

<b>Matter of New York City Asbestos</b>
2013 NY Slip Op 30954(U)
May 1, 2013
Supreme Court, New York County
Docket Number: 116087/05
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE  
Justice

PART 12

AMBRUSO, LINDA J.

INDEX NO. 116087/05

A.O. SMITH WATER PRODUCTS  
COMPANY, INC., ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 14

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

12

Answering Affidavits — Exhibits \_\_\_\_\_

3-9

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAY 03 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/1/13

37  
BARBARA JAFFE <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION <sup>J.S.C.</sup>

Check if appropriate:  DO NOT POST  REFERENCE

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

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

This Document Relates To:

Index No. 116087/05

LINDA J. AMBRUSO as Executrix for Estate of  
LEONARD A. AMBRUSO, *et al.*,

Subm.: 4/10/13

Plaintiffs,

**DECISION AND ORDER**

- against -

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

Defendants.

**FILED**

MAY 03 2013

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

NEW YORK

COUNTY CLERK'S OFFICE

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By order to show cause dated February 1, 2013 and supplemented by letter dated March

8, 2013, plaintiffs move pursuant to CPLR 602 for an order consolidating their cases for trial. Defendants jointly oppose, with supplemental opposition submitted by defendants Ira S. Bushey and Sons, Inc. (Bushey), Carrier Corporation (Carrier), Pneumo Abex LLC (Pneumo), Northrop Grumman (Northrop), Trane U.S., Inc. (Trane), and National Automotive Parts Association (NAPA).

### 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 [1<sup>st</sup> 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;
- (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 15 actions into four trial groups, with Group One (Naval Exposure Group) consisting of plaintiffs Cynamon, Eichen, Harriett, Hochberg, Montuoro, Rockmaker, Vorchheimer, and Wubbe, Group Two (Land-Based Construction and Maintenance Group) consisting of plaintiffs Ambruso, Consorti, and Rauscher, Group Three (Automotive Friction Group) consisting of plaintiffs Durham and Romano, and Group Four (Building Maintenance Group) consisting of plaintiffs Rimicci and Santini.

### A. Leonard Ambruso

Ambruso died on April 3, 2006 from lung cancer. He was allegedly exposed to asbestos beginning in the 1950s and ending in the 1980s while working as an electrical engineer at industrial and commercial buildings, thereby being exposed to products containing asbestos such

as boilers, furnaces, pumps, compressors, and electrical switchboards. The defendants remaining in his action are Goulds Pumps Incorporated (Goulds), IMO Industries, Inc. (IMO), J. H. France Refractories Company (J.H.), and Warren Pumps, Inc. (Warren).

B. Robert Cynamon

Cynamon is dying from lung cancer. He was allegedly exposed to asbestos in the 1940s while serving as a shipfitter and seaman in the United States Navy and working in the Brooklyn Navy Yard and on the USS Chicago, thereby being exposed to products with asbestos components such as engines, pumps, valves, turbines, generators, gaskets, and packing. The defendants remaining in his action are General Electric Company (GE), Goulds, IMO, Rapid-American Corporation (Rapid-American), and Viacom, Inc. (Viacom).

C. Peter Consorti

Consorti died of mesothelioma on February 24, 2004. He worked as an insulator at various industrial and commercial buildings from the 1950s to the 1990s, and was allegedly exposed to asbestos contained in baskets, cloth, felts, cement, mastic, canvas, aircell boards, cellular boards, millboard, paper, twine, pipe covering, and block insulation. The remaining defendants in his action are Goulds, IMO, and J.H.

D. James Durham

Durham is dying from lung cancer. He was allegedly exposed to asbestos while working as a general laborer, bus cleaner, and mechanic's assistant for the New York City Transit Authority during the 1970s and 1980s, and while working with automotive brakes, clutches, and gaskets. The remaining defendants in his action are Pneumo and Rapid-American.

E. George Eichen

Eichen died of mesothelioma on February 26, 2008. He worked as a fireman in the boiler room and as an electrician's mate for the Navy at the Brooklyn Yard and on the USS Sims DE-154 in the 1940s. He was allegedly exposed to asbestos contained in electrical equipment, pumps, engines, valves, gaskets, and packing. The remaining defendants in his action are Buffalo Pumps (Buffalo), Carrier, FMC Corporation (FMC), Goulds, Hopeman Brothers, Inc. (Hopeman), IMO, J.H., Sterling Fluid Systems USA, LLC (Sterling), Viacom, and Warren.

