Brown v Bell & Gossett Co.

2014 NY Slip Op 33983(U)

August 29, 2014

Supreme Court, New York County

Docket Number: 190415/12

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

PHYLLIS BROWN, AS ADMINISTRATRIX OF THE ESTATE OF HARRY E. BROWN, AND PHYLLIS BROWN INDIVIDUALLY

VS.

BELL & GOSSETT COMPANY, ET AL.,

INDEX NO. 190415/2012

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

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

Dated: 8/29/14

______, J.S.C.
BARBARA JAFFE
J.S.C.

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 OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

---x

PHYLLIS BROWN, as Administratrix of the Estate of HARRY E. BROWN, and PHYLLIS BROWN, Individually,

Plaintiffs,

-against-

BELL & GOSSETT COMPANY, *et al.*,

Defendants.

---x

Index No. 190415/12

DECISION AND ORDER

BARBARA JAFFE, JSC:

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Defendant Consolidated Edison Company of New York, Inc. moves pursuant to CPLR 4404(a) for an order setting aside the jury verdict rendered against it. Plaintiffs oppose.

I. BACKGROUND

Harry Brown sued defendant Con Edison and others, claiming that exposure to asbestos from products manufactured or used by them or at their premises caused him to develop mesothelioma. Upon his death on September 8, 2013, his wife Phyllis Brown was appointed administratrix of his estate.

It is undisputed that from 1964 to 1965, Brown was exposed to asbestos while he worked as an insulator at Ravenswood 3, a newly constructed Con Edison powerhouse, and that during that time, he worked for Robert A. Keasbey, Inc., the sole insulation subcontractor there. Combustion Engineering was the general contractor.

The trial of this action was consolidated with two other actions, *Mary Anne McCloskey, as Administratrix of the Estate of Patrick McCloskey, and Mary Anne McCloskey, Individually*, index No. 190441/12, and *Debra Terry, as Administratrix of the Estate of Carl Terry, and Debra Terry, Individually*, index No. 190403/12. A jury trial commenced on November 13, 2013, and a verdict was rendered on March 18, 2014. As pertinent here, the jury found Con Edison liable for Brown's mesothelioma and awarded damages to his estate and to his wife.

A. Trial testimony and evidence

1. Brown

During the trial, Brown's deposition was read to the jury. He testified, in pertinent part, as follows:

At Con Edison's powerhouses, Con Edison was "in charge," "told the trades what to do," inspected the work after it was completed, and if it found mistakes, directed correction. (Trial Transcript [Tr.] 2179-80). At any site at which Brown worked for Keasbey, however, a Keasbey foreman told him what to do at the site, was directly in charge of his work, and would tell him how to do the work. Brown did not know whether Con Edison employees told Keasbey what to do, and had no reason to believe that Con Edison was in charge of his work. (Tr. 2200-2202).

At Ravenswood, Brown insulated boiler and pump parts with asbestos-containing material provided by Combustion, directed for use by the insulation manufacturer (Tr. 1960; 2179-80), and was supervised by Keasbey foreman, Jack Novak (Tr. 1810-1813), taking "all of [his] instructions and directions from either Mr. Novak . . . or other Keasbey people" (Tr. 1966-67). In mixing asbestos-containing cement, and cutting pipe covering, Brown created asbestos dust that he then breathed in along with asbestos dust created by his Keasbey co-workers. (Tr.

1815-16, 1953-54). No masks or breathing protection were used by any Keasbey employees. (Tr. 1813). Although millwrights, bricklayers, fitters, plumbers, carpenters, and sheet metal workers, "almost every trade that you can think of" worked in his vicinity, Brown did not believe he was exposed to asbestos from any of their work. (Tr. 1818).

2. Keasbey witnesses

Lapinski was employed by Keasbey in the 1960s. (Tr. 6395). He determined what products to use for a particular job pursuant to the pertinent specifications which, during new construction, were prepared by the general contractor at the site. (Tr. 6398). The general contractor, who would usually give each trade a work schedule, would also inspect the work of the trades (Tr. 6416-7), while Keasbey management would inspect the work of its employees (Tr. 6428-9).

