SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PETER H. MOULTON

PRESENT: _____ **J.S.C.** **PART** 50

Justice

Index Number : 040000/1988
NYC ASBESTOS LITIGATION
vs.
ALL WEITZ & LUXENBERG CASES
SEQUENCE NUMBER : 017
STAY PROCEEDINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

decided in accordance with the
written decision of today's date.

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

Dated: 8/28/15

_____, J.S.C.
HON. PETER H. MOULTON

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50

- X

IN RE: NEW YORK CITY ASBESTOS LITIGATION :

: Index No.:

THIS DOCUMENT RELATES TO : 40000/1988

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ALL ASBESTOS CASES :

- X

Peter H. Moulton, J.S.C.

Defendants in asbestos cases pending in the New York City Asbestos Litigation ("NYCAL") move for a stay of all asbestos cases in NYCAL for 60 days, with limited exceptions for certain cases involving plaintiffs with terminal disease. Defendants' purpose in proposing a stay is to allow the parties to undertake a renegotiation of the Case Management Order that governs pretrial proceedings in NYCAL. Defendants contend that the Case Management Order does not reflect important changes in asbestos litigation and is systematically unfair to defendants in various respects.

Plaintiffs oppose any stay of NYCAL litigation. While plaintiffs concede that the Case Management Order might benefit from some minor revisions, they reject defendants' argument that it is systematically unfair to defendants. Plaintiffs argue that many of the practices and procedures that defendants wish to change via a new Case Management Order have been affirmed by the First Department.

For the reasons stated below, the court denies any stay of NYCAL litigation, but will participate with the parties in a

thoroughgoing reevaluation of the Case Management Order. The court will attempt to gain consensus of plaintiffs and defendants in any change to the Case Management Order. While the court's goal will be to craft a new Case Management Order that is wholly consented to by both sides, there may be too great a division between the two sides on certain issues to reach that goal. It may also be that a consent document will be impossible to attain given the diversity of opinion *within* the defendants' or the plaintiffs' respective camps. In any event, the reevaluation of the Case Management Order with the plaintiff and defense bars will inform the court's understanding of the parties' varied positions, and will assist the court, if necessary, in drafting a Case Management Order in the absence of complete unanimity among the parties.

THE CASE MANAGEMENT ORDER

Case Management Orders are issued in coordinated proceedings, such as New York City's Asbestos Litigation, pursuant to New York's Rules for Trial Courts section 202.69(c)(2). They are commonly used to regularize and streamline pleadings and discovery, and, in mass torts, to prioritize cases for trial. A Case Management Order has been in place in NYCAL since its inception and has been amended from time to time on consent.

THE PARTIES' CONTENTIONS

Defendants contend that periodic amendments to the CMO have not kept pace with changes in asbestos litigation. Among the fundamental changes defendants cite are the changing characteristics of the defendants and plaintiffs themselves. For the most part, the key parties responsible for the manufacture of asbestos have filed for bankruptcy. Persons who claim they were exposed to asbestos may assert claims against trusts created during bankruptcy proceedings, but the payments by the trusts are usually very low, and not commensurate with the damages suffered by claimants. The entities who are defendants in asbestos litigation today are users of asbestos products, such as premises owners, construction contractors, and companies who incorporated asbestos products in their own products, or encouraged consumers to do so. This latter category is a diverse collection of manufacturers of a variety of products, from boilers to pizza ovens, from car brake pads to floor tiles. While these types of defendants have always been present in NYCAL, they now predominate due to the absence of the bankrupt entities.

Defendants also assert that plaintiffs' claimed disease has gradually shifted from mostly mesothelioma and asbestosis -- diseases where the connection to asbestos is certain -- to lung cancer and other cancer cases - where the disease's potential causes are more varied. According to defendants, the disclosure

required by the CMO needs to account for these shifts.

Defendants claim that these and other changes have been exacerbated by the recent modification to the CMO allowing punitive damages, and by various trial practices common in NYCAL litigation that defendants would like to see curtailed by a new, amended CMO.

The reintroduction of plaintiffs' right to seek punitive damages in 2014 is the primary change in NYCAL litigation decried by defendants. Since 1996 the CMO provided for the indefinite deferral of all punitive damages claims. In 2013, plaintiffs moved to modify the CMO to allow punitive damages claims. Defendants opposed the motion and sought to continue the deferral.

The motion was granted by then-Coordinating Justice Sherry Klein Heitler in April 2014 ("the April 2014 decision") and plaintiffs were thus free to seek to seek punitive damages. In the wake of the April 2014 decision, no trial judge in NYCAL has granted a plaintiff's application to assert a punitive damages claim.

The April 2014 decision was recently affirmed as modified by the First Department. (In re New York City Asbestos Litigation, 130 AD3d 489.) The First Department found that the Coordinating Justice had the power to amend the CMO to allow for the assertion of punitive damages, but held that defendants were entitled to more notice and discovery of a plaintiff's claim for punitive damages than provided by the April 2014 decision and subsequent decisions.

The First Department stayed any claim for punitive damages pending further modification of the CMO to provide for "procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages." (In re New York City Asbestos Litigation, supra, 130 AD3d at __, 13 NYS3d at 404.)

