

EXHIBIT E

New York City Asbestos Litigation, 2015 WL 4501189 (2015)

2015 WL 4501189 (N.Y.Sup.), 2015 N.Y. Slip Op. 31358(U) (Trial Order)
Supreme Court, New York.
New York County

In Re: NEW YORK CITY ASBESTOS LITIGATION.

Michail Andreadis, Plaintiff,

v.

ABB, Inc., et al., Defendants.

No. 190411/13.

July 24, 2015.

Decision and Order

For plaintiff: Derell D. Wilson, Esq., The Early Law Firm, 360 Lexington Ave., 20th fl., New York, NY 10017, 212-986-2233.

For William Powell Co.: Matthew H. Mueller, Esq., Clemente Mueller, P.A., 5 Penn Plaza, 23rd fl., New York, NY 10001, 212-425-5005.

For Mario & DiBono: Austin D. O'Malley, Esq., Cullen and Dykman LLP, 44 Wall St., New York, NY 10005-2407, 212-732-2000.

For joint defendants: Stephen Novakidis, Esq., Malaby & Bradley, LLC, 150 Broadway, 6th fl., New York, NY 10038, 212-791-0285.

For Milwaukee/Oakfabco: Mark K. Hsu, Esq., Joanna Drozd, Hawkins Parnell et al., 600 Lexington Ave., 8th fl., New York, NY 10022, 212-897-9655.

For Fairbanks: Lee D. Schneider, Esq., McGivney & Kluger, P.C., 80 Broad St., 23rd fl., New York, NY 10004, 212-509-3456.

For Goulds: Austin D. O'Malley, Esq., Cullen and Dykman LLP, 44 Wall St., New York, NY 10005-2407, 212-732-2000.

For Andal: Samantha J. Geoghan, Esq., Wilson, Elser, et al., 150 E. 42nd St., New York, NY 10017, 212-915-5542.

Barbara Jaffe, J.

*1 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) Michail Andreadis, Index No. 190411/13; (2) Joseph Barry Best, Index No. 190109/14; (3) David William Fahy, Index No. 190259/13; (4) Donald Nefsey, Index No. 190051/14; (5) Donald Rocovich, Index No. 190042/14; and (6) William Weil, Index No. 1900434/11. Plaintiff seeks to try the cases in four groups as follows: Group one - Andreadis; Group two - Fahy; Group three - Best and Nefsey; and Group four - Rocovich and Weil.

Defendants jointly oppose; opposing in the Nefsey matter are defendants The William Powell Company (Powell), Milwaukee Valve Company, Inc., Oakfabco, Goulds Pumps, Inc., and The Fairbanks Company (Fairbanks); opposing in the Rocovich matter are defendants Oakfabco and Goulds; opposing in the Best matter is defendant Goulds; and opposing in the Weil matter are defendants Andal, Goulds, and Mario & DiBono.

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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 [Dummitt]*, 121 AD3d 230 [1st Dept 2014]; *JP Foodservice Distrib., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323 [1st 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 [1st Dept 2005]). A motion for a joint trial should be granted unless the opposing party demonstrates prejudice to a substantial right (*in re New York City Asbestos Litigation [Bernard]*, 99 AD3d 410 [1st Dept 2012]), and allegations of prejudice must be specific and non-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 the 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
- *2 (6) 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

As there is no opposition to proposed groups one and two (Andreadis and Fahy), I address only groups three (Best and Nefsey) and four (Rocovich and Weil).

A. John Barry Best

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Best recently passed away at the age of 68 from mesothelioma. From 1966 to 1970, he served as a shopkeeper for the United States Navy, and was allegedly exposed to asbestos while taking damaged returned parts, such as asbestos-containing gaskets and packing, to the shop from ship engineers while they were doing repair work. He also assisted with, and worked near others performing, work on boilers, engine, pumps, valves, steam traps, and turbines, and general cleanup. After he left the Navy, Best performed brake jobs on vehicles using asbestos-containing brakes. (NYSCEF 95).

Defendants remaining in his action are Carrier Corporation, Goulds, ITT Corporation, and Warren Pumps, LLC.

B. Donald Nefsey

Nefsey is 81 years old and suffers from mesothelioma. From 1951 to 1955, he served in the Navy as a fireman aboard the USS Charles P. Cecil, DDR 835, and was allegedly exposed to asbestos from asbestos-containing pumps, steam traps, and valves. From 1946 to 1979, Nefsey also worked as a fireman, laborer, and pipefitter, during which time he was exposed to asbestos contained in and used with boilers, heating coils, insulation, pumps, steam traps, and valves. (NYSCEF 95).