Pereira, president of Keasbey since 1988, testified that in the 1960s, Keasbey foremen were responsible for running job sites, hiring the labor, ordering materials, and supervising the work, all coordinated with the utilities or general contractors. (Tr. 6431, 6439-40).

Scherer was a Keasbey estimator for the Ravenswood project. (Tr. 5248). According to him, Keasbey was generally required to use the products approved in specifications, or equivalent products (Tr. 5260, 5264), and when Combustion was in charge of insulation work at a site, it created and used its own specifications, which Con Edison approved. (Tr. 5258-9). When Scherer did estimating work for Ravenswood, he worked from Combustion's blueprints and drawings. (Tr. 5276). Included in the specifications that Combustion gave Keasbey was a list of products Keasbey could use. (Tr. 5279). Scherer recalled seeing Con Edison engineers on various job sites (TR 5269), supervising construction (TR 5270).

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3. Con Edison's witness

Stanley Marx was a Con Edison plant manager at Ravenswood. (Tr. 4882). While there, he reviewed the work of contractors and subcontractors, and with other Con Edison employees, monitored work daily according to set schedules, seeing whether installation was done pursuant to contract specifications, and interfacing with contractors or subcontractors as to the work's progress. (Tr. 4895-7).

Marx also testified that the specifications relating to the insulation of piping systems at Ravenswood were not created by Con Edison but by Combustion, and while they were reviewed by Con Edison's engineers, Con Edison was "not necessarily" required to approve them. (Tr. 4905).

Marx was also responsible for ensuring that the contractors' work was safely, productively, and efficiently performed (Tr. 4906, 4908), and although he inspected the insulators' work to ensure it was "quality work," no one from Con Edison instructed the insulators as to how to do their work (Tr. 4912, 4915).

4. Specifications

In its "NP-5620 R-2 General Insulation Specification for Piping and Equipment, All Stations," Con Edison specified, as pertinent here:

II.a. The Contractor shall furnish competent supervision, labor . . .

IV.j. Substitutions - it is not intended that materials listed in Part IV exclude other high grade materials as they become available, however, no substitution of material shall be permitted without specific prior approval of [Con Edison]

IV.k. List of Acceptable materials - for use on High Temperature Pipe Insulation includes asbestos materials

(Con Edison Trial Exh. 2).

Pursuant to Con Edison's 1958 Articles of General Conditions:

8. The specifications and drawings . . . are intended to completely describe the work . . . and shall be binding . . .

12. The contractor shall at all times have a competent superintendent or foreman in charge of the condition of the work . . .

15. All work will be inspected by [Con Edison] from time to time as the work progresses . . . all materials or work rejected by [Con Edison] as not in accordance with the drawings or specifications shall be removed immediately . . .

18. Whenever . . . work of any kind creates harmful dust or fumes, equipment [for the protection of employees] shall be installed, maintained, and effectively operated by the contractor as required by law.

(Con Edison Trial Exh. 9).

In its 1963 Amendment to General Articles, Con Edison provides that:

14. The contractor shall furnish for approval any samples or materials or workmanship as required by [Con Edison].

(Con Edison Trial Exh. 10).

B. Jury charge and summations

Plaintiffs asked, as pertinent here, that I charge the jury pursuant to PJI 2:216, the provision applicable to Labor Law § 200, and specified that they were asserting a claim against Con Edison solely as to a defective or unsafe condition at its premises, particularly, that "Con Edison violated the Labor Law by allowing insulators to apply asbestos-containing insulation to equipment, and, through that process, to create asbestos-containing dust." (Pl. Req. to Charge). On their proposed verdict sheet, plaintiffs asked that the jury decide, as part of the questions on liability against Con Edison, whether Con Edison had the authority to exercise supervision and

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control over plaintiffs' worksite at Con Edison's powerhouses and, that if the answer were no, that the jury decide no more questions about Con Edison. Plaintiffs thus indicated that absent a finding of supervision and control, there would no liability against Con Edison.