Defendants argue in the instant motion that the reintroduction of claims for punitive damages has thrown the CMO off of equipoise. They make this argument even though no trial Judge in NYCAL to date has granted a plaintiff's application to assert punitive damages. According to defendants, the in terrorem effect of the possibility of punitive damages compromises their ability to properly defend themselves, and compels them to agree to settlements when they may have strong defenses. Punitive damages are not covered by defendants' insurance contracts. Any punitive damages would thus be paid out of defendants' pockets.[1]

In response, plaintiffs make the argument that animates the April 2014 decision: plaintiffs in NYCAL may not be deprived of a right (the right to seek punitive damages where warranted by the facts) that is afforded all other personal injury plaintiffs in New York courts outside of NYCAL. Plaintiffs may feel that this argument has now been vindicated by appellate authority. The First

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[1]Further litigation could arise from the allegation by the insured that its insurance company refused to settle a case at a reasonable amount, followed by an award of punitive damages at trial. Such a scenario opens up the possibility of lawsuits between defendants and their insurers.

Department's affirmance of the April 2014 decision, however, does not explicitly state that plaintiffs in NYCAL have a right to punitive damages. Rather the decision focuses on the power of the Coordinating Justice to reintroduce punitive damages. The First Department states at near the end of the decision:

> [We] ... remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April Order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.

(130 AD3d at __, 13 NYS3d at 404.)

Apart from the reintroduction of punitive damages, defendants argue that a number of other provisions of, or omissions from, the CMO are systematically unfair to NYCAL defendants.

The first of these additional issues raised by defendants is the absence of any limitation on joinder. It is common practice for NYCAL trial justices to join two or more plaintiffs' cases for trial. Defendants assert that joinder of several cases is inherently confusing to a jury. They claim that frequently two or more plaintiffs' cases are joined for trial where there is little or no commonality with respect to the facts in each case. Apart

from juror confusion, defendants also contend that joinder leads to prejudice. A sympathetic plaintiff with strong proof of liability might assist another plaintiff with a more tenuous case. Defendants also assert that a single, more culpable, defendant can tar other less culpable (or non-culpable) defendants, causing a jury to rule against all. Defendants assert that this concern is magnified when one or more plaintiffs seek punitive damages against one or more defendants in cases joined for trial. Instead of individualized attention to liability and damages, defendants contend that they face, in joined trials, a situation in which jurors frequently indiscriminately rule against all defendants.

In response, plaintiffs point out that the First Department has given broad discretion to trial judges to join asbestos cases for trial in In Re New York City Asbestos Litigation (Konstantin/Dummitt) (121 AD3d 230). Plaintiffs point out that the large number of plaintiffs in NYCAL, many of whom are facing imminent death, requires the joinder of cases. They also raise examples of trials where the jury found for certain defendants, and not others, indicating that juries are fully capable of distinguishing between claims in consolidated trials.

Defendants also seek some requirement that plaintiffs make claims to bankruptcy trusts before commencing trial. Defendants are concerned that the jury hear about all potential defendants that may possibly carry a portion of fault. Under the

current CMO:

> Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.

Defendants assert that plaintiffs sometimes delay making such claims, on the pretense that they do not "intend" at a given time to submit a claim, in order to reduce the number of potential tortfeasors on the jury sheet at trial.[2] Plaintiffs' counter that the current provision is adequate, and that any intended claims are asserted by plaintiffs in accordance with the CMO. Plaintiffs argue that they must have the ability to submit a claim to a bankruptcy trust in case they learn of new facts post-trial that would allow the assertion of such a claim.

Other changes to the CMO sought by defendants appear to be blocked by the CPLR or existing case law. These include the forum selection case law in NYCAL, which has allegedly allowed some plaintiffs to bring suit in NYCAL when they had very little asbestos exposure in New York City compared to their alleged exposures in other jurisdictions. (Eg Golden v Alliance Laundry Systems, LLC, __ Misc3d __, Sup Ct, New York County, February 5, 2014, Heitler, J., Index No.:190160/13.) However, the doctrine of

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[2]The existence of this strategy in another jurisdiction, and its effects, is discussed in In re Garlock Sealing Technologies, 504 BR 71, 84-7. [Bankruptcy Ct., WD North Carolina, 2014].)

forum non conveniens is well-established in New York State, and defendants are not foreclosed from making such motions.

Defendants also complain about their lack of success in obtaining dismissal of marginal claims via summary judgment. They appear to complain that the burden to disprove a plaintiff's claim has been unfairly placed on them. However, that is essentially the standard for summary judgment. At trial, of course, plaintiff has the burden to prove his case. On summary judgment, by contrast, the movant must demonstrate its prima facie entitlement to judgment as a matter of law. (See Vega v Restani Construction Corp., 18 NY3d 499.) Therefore, pursuant to well-established appellate authority, summary judgment in NYCAL is denied where a defendant is unable to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury." (Reid v Georgia-Pacific Corp., 212 AD2d 462, 463.) A third complaint of defendants that appears beyond the reach of any amendment to the CMO is defendants' contention that NYCAL trial justices are too amenable to charging the jury on recklessness. It would appear that whether or not a jury is to be given a recklessness charge is a question best reposed with the trial judge who has heard the facts come into evidence.

