Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Kapnick, González, Pitt-Burke, JJ.

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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Index No. 190225/18
Case Nos. 2023-01490
2023-06327

SINAR SEEN, etc.,
Plaintiff-Respondent,

-against-

84 LUMBER COMPANY, et al.,
Defendants,

KAISER GYPSUM COMPANY, INC.,
Defendant- Appellant.

Clyde & Co US LLP, New York (Peter J. Dinunzio of counsel), for appellant.

Simmons Hanly Conroy LLP, New York (James M. Kramer of counsel), for respondent.

Judgment, Supreme Court, New York County (Suzanne J. Adams, J.), entered November 2, 2023, upon a jury verdict awarding plaintiff $15,000,000 million for past pain and suffering and finding defendant Kaiser Gypsum Company, Inc. 70% liable, and bringing up for review an order, same court and Justice, entered March 16, 2023, which denied Kaiser's post-trial motion pursuant to CPLR 4404 and 5501(a), unanimously modified, on the law and the facts, to vacate the award for pain and suffering, to remand for a new trial on those damages, unless plaintiff stipulates, within 30 days of entry of this order, to reduce the award for pain and suffering to $10 million, and to entry of an amended judgment in accordance therewith, and remand to recalculate the judgment in accordance with this opinion, and otherwise affirmed, without costs. Appeal from

aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

It was a provident exercise of the trial court's discretion to permit plaintiff to admit into evidence, pursuant to CPLR 3117(a), the videotaped de benne esse deposition (DBE) of plaintiff's decedent Munir Seen taken a few months prior to his death (*see Feldsberg v Nitschke*, 49 NY2d 636, 640 [1980]; *see also International Fin. Corp. v Carrera Holdings Inc.*, 159 AD3d 465, 467 [1st Dept 2018]). While Kaiser was not yet a party to this action at the time of the DBE, it subsequently deposed Seen after it was impleaded as a third-party defendant and had a full opportunity to cross-examine him on the contents of the DBE, as well as any other relevant subjects.

Seen's testimony that he worked almost every workday with dry mix joint compound in large bags marked "Kaiser," coupled with corporate documentation concerning the asbestos-containing formulas for those products, was sufficient evidence that he was exposed to asbestos containing Kaiser products (*see Matter of New York City Asbestos Litig.*, 256 AD2d 250, 251 [1st Dept 1998], *lv denied* 93 NY2d 818 [1999], *cert denied* 529 US 1019 [2000]; *Howard v A.O. Smith Water Prods.*, 212 AD3d 924, 925 [3d Dept 2023]). There was also sufficient evidence to support the jury's finding of specific causation. Plaintiff's experts, in reliance on historical data and studies, calculated Seen's total exposure and opined that Kaiser's products were a proximate cause of his mesothelioma (*see e.g. Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]; *Matter of New York City Asbestos Litig.*, 186 AD3d 401 [1st Dept 2020], *lv dismissed* 37 NY3d 1138 [2022]; *compare Nemeth v Brenntag N. Am.*, 38 NY3d 336 [2022]; *see also Matter of New York City Asbestos Litig.*, 207 AD3d 415, 416 [1st Dept 2022), *lv denied* 39 NY3d 913 [2023]). Nor was evidence improperly admitted that the drywall

compound, in addition to containing asbestos as a direct part of its formula, was contaminated by asbestos from the use of industrial talc, where plaintiff's CPLR 3101(d) expert exchange specifically stated that there would be testimony about asbestos contaminated talc and annexed various studies and articles concerning same.

We find that the damages award for pain and suffering in the amount of $15 million deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see Matter of New York City Asbestos Litig.*, 121 AD3d 230, 255 [1st Dept 2014], *affd* 27 NY3d 1172 [2016]). We thus direct a new trial on those damages unless plaintiff stipulates to reduce the award as indicated. We also remand this matter to the trial court to fashion the judgment in accord with General Obligations Law § 15-108 to deduct from the total award the settlement money received by those defendants who did not appear on the verdict sheet, and then to offset that amount by either the sum received from the settling defendant, Weyerhaeuser, who appeared on the verdict sheet or the 30% share attributed to it by the jury, whichever is greater (*see Williams v Niske*, 81 NY2d 437, 444-445 [1993]; *see also Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 21, 2024

Susanna Molina Rojas
Clerk of the Court