After the issue was discussed at the charge conference, the jury was charged pursuant to the portion of PJI 2:216 "for cases involving claims against owners or general contractors where the claim arises from alleged unsafe means or manner of work," as follows:

> A property owner or contractor/agent who exercises supervisory control over the work owes a duty to workers to use reasonable care to make the means and manner of work reasonably safe.
>
> This duty includes an obligation to correct any unsafe methods, practices, materials or equipment used in the work if the property owner or contractor/agent knew or, in the exercise of reasonable care, should have known of the unsafe practices or equipment.
>
> A property owner or contractor/agent exercises supervisory control when it actually manages, directs or oversees the manner in which the work that led to the injury was [per]formed. A property owner or contractor/agent does not exercise supervisory control by merely having the general responsibility or power to monitor safety conditions at the worksite.
>
> In deciding whether Con Edison . . . violated section 200 of the Labor Law, you will first consider whether [it] exercised supervisory control over Brown['s] work. If you decide that [Con Edison] did not exercise supervisory control over the work that led to Brown['s] injury, then you will find for Con Edison . . . on this claim. On the other hand, if you decide that Con Edison exercised supervisory control over the work that led to Brown['s] injury, you will then go on to consider whether the methods, practices, materials or equipment used in Brown['s] work were unsafe and, if so, [whether] Con Edison knew about or, in the exercise of reasonable care should have known about that unsafe method, practice, material or equipment and failed to use reasonable care to prevent or correct it.
>
> . . .

(Tr. 7876-7877).

Thus, the verdict sheet contains the following questions as to Con Edison, with the direction that after answering each, if the answer is no, the jury should answer no more questions

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on the claim:

(1) Was Harry Brown exposed to asbestos at Con Edison's Ravenswood powerhouse?

(2) Did defendant Con Edison exercise supervision and control over workers at the Ravenswood powerhouse?

(3) Did defendant Con Edison fail to exercise reasonable care to make the Ravenswood powerhouse reasonably safe?

(4) Was Con Edison's failure to exercise reasonable care to make the Ravenswood powerhouse reasonably safe a substantial contributing factor in causing Harry Brown's mesothelioma?

As to other companies, the verdict sheet asked the jury to decide as follow:

(1) Was Harry Brown exposed to asbestos from products made, sold, distributed and/or used in connection with products or equipment by any of the following companies?

(2) Did any of the following companies fail to exercise reasonable care by not providing an adequate warning to Harry Brown about the potential hazards of exposure to asbestos?

(3) Were these companies' failures to provide an adequate warning a substantial contributing factor in the development of Harry Brown's mesothelioma?

The jury found as follows:

(1) Brown was exposed to asbestos-containing products made or sold by six of 19 non-defendant companies, and three were found liable to Brown for his injuries;

(2) Liability was apportioned as follows: (a) Con Edison, 30 percent; (b) LILCO, five percent; (c) Owens-Corning Fiberglass Corp., 30 percent; and (d) Keasbey, 35 percent;

(3) Con Edison did not act recklessly;

(4) \$2.5 million for Brown's pain and suffering from March 2012 to September 8, 2013; and

(6) \$1 million to Brown's wife for loss of Brown's services.

II. MOTION TO SET ASIDE THE VERDICT

A. CPLR 4404

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial and direct that judgment be entered in favor of a party entitled to judgment as a matter of law on the ground that the verdict was not supported by legally sufficient evidence. In order to find that a verdict should be set aside as a matter of law, the court must determine that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]; *Sow v Arias*, 21 AD3d 317 [1st Dept 2005], *lv denied* 5 NY3d 716). A verdict may be set aside as a matter of law when, upon the evidence presented, there is no rational process by which the jury could have found in favor of the nonmoving party, and the court must afford the party opposing the motion every inference properly drawn from the facts presented, which must be considered in a light most favorable to the nonmovant. (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

B. Labor Law § 200(1)

1. Contentions

Con Edison argues that no evidence was presented at trial from which the jury could have reasonably inferred that it exercised supervisory control over Brown's and Keasbey's work with asbestos-containing products at Ravenswood. (NYSCEF 422).