F. William Harriet

Harriet died on January 4, 2004 from mesothelioma. He worked for Bethlehem Steel as a pipefitter and welder from the 1940s to the 1960s and at various locations in Brooklyn, New York including the Brooklyn navy yard and the Todd Shipyard. He was allegedly exposed to asbestos contained in boilers, turbines, pumps, generators, compressors, valves, refractory products, gaskets, and packing. The remaining defendants in his action are GE, Goulds, IMO, J.H., Rapid-American, Viacom, and Warren.

G. Bernard Hochberg

Hochberg passed away from mesothelioma on December 30, 2005. He worked as an electrician's helper and mate for the Navy at various yards and ships in the 1940s, when he was allegedly exposed to asbestos contained in boilers, pumps, steam pipes, turbines, valves, gaskets, and packing. The remaining defendants in his action are FMC, Goulds, IMO, J.H., Sterling, Tyco Flow Control Inc. (Tyco), Viacom, and Warren.

H. Vincenzo Montuoro

Montuoro died from lung cancer on March 12, 2004. He worked as a welder at a navy

yard in Brooklyn during the 1940s and the 1960s, and was allegedly exposed to asbestos in boilers, pumps, valves, turbines, gaskets, and packing. The remaining defendants in his action are Carrier, Foster Wheeler Energy Corp. (Foster), GE, Goulds, Rapid-American, and Viacom.

I. Donald Rauscher

Rauscher died from lung cancer on June 29, 2003. He was allegedly exposed to asbestos while working as a boiler mechanic at residential and commercial sites during the 1960s to the 2000s, and was exposed to asbestos contained in boilers, furnaces, pumps, valves, compressors, generators, refractory materials, gaskets, and packing. He also served in the Navy in 1960s. The defendants remaining in his action are Goulds, IMO, J.H., Warren, and Peerless.

J. Anthony Rimicci

Rimicci passed away from mesothelioma on December 16, 2002. He performed building maintenance at residential buildings in the 1950s to the 1970s, when he was allegedly exposed to asbestos in refractory products, joint compound, gaskets, packing, cement, and tiles. The defendants remaining in his action are A.O. Smith Water Products Company (A.O. Smith), American Standard, Inc. (American), Burnham Holdings, Inc. (Burnham), Certain Teed Corporation (Certain), Cleaver-Brooks, Inc. (Cleaver-Brooks), Crane, Crane Pumps & Systems, Inc. (Crane Pumps), Empire Ace (Empire), Goulds, IMO, J.H., National US Radiator (National US), Peerless, Rapid-American, Viacom, Weil McLain (Weil), and York Industries, Inc. (York).

K. Gordon Rockmaker

Rockmaker died of mesothelioma on August 26, 2004. He served with the Navy and worked as an electrician's assistant on the USS Franklin D. Roosevelt during the 1940s. He was allegedly exposed to asbestos contained in gaskets, packing, pumps, valves, compressors, and



turbines. The defendants remaining in his action are Buffalo, Carrier, FMC, Goulds, IMO, J.H., Peerless, Rapid-American, Tyco, Viacom, and Warren.

L. Benny Romano

Romano passed away from lung cancer on November 14, 2006. He worked as a student mechanic at various automotive garages during the 1940s, when he was allegedly exposed to asbestos contained in automotive brakes, clutches, and gaskets. The defendants remaining in his action are Pneumo and Rapid-American.

M. Anthony Santini

Santini died of mesothelioma on March 2, 2004. During the 1970s to the 2000s, he worked as a maintenance man at residential buildings, and was allegedly exposed to asbestos contained in boilers, plumbing, and flooring. The defendants remaining in his action are A.O. Smith, American, Burnham, Certain, Cleaver-Brooks, Crane, Crane Pumps, Empire, Goulds, IMO, J.H., National US, Peerless, Rapid-American, Viacom, Weil, and York.

N. Norman Vorchheimer

Vorchheimer passed away from lung cancer on September 6, 2002. He served with the Navy as a machinist mate and fireman on four ships during the 1940s, and was allegedly exposed to asbestos in boilers, pumps, gaskets, compressors, turbines, valves, engines, and packing. The defendants remaining in his action are Crane, GE, Goulds, Hopeman, IMO, J.H., Rapid-American, and Viacom.

