

EXHIBIT F

Borman v. A.O. Smith Water Products Co., 2015 WL 7188355 (2015)

2015 WL 7188355 (N.Y.Sup.), 2015 N.Y. Slip Op. 32109(U) (Trial Order)
Supreme Court, New York.

Part 12

New York County

BORMAN, Frances,

v.

A.O. SMITH WATER PRODUCTS CO.

No. 190115/08.

August 3, 2015.

Trial Order

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Present: Jaffe, Justice.

*1 [This opinion is uncorrected and not selected for official publication.]

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1

Answering Affidavits — Exhibits No(s). 2 - 9

Replying Affidavits No(s).

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

Dated: 8/3/15

<<signature>>, J.S.C.

BARBARA JAFFE

J.S.C.

DECISION AND ORDER

BARBARA JAFFE, J.:

By order to show cause, plaintiffs move pursuant to CPLR 602 for an order consolidating the following “FIFO” (First In, First Out) cases for a joint trial: (1) George Brady, Index No. 190115/08; (2) John Carey, Index No. 126304/93; (3) Robert Castorina, Index No. 123077/01; (4) William Falkenmeyer, Index No. 190116/10; (5) Charles Frick, Index No. 190120/08; (6) Donald McCormick, Index No. 190195/09; (7) Bart Miceli, Index No. 100057/99; (8) Paul Miller, Index No. 190174/09; (9) Edward Morgan, Index No. 123392/1997; (10) Richard Nash, Index No. 116095/02; (11) Dennis Padula, Index No. 101177/99; (12) Romeo Pettinelli, Index No. 118400/98; and (13) John Ward, Index No. 118998/02. Plaintiff seeks to try the cases in two groups: (a) Group one - Brady, Carey, Falkenmeyer, Frick, McCormick, Miceli, Miller, and Ward; and (b) Group two - Castorina, Morgan, Nash, Padula, and Pettinelli.

Defendants jointly oppose; separate opposition is submitted by defendants Oakfabco, Inc. in the Brady and Frick actions, Cleaver Brooks, Inc. in the Frick and Pettinelli actions, Neles-Jamesbury Inc. in the Miceli action, Domco Products Texas, Inc. (Azrock) in the Morgan action, Velan Valve Corp. in the Miceli action, and Bird Incorporated in the Padula matter.

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 [Dunmitt]*, 121 AD3d 230 [1st Dept 2014]; *In re 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]).

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 Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012]), and allegations of prejudice must be specific and not conclusory (*Dunmitt*, 121 AD3d at 245). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*)

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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 *Malcoln v Ntl. Gypsum Co.*, 995 F2d 346 (2d Cir 1993), which follow, in pertinent part:

- *2 (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.

(*Malcoln*, 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. George Brady

Brady passed away from lung cancer on May 31, 2007 at the age of 78. From 1946 to 1964, he served in the US Navy, and worked as a boilermaker on ships and at shipyards, when he was allegedly exposed to asbestos-containing boilers, evaporators, turbines, generators, pipes, gaskets, and blankets. From 1968 to 1986, Brady worked at Lehman College as a fireman, custodial engineer, and superintendent, maintaining boilers, pumps, and valves, and thereby allegedly exposing himself to asbestos-containing jackets, gaskets, lagging, cement, pipe insulation, and spray. From 1966 to 2007, Brady was employed as a superintendent at a building in the Bronx, where he was allegedly exposed to asbestos-containing boilers, valves, pumps, and joint compound. Defendants remaining in his action are Crane Co., Goulds, Oakfabco, and Westinghouse. (Affirmation of Thomas M. Comerford, Esq., dated May 11, 2015 [Comerford Aff.]).

2. John Carey

Carey died from lung cancer on February 17, 2010 at the age of 75. From 1959 to 1993, he worked as a steamfitter at worksites throughout New York State, including powerhouses, universities, hospitals, schools, manufacturing plants, and commercial buildings. He was allegedly exposed to asbestos from insulation, firebrick, and gaskets used with generators, boilers, pumps, and valves. Defendants remaining in his action are Crane Co., Foster Wheeler, and Owens-Illinois, Inc. (Comerford Aff).

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According to defendants, Carey spent almost his entire career working at the Indian Point powerhouse, and he smoked a pack of cigarettes a day from 1945 to 1960. (Affirmation of Andrew J. Mundo, Esq., dated June 8, 2015 [Mundo Aff.]).

3. Robert Castorina

*3 Castorina passed away on March 12, 2013 from lung cancer at the age of 69. From 1963 to 1998, he worked as a carpenter for numerous employers and at commercial and residential worksites in the metropolitan New York area. During that time, he was allegedly exposed to asbestos from sweeping and cleaning up asbestos-containing materials and while other workers were using asbestos, including mixing and applying asbestos insulation on boilers and piping and using asbestos-containing gaskets to maintain and repair pumps and valves; air-brushing electrical motors in elevators; and working with joint compound and floor tiles while putting up walls. He also was present when asbestos was sprayed during the construction of the World Trade Center, and worked in every building in Coop City, including the powerhouse. (Comerford Aff.).

Defendants remaining in his action are A.O. Smith, Burnham, Crane Co., DB Riley, Foster Wheeler, Goodyear, Goulds, Kohler, Mario & DiBono, Owens-Illinois, Inc., Peerless, Tihman (WTC), Westinghouse, and Weil-McLain. (*Id.*)

Defendants note that Castorina is the only plaintiff who alleged exposure from cutting rubber blankets while working at a printing company, and that between 1963 and 1998, he worked at over 80 different sites. (Mundo Aff).

4. William Falkenmeyer

Falkenmeyer died at the age of 60 from lung cancer on July 18, 2008. He worked as a wire lather in 1968, an asbestos worker from 1974 to 1975, and a truck driver and dispatcher from 1976 to the 1990s. As an asbestos worker, he sprayed asbestos-containing ceiling insulation in various structures. From 1977 to 1979, while working for Wechter Fuel Oil, he removed boilers and was exposed to insulation and rope. As a dispatcher, Falkenmeyer was allegedly exposed to asbestos-containing brakes while performing vehicle repairs. Defendants remaining in his action are Burnham, Foster Wheeler, Peerless, Westinghouse, and Weil-McLain. (Comerford Aff.).

Defendants contend that Falkenmeyer worked directly with asbestos products on a very limited basis between 1977 and 1979, and that as most of his work was as a truck driver and dispatcher, his exposure to boilers and roofing material was minimal. They also observe that Falkenmeyer smoked cigarettes for approximately 50 years. (Mundo Aff).

5. Charles Frick

Frick passed away from lung cancer on January 11, 2007 at the age of 75. From the 1960s to the mid-1980s, he worked for Tulio Oil Company as a boiler serviceman, and was allegedly exposed to asbestos by installing and removing boilers at various worksites in the metropolitan New York area which exposed him to asbestos-containing insulation, cement, and gaskets. He also maintained the boilers in his own home and another house he owned, and performed home improvement in the 1960s, exposing him to wallboard, joint compound, and vinyl asbestos tile. Defendants remaining in his action are Burnham, Cleaver Brooks, Crane Co., Oakfabco, Owens-Illinois, Peerless, and Weil-McLain. (Comerford Aff.).

Defendants observe that Frick had a 62-year history of smoking cigarettes. (Mundo Aff).

6. Donald McCormick

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