Plaintiffs oppose the motion, arguing that the evidence presented was sufficient to find both that Con Edison exercised supervision and control over Brown's asbestos-producing work, and that Con Edison had actual or constructive knowledge of the dangerous condition and failed

to take any remedial action on it. It relies on Con Edison's: 1) specifications for the proposition that Con Edison's contractors were "essentially restrained from taking independent action without first obtaining Con Edison's approval"; 2) 1958 Articles of General Conditions, arguing that its specifications and drawings were binding on the contractors and rendered Con Edison "responsible for work creating harmful dust"; 3) 1963 Amendment to the Articles requiring contractors to obtain Con Edison's approval of any samples of material or workmanship as it requires, which it incorporated into its contracts; 4) 1959 General Insulation Specification for Piping and Equipment requiring the use of asbestos jackets for insulation and uses of high and low temperature asbestos insulation with no substitutions without Con Edison's prior approval; and 5) an internal memorandum issued in September 1971 permitting and prescribing the use of many asbestos-containing products at Ravenswood. Plaintiffs also argue that defendant's motion is fatally defective absent a notice of motion. (NYSCEF 438).

2. Analysis

Pursuant to Labor Law § 200(1), an owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). While an owner or general contractor may also be held liable under Labor Law § 200(1) if it creates or has notice of a dangerous condition on its premises (*see* NY PJI 2:216), at this trial, the jury was solely instructed to determine whether Con Edison exercised supervision and control of Brown's work sufficient to hold it liable for Brown's mesothelioma, not whether it created or had notice of a

dangerous condition, and the verdict sheet reflected that theory of liability only.[1]

Thus, the dispositive issue is whether the owner supervised or instructed the plaintiff as to how to do the work which allegedly led to his injury or whether it "controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2007]; *see also Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [no evidence that defendant gave anything

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[1] When instructing a jury on a cause of action based on Labor Law § 200(1), "[c]are must be taken in distinguishing between accidents arising from premises conditions and those arising from the manner in which the work was performed." (NY PJI 2:216, Comment, Caveat 1). Liability for a dangerous condition on premises generally pertains to "a defect inherent in the property," not to the manner in which the work is performed. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876 [1993] ["But more to the point, this Court has not . . . imposed liability under the statute solely because the owner had notice of the allegedly unsafe manner in which the work was performed."]; *see also Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014] [plaintiff's Labor Law § 200 claim dismissed as dangerous condition that caused plaintiff's accident arose from means and methods of his work]; *Farrell v Okeic*, 266 AD2d 892 [4th Dept 1999] [recognizing distinction between injury caused by defective condition of premises and injury resulting from defect "not in the land itself but in the equipment or its operation"]).

As an insulator, Brown regularly applied asbestos insulation to various components at Ravenswood, and was exposed to asbestos dust from his own work and from that of his co-workers. Like the water that sprayed onto the floor due to a malfunctioning wet saw and caused the plaintiff to slip in *Cappabianca*, the asbestos dust in issue here "would not have been present but for the manner and means of [Brown's] injury-producing work." Con Edison's liability may be predicated solely on its supervision and control over that work.

In re New York City Asbestos Litigation [Konstantin] v 630 Third Ave. Assocs. is distinguishable as there, liability attached to the general contractor because the plaintiff's exposure to asbestos dust resulted when the dust was swept up by the general contractor's own employees. (*Konstantin v 630 Third Ave. Assocs.*, 37 Misc 3d 1206[A] [Sup Ct, New York County 2012], *affd* AD3d , 2014 NY Slip Op 05054 [1st Dept 2014]).

