

<b>Matter of New York City Asbestos Litig.</b>
2016 NY Slip Op 30936(U)
May 17, 2016
Supreme Court, New York County
Docket Number: 190207/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
IN RE: NEW YORK CITY ASBESTOS LITIGATION

-----X  
JACQUELINE A. CICIO, as Executrix for the Estate of  
FREDERICK J. CICIO, SR. and JACQUELINE A.  
CICIO, as Spouse, ET AL,

Index No. 190207/14

Plaintiff,

**DECISION AND ORDER**

- against -

ALFA LAVAL, INC., *et al.*,

Defendants.

-----X  
BARBARA JAFFE, J.:

**For plaintiff:**  
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**For Am. Biltrite:**  
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Landman Corsi *et al.*  
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**For Kaiser Gypsum:**  
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Lewis Brisbois *et al.*  
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By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following *in extremis* cases for a joint trial: (1) Frederick Joseph Cicio, Index Nos. 190206/14 and 190207/14; (2) Harry Franklin Keeny, III, Index No. 190203/14; and (3) Charles Anthony Matuk, Index Nos. 190314/14 and 190315/14. Defendants American Biltrite, Inc. and Kaiser Gypsum Company, Inc. oppose.

**I. APPLICABLE LAW**

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court. (See *Matter of New York City Asbestos Litigation [Dummit]*, 121 AD3d 230 [1<sup>st</sup> Dept 2014]; *Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1<sup>st</sup> Dept 2013]; *JP*

*Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1<sup>st</sup> Dept 2002];

*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]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1<sup>st</sup> Dept 2005]). A motion for a joint trial should be granted unless the opposing party demonstrates prejudice to a substantial right (*Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1<sup>st</sup> Dept 2012]), and allegations of prejudice must be specific and not conclusory (*Dummitt*, 121 AD3d at 245). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*).

In determining whether to consolidate individual plaintiffs’ cases for a joint trial where exposure to asbestos is alleged, 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 a common or similar 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 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 about the etiology and pathology of different diseases, and prejudice may result where the jury learns that a terminal cancer engenders greater suffering and shorter life span than does asbestosis;
- (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 named in each case.

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

To reduce juror confusion and minimize any alleged prejudice to defendants in consolidated cases, 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. (*Dummitt*, 121 AD3d at 245).

## II. PLAINTIFFS’ INFORMATION

### 1. Frederick J. Cicio

Cicio died from mesothelioma at the age of 84. From 1948 to 1967, he served in the United States Navy as an engineman and worked on naval ships and shipyards. It is alleged that Cicio was exposed to asbestos-laden dust resulting from his work with and working around others installing and manipulating asbestos-containing gaskets, packing, and insulation on pipes, traps, valves, and turbines. In the 1960s and 1970s, Cicio also worked as a gas station attendant where he was exposed to asbestos emanating from pumps, compressors, valves, gaskets, and car brakes and clutches. Sixteen defendants remain in this action: Alfa Laval Inc., Armstrong International, Inc. f/k/a Armstrong Machine Works, Blackmer Pump, Carrier Corp., Crane Co. (successor to Jenkins Bros. and Weinman Pump), FMC Corp., Genuine Parts Co., (individually and as successor to NAPA, Rayloc, and Colyear Motor Sales), Goulds Pumps, Inc., Honeywell International Inc., Ingersoll-Rand Co., ITT Corp., J.C. Whitney & Co., Jenkins Bros., Todd Shipyards Corp., Trane U.S., Inc., and Warren Pumps, LLC. (NYSCEF 175, 176).

## 2. Harry F. Keeny

Keeny passed away at the age of 72 from mesothelioma. From 1962 to 1966, he served as an apprentice marine installation specialist for a private shipbuilding company, where he installed turbines, boilers, valves, pumps, and other associated equipment in the engine and boiler rooms on ships and at shipyards. It is alleged that Keeny was exposed to asbestos from asbestos-containing gaskets, packing, and insulation. In the 1970s, Keeny worked for PSI, a division of Warner Electric, as a senior applications engineer and regional sales manager, where he inspected brakes and clutches at various commercial and industrial worksites, including factories in New York City, New Jersey, and Pennsylvania, where he was allegedly exposed to asbestos-containing brakes. It is also alleged that Keeny was exposed to asbestos-containing dust from joint compound he used while renovating his home in the 1960s and 1970s. The six defendants remaining in his action are Goulds Pumps, Inc., Honeywell International, Inc., Ingersoll-Rand Co., Kaiser Gypsum Co., Inc., Pneumo Abex Corp., and Warren Pumps, LLC. (NYSCEF 175, 176, 182).

Kaiser Gypsum objects to consolidation, as it is a defendant in only the Keeny matter, and the allegations against it relate to Keeny's home renovation work. It also observes that Keeny is the only plaintiff here who alleges exposure to its products while performing home renovations. (NYSCEF 181, 182).