Defendants remaining in his action are Armstrong International, Inc. f/k/a Armstrong Machine Works, Aurora, Bell & Gossett Company, Bryan Steam Corporation, Burnham Corporation, Burnham LLC, Crown Boiler Co., FMC Corporation on behalf of Peerless Pumps, Fort Kent Holdings, Inc. f/k/a Dunham-Bush, Inc., Goulds, Jenkins Bros., Milwaukee Valve, Oakfabco, Perma-Pipe (a subsidiary of MFRI, Inc.), Riley Power, Inc., Sterling Fluid Systems (USA), LLC (formerly known as Peerless Pump Company), Taco, Inc., Fairbanks, Powell, and Warren Pumps, LLC.

C. Donald Rocovich

Rocovich recently passed away at the age of 84 from lung cancer. From 1949 to 1974 he worked as an insulator at various residential, commercial, and industrial sites, and was allegedly exposed to asbestos from asbestos-containing insulation, piping and fittings, valves, elbows, steam traps, pumps, turbines, and other related equipment. Defendants remaining in his action are Goulds and Oakfabco. (NYSCEF 95).

D. William Weil

Weil is a 76-year-old suffering from lung cancer. From 1957 to 1979, he worked as a sheet metal worker, and was allegedly exposed to asbestos from asbestos-containing joint compound, insulation, and fireproofing while working on construction of the World Trade Center. He also performed home renovations in the 1950s and 1960s, and was allegedly exposed to asbestos-containing floor tiles and joint compound. Defendants remaining in his action are Andal, Kaiser Gypsum Company, Mario & DiBono, Port Authority of New York and New Jersey, Tishman Realty & Construction Co., Inc., and Tishman Realty Corporation.

III. ANALYSIS**A. Judicial economy**

*3 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. (NYSCEF 95).

Defendants assert that the more plaintiffs in a trial group, the more defendants, and the correspondingly longer process needed for jury selection and trial. And, when a multi-plaintiff trial is scheduled, jurors are asked to serve weeks if not months. Thus, they maintain, finding jurors who will commit to a lengthy trial prolongs jury selection, as does

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the necessity of selecting extra alternates against the possibility that one or more jurors will be released before the trial concludes. Defendants also observe that jurors who are students or professionals and/or hold managerial or supervisory positions may be unable to serve for a long period, yielding a less diverse pool. (NYSCEF 102).

In denying plaintiffs' claim that consolidation results in speedier dispositions, defendants offer statistics reflecting that of the most recent 19 asbestos trials in New York County, those with only one plaintiff lasted up to three weeks each, whereas those with more lasted as long as 18 weeks. (*Id.*). Defendants also argue that longer trials involving more than one plaintiff almost always lead to large plaintiff verdicts, while trials with one plaintiff often lead to defense verdicts or smaller plaintiff verdicts. Their statistics show that of the nine trials in New York County with one plaintiff, six resulted in defense verdicts, and the other three in verdicts of \$2.5 million, \$3.8 million, and \$7 million. In contrast, of the ten trials conducted with more than one plaintiff, only one had a defense verdict, and the remaining aggregate verdicts ranged from \$7.3 million to \$190 million, or between \$2.43 million at the lowest and \$38 million at the highest per plaintiff, representing an average of approximately \$9 million per plaintiff.

Defendants also observe that the large verdicts are often reduced by the trial or appellate courts, illustrating a disconnect between juror verdicts in those cases and the sustained verdicts. They thus argue that there is no great efficiency in trying consolidated cases as final judgments must often await appellate scrutiny and decision. (*Id.*).

In juxtaposition to the alleged New York County consolidation trend (*see In re New York City Asbestos Litigation*, 188 AD2d 214 [1st 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 Litigation [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]), elsewhere the trend is to prohibit the consolidation of asbestos trials absent the consent of all parties. (Ohio R Civ P 41[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).

And, while judicial economy and efficiency should be considered 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.” (*In re 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”]). However, consolidating cases that are somewhat diverse does not “suggest the prejudice of defendant's right to a fair trial.” (*In the Matter of New York City Asbestos Litigation [Baruch]*, 111 AD3d 574 [1st Dept 2013]).

*4 Moreover, state of the art evidence differs according to the pertinent occupation or industry, and may differ according to the 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 medical evidence may be duplicative, it takes less trial time than that spent on each plaintiff's medical history. Thus, the length of the trial often depends on the plaintiffs' occupations and medical histories.

Accordingly, in exercising my discretion in deciding whether to consolidate these cases, I duly consider judicial economy and efficiency.

B. Best and Nefsey

Powell, a defendant only in the Nefsey case, maintains that while it was also sued in the Best matter, it was granted summary dismissal, and it would thus be unfair to require it to participate in a trial from which it has been dismissed.

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