Consequently, plaintiffs' argument that the evidence is sufficient to prove that Brown's exposure arose from the dangerous asbestos dust present on the premises of which Con Edison had notice, is irrelevant.

more than general instructions on what needed to be done, not how to do it]; *Gonzalez v UPS.*, 249 AD2d 210 [1st Dept 1998] [no proof that owner of premises had control over manner in which work at issue was done]; *see also Pipia v Turner Constr. Co.*, 114 AD3d 424 [1st Dept 2014] [defendant not liable as plaintiff testified that his supervisor was person who instructed him on how to perform work]).

Here, while Con Edison was "in charge" at Ravenswood, Brown's direct supervisor was a Keasbey foreman or other Keasbey employees, from whom Brown took all of his instructions and directions. Thus, the evidence is insufficient to prove that Con Edison supervised Brown's work. (*See Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014] [defendant did not control work that caused plaintiff's accident as plaintiff testified that he worked solely under supervision of his employer-subcontractor's foreman and did not receive direction from anyone else]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [plaintiff worked under direction of his own employer's foreman and was not supervised by anyone else]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007] [plaintiff testified that defendant did not tell plaintiff's employer or its employees how to perform its work and defendant testified that it did not supervise subcontractors' work and did not tell them what to do]; *see also Castellon v Reinsberg*, 82 AD3d 635 [1st Dept 2011] [as it was undisputed that defendant did not tell plaintiff how to do his work, plaintiff's Labor Law § 200 claim should have been dismissed]).

That Con Edison exercised general supervision over all workers at Ravenswood, inspected their work for safety, and ensured that the work was done well, quickly, and in compliance with project or contract provisions and specifications is irrelevant because, as a

matter of law, such actions are insufficient to impose Labor Law § 200 liability on a premises owner for injuries arising from the method and manner of the work being performed. (*See Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012] [owner's right to stop work if he observed subcontractor engaging in unsafe activity insufficient]; *Cabrera v Revere Condominium*, 91 AD3d 695 [2d Dept 2012] [overseeing progress of work and inspecting work product insufficient]; *Foley v Consol. Edison Co. of New York*, 84 AD3d 476 [1st Dept 2011] [evidence that Con Edison exercised general supervisory powers over plaintiff or monitored timing and quality of work insufficient to impose liability]; *Mazzocchi v Intl. Bus. Machs.*, 294 AD2d 151 [1st Dept 2002] [Labor Law § 200 claim against owner of premises dismissed where plaintiff was allegedly injured by inhaling asbestos-laden dust, absent evidence that owner exercised supervision or control over work that allegedly created dust; irrelevant that owner had employees on site with right to inspect progress of work or general right of supervision]).

Squarely on point here is *Matter of New York City Asbestos Litig. (Tortorella)*. There, the plaintiffs alleged that Con Edison was liable for Tortorella's mesothelioma pursuant to Labor Law § 200 based on Tortorella's exposure to visible asbestos dust at Con Edison's Astoria powerhouse, which emanated from leaks in the building's ducts and coverings. In opposition to Con Edison's motion for summary judgment dismissing the claim against it, the plaintiffs argued that Con Edison could be held liable for failing to maintain a safe work area, observing that asbestos dust permeated the air when Tortorella was there, that only Con Edison could have taken precautions to ensure the safety of workers in its plant, and that Tortorella did not use asbestos-containing products in his work at the premises. Then, the plaintiffs added, by supplemental opposition, that Tortorella was exposed to asbestos through his own electrical work

handling asbestos-containing products, and asserted that Con Edison supervised and controlled the work by providing him and his co-workers with asbestos-containing materials, by overseeing and correcting the work, and by furnishing specification MP 5620 R-2, reflecting that Con Edison retained supervision and control over workers, including the ability to reject materials or work not in compliance with drawings or specifications. The motion court denied Con Edison's motion, finding that Con Edison had general