of these 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 Litig.*, 11 Misc. 3d 1063[A].

Finally, “the Malcolm factors do not compel the plaintiffs to share a common occupation or common time of exposure.” *Id.* The courts have routinely granted consolidation of trials even

where the plaintiffs work at different work sites and have disparate occupations on the ground that “these factors really concern the type of asbestos exposure each plaintiff is claiming and whether there will be shared testimony about the airborne fibers to which plaintiffs were exposed.” *In Re New York City Asbestos Litigation*, (Index No. 114483/02, NY Co. Sup Ct., order dated May 2, 2011, Gische, J.); *Carroll v. A.W. Chesterton Company* (index # 190295/09; NY Co. Sup Ct., order dated August 25, 2010, Friedman, J.)(“The court recognizes that the plaintiffs...did not share the same work sites or same occupations. However, there are overlapping exposures, that is, exposures to various of the same asbestos-containing products as well as exposures that occurred in the same manner, that is, by working directly with asbestos containing materials and/or by means of by-stander exposure.”) In the present case, with respect to Group 1, the plaintiffs have similar occupations and exposures as they both allege that their exposure was from working as a painter and there is a large overlap in the type of products that these plaintiffs allege that they were exposed to throughout their respective careers. With respect to the other two groups, although the plaintiffs have had different occupations and worked at different job sites, they have had exposure to similar types of asbestos-containing products as well as exposures that have occurred in the same manner- by working directly with asbestos-containing products and by means of bystander exposure. Moreover, they have all had overlapping periods of exposure. Finally, the court does not agree that the Negri case should be tried separately on the ground that he is the only plaintiff who worked with laboratory equipment and products as his exposure to these types of products would not be treated differently than the other plaintiffs’ exposures to different products or his exposure to different products.

The other arguments raised by defendants in opposition to consolidation, including their

due process and equal protection arguments, are without basis. The First Department has just recently held that the trial courts have the authority to consolidate asbestos cases pursuant to CPLR 602 (a) where they involve common questions of law and fact. *See Matter of New York City Asbestos Litig. (Dummitt)*, 121 A.D.3d 230 (1st Dept 2014). The court also sees nothing improper in consolidating the case of Negri with two other cases even though he allegedly has peritoneal mesothelioma and the other two plaintiffs have pleural mesothelioma. *See Dummitt*, 121 A.D.3d at 244 (upholding consolidation even though one plaintiff has pleural mesothelioma and other plaintiff has peritoneal mesothelioma).

Based on the foregoing, the motion to consolidate the cases for trial is granted to the extent stated herein. As discussed at the first conference of this matter, the court will post an order on the NYCAL website two weeks before the date scheduled for jury selection for each group. This constitutes the decision and order of the court.

Dated: 10/2/15

Enter: CR

CYNTHIA S. KERN
J.S.C