O. William Wubbe

Wubbe died of lung cancer on December 27, 2007. He served as an electrician for the Navy at the Brooklyn navy yard and on several ships during the 1950s to the 1960s, where he

was allegedly exposed to asbestos in ship and welding equipment. He was also allegedly exposed to asbestos while working as an assembler in the 1940s and handled asbestos-containing materials including Bakelite panels. The defendants remaining in his action are Buffalo, Carrier, Crane, FMC, Foster, Goulds, IMO, J.H., Rapid-American, Sterling, Tyco, Viacom, and Warren.

### III. ANALYSIS

Based on an analysis of the *Malcolm* factors and relevant caselaw, the *Cynamon*, *Eichen*, *Harriett*, *Hochberg*, *Montuoro*, *Rockmaker*, *Vorchheimer*, and *Wubbe* cases should be consolidated for trial in one group (Navy Group), the *Ambruso*, *Consorti*, and *Rauscher* cases should be consolidated in another group (Construction Group), the *Durham* and *Romano* cases consolidated in a third group (Automotive Group), and the *Rimicci* and *Santini* cases should be consolidated in a fourth group (Building Maintenance). My reasoning follows:

#### A. Navy Group - *Cynamon*, *Eichen*, *Harriett*, *Hochberg*, *Montuoro*, *Rockmaker*, *Vorchheimer*, *Wubbe*

These plaintiffs worked in the armed services, and thus federal law may uniquely apply to their actions. (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] [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]).

All but Wubbe were first exposed to asbestos in the 1940s, and all of them were exposed no later than the 1960s. 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 were engaged in activities involving welding or electrical work in the Navy Yard and on ships, and were exposed to asbestos contained within pumps, valves, gaskets, and packing. (*See Dummitt*, 36 Misc 3d 1234[A] [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 may have worked at different sites, a well-organized trial presentation, including materials for the jurors to use in organizing their deliberations, will reduce any confusion.

Seven of the eight plaintiffs are deceased, and while four suffered or suffer from lung cancer and four from 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]).

They are also represented by the same attorney, discovery is complete, and all of them will use one of three experts at trial. Finally, of the 16 defendants remaining in these cases, four of the defendants are in two cases, three are in three cases, and nine are in at least four of the cases. Thus, there are defendants in common.

For these reasons, there exist in these eight cases common issues that predominate over

individual issues, and defendants have not established that any undue prejudice will result, or that their fourteenth amendment right to due process will be violated.

B. Construction Group - *Ambruso, Consorti, Rauscher*

These plaintiffs were allegedly exposed to asbestos while working at industrial, residential, and commercial sites and buildings between the 1950s and 2000s, with an overlapping period of two decades between the 1960s and 1980s.

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

C. Automotive Group - *Durham, Romano*

These two plaintiffs worked as mechanics, albeit at different facilities and times, both have or had lung cancer, and both were exposed to asbestos contained in automotive brakes, clutches, and gaskets. Moreover, the same two defendants are named in both cases.

D. Building Maintenance Group - *Rimicci, Santini*

These plaintiffs performed building maintenance at residential buildings, during an overlapping period in the 1970s, and both died of mesothelioma. Moreover, all 17 defendants involved in these actions are defendants in both actions, and 10 of all defendants are involved only in these two actions.

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) Robert Cynamon, Index No. 119748/02, (b) George Eichen,

Index No. 114777/05, (c) William Harriett, Index No. 113966/04, (d) Bernard Hochberg, Index No. 115185/05, (e) Vincenzo Montuoro, Index No. 107279/04, (f) Gordon Rockmaker, Index No. 110157/05, (g) Norman Vorchheimer, Index No. 109455/03, and (h) William Wubbe, Index No. 116162/05;.

- (2) Group Two - (a) Leonard Ambruso, Index No. 116087/05, (b) Peter Consorti, Index No. 101948/04, and (c) Donald Rauscher, Index No. 113072/04;
- (3) Group Three - (a) James Durham, Index No. 105615/04, and (b) Benny Romano, Index No. 106962/11; and
- (4) Group Four - (a) Anthony Rimicci, Index No. 117050/04, and (b) Anthony Santini, Index No. 109973/05; and it is further

ORDERED, that the parties in all of these actions shall appear for a settlement conference and to discuss any remaining discovery issues at 10 am on May 24, 2013, as previously scheduled, 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.

**FILED** ENTER:

MAY 03 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Barbara Jaffe, JSC

DATED: May 1, 2013  
New York, New York