DISCUSSION

Defendants have not demonstrated the need for the injunction they seek: a stay of all NYCAL litigation, with limited exceptions, while the parties re-negotiate the CMO. In balancing the parties' interests, the court finds that the current state of NYCAL is not so rampantly unfair as to warrant suspending the trials, or the preparation for trials, of hundreds of cases where the plaintiffs have a mortal illness.

However, the court agrees that defendants have raised important issues that warrant a complete re-examination of the CMO. A top to bottom re-examination is necessary for at least two reasons. First, the CMO has many interdependent provisions, and changes to one portion may affect other aspects of the litigation. Second, the court intends to assist the parties in reaching a negotiated agreement. In such a negotiation it is useful at the outset to leave all aspects of the CMO "on the table," so that the parties have the greatest leeway to reach agreement.

Negotiation shall proceed as set forth below. This framework for negotiations is by necessity provisional, as it is impossible to foresee all impediments to negotiation that might arise.

In a litigation with so many stakeholders, an initial challenge is how to negotiate in a way that gives voice to the diversity of opinion among the NYCAL bar. While the court will

ensure that every practitioner will be able to give input, it is not possible to meet and have a coherent discussion with hundreds of participants. Accordingly, both plaintiffs and defendants shall have four representatives, respectively, who will present the parties' positions to the court and to the other side.

The CMO has long provided for liaison counsel in NYCAL, who "facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation." (Case Management Order, § VII(A).) These individuals, Charles Ferguson and Jordan Fox for the plaintiffs, and Judith Yavitz and Robert Malaby for the defendants, have served with distinction under my predecessors Justice Helen Freedman and Justice Sherry Klein Heitler. In my brief tenure as Coordinating Justice I have been impressed by their collective institutional knowledge of NYCAL. I have found them to be strong advocates for their respective sides but also honest brokers. Therefore, these four people shall serve on the CMO negotiating committee. For the remaining two representatives for each side, the plaintiffs and defendants should each choose their representatives. For purposes of the remainder of this decision, the eight representatives shall be collectively referred to as "the CMO representatives." The role of the parties' CMO representatives is to canvas their respective sides and negotiate on their behalf.

A provisional time line for the negotiations is described

below.

1) Plaintiffs and defendants shall each pick their two additional representatives to serve as CMO representatives by September 18, 2015.

2) Plaintiffs' and defendants' CMO representatives shall caucus without court intervention to determine what common ground exists. The court notes that there was some overlap between the parties' respective proposed modified CMOs presented to the Special Master in December 2014. For example, to the extent that the parties can agree on standardized pleadings, discovery requests, and the like, they should do so. Additionally, at oral argument on the instant motion the parties both indicated that a side agreement that would continue the tenure of the Special Master would be possible even if there was not complete agreement on the CMO.

The defendants' and plaintiffs' CMO representatives shall prepare a joint document for the court that specifies points of agreement and disagreement. Both sides may set forth brief summaries of their respective positions with respect to disagreements. However, in preparing this document the points of disagreement may be set out in brief summaries, as the parties' motion papers, and letters to the court, have already mapped out their respective positions. This document shall be submitted to the court by October 9.

4) The court will meet with the CMO representatives at 60 Centre Street to attempt to reach a negotiated settlement. The

court will block out five days to conduct the negotiation.[3] It may turn out that more or less time is necessary. The goal of the negotiation is to reach agreement on a new draft CMO, which will be presented to the NYCAL bar at large for comment. The days that the court has available currently are October 26 to November 13.

5) The court will prepare a draft CMO arising from its negotiation with the CMO representatives, which will be posted on the NYCAL website. Thereafter, there will be a suitable period for comment on the draft CMO from any law firm that currently appears in NYCAL. The comments will be shared, either via the website or some other means, with all counsel who appear in NYCAL. If substantial changes are made to the CMO by the court as a result of these comments, it may be necessary to have a second comment period.[4]

The framework set forth in the above numbered paragraphs is not set in stone. There may be impediments that slow the process. Rosh Hashanah and Yom Kippur, as well as a large asbestos litigation conference in San Francisco, may limit counsel's availability in September.

At the conclusion of this process the court will issue a new NYCAL Case Management Order.

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[3]I will be unavailable on Tuesday mornings, as that is my motion day.

[4]The court would also consider holding a "Town Hall" at some point in the process if the parties think it is warranted, to take questions and comments from the NYCAL bar.

CONCLUSION

The motion for a stay is denied. The motion to negotiate a modification of the NYCAL Case Management Order is granted to the extent set forth above. To reiterate: the goal of the negotiation is to reach complete agreement on a new CMO. It may be that partial agreement is all that is possible. If consensus is not possible, then the court will issue a new Case Management Order informed by its dialogue with the parties.

This constitutes the decision and order of the court.

Dated: New York, NY
August 28, 2015

Hon. Peter H. Moulton
JSC