## 3. Charles A. Matuk

Matuk died from mesothelioma at the age of 74. From 1956 to 1957, he worked for St. Paul Auto Parts as an automotive repair worker, where he worked on asbestos-containing brakes and clutches. From 1958 to 1964, Matuk served in the US Navy as an electrician's mate on ships

and shipyards, and was allegedly exposed to asbestos from his work with asbestos-containing electrical panel boxes and circuit breakers, and around others working with asbestos-containing gaskets, packing, and insulation on pumps, traps, valves, generators, and turbines. In the 1960s and 1970s, during home renovation work, Matuk was allegedly exposed to dust containing asbestos from joint compound, sealant materials, electrical panels, switches, floor tiles, and roofing materials. The eight defendants remaining in his action are American Biltrite, Inc., Cutler-Hammer, Inc., Honeywell International Inc., Rockwell Automation Inc. (a/k/a Allen Bradley), Siemens Energy, Inc., Spirax Sarco, Inc., Square D. Co., and Warren Pumps, LLC. (NYSCEF 175, 176).

American Biltrite objects to consolidation of the Matuk case with others, as it is only a defendant in the Matuk case, and Matuk was the only plaintiff allegedly exposed to asbestos in its floor tiles. It also contends that the differences in plaintiffs' occupations may confuse the jury. (NYSCEF 180).

### III. ANALYSIS

#### A. Judicial economy

Plaintiffs argue that consolidating these cases will save time and lead to more efficient and speedier dispositions as the same state of the art evidence and medical evidence will be offered at each trial. (Comerford Aff.).

In juxtaposition to the previous New York County consolidation trend (*see Matter of New York City Asbestos Litig. [Anczewicz]*, 188 AD2d 214 [1<sup>st</sup> Dept 1993], *aff'd* 82 NY2d 821 [joint trials may potentially reduce cost of litigation, promote judicial economy, speed disposition of cases, and encourage settlements]; *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 [1<sup>st</sup> Dept 2014] [in asbestos cases, it has been routine to join cases together]), courts in other states 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 should be considered in determining whether to consolidate, the “paramount concern [is] 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]).

Although consolidating somewhat diverse cases may not result in prejudice to a defendant’s right to a fair trial (*Matter of New York City Asbestos Litig. [Baruch]*, 111 AD3d 574 [1<sup>st</sup> Dept 2013]), state of the art evidence may differ according to the pertinent 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 mitigating against potential efficiency of consolidation]). And, while each separate trial will require the presentation of general evidence about mesothelioma, the time it takes does not significantly add to a trial's duration, as compared with the great amount of time taken in eliciting a plaintiff's specific medical history. Thus, a trial's duration often depends on the plaintiffs' occupations and medical histories.

Also militating against consolidation is the difficulty inhering in selecting a jury for a multi-plaintiff trial, a consideration that is not of recent vintage. (See "Management Issues in Toxic Tort Litigation," ALI-ABA, June 26, 1995 [trial convenience and administration economy best served by not consolidating cases as "Voir Dire and jury selection problems arise in finding a group of people who can sit on a jury for an extended length of time."]).

#### B. Cicio, Keeny, and Matuk

Plaintiffs have in the common that they all died from mesothelioma, and that they were allegedly exposed to asbestos in the 1960s and 1970s. The medical evidence about mesothelioma and the historical state-of-the-art evidence would thus overlap or be the same. (See *Matter of New York City Asbestos Litig. [Konstantin]*, 121 AD3d 230 [2014] [consolidation properly granted as both plaintiffs' exposures sufficiently common and both exposure periods ended in 1977, and thus state of art evidence same for both cases]).

However, while Cicio and Matuk served in the Navy and were allegedly exposed to asbestos during that service, Keeny did not, and the cases involving the Navy employees may implicate federal maritime law which would not apply to Keeny. Moreover, Cicio's exposure



began in the 1940s, Matuk's in the 1950s, and Keeny's in the 1960s, Cicio alone was exposed while working at gas stations, and Matuk alone was exposed to asbestos contained in electrical parts and in floor tiles and roofing material. Plaintiffs labored in different occupations and at many different worksites. (*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 Matter of New York City Asbestos Litig. [Altholz]*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[U] [Sup Ct, New York County 2006] [one case not consolidated with others absent overlap in exposure periods and state of art evidence through 1990s could prejudice defendants]).

Of the 24 remaining defendants in these cases, only two are named in all and another two are defendants in two of the three cases. The result of consolidating these cases would thus be that 20 of the 24 defendants would be participating in a trial in which they are parties in only one of the three cases, thereby not only likely extending the length of the trial, but also requiring the jury to sift through potentially voluminous information in order to differentiate between claims and defenses. (*Altholz*, 11 Misc 3d 1063[A], 2006 NY Slip Op 50375[U] [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]).

#### IV. CONCLUSION

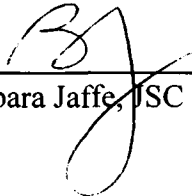
For all of the foregoing reasons, it is hereby

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 three actions are directed to appear for the previously scheduled settlement conference at 2:30 pm on June 1, 2016 at 80 Centre Street, Room 279, New York, New York, as follows:

- (1) plaintiffs are directed to communicate a settlement demand to each defendant on or before May 27, 2016 and defendants must communicate a counter-offer on or before May 31, 2016;
- (2) all attorneys must appear with either settlement authority or the ability to communicate immediately with their insurance carriers; if any; and
- (3) the parties are directed to bring their trial calendars for June, July, and August in order to set trial dates in each case.

ENTER:

  
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Barbara Jaffe, JSC

DATED: May 17, 2016  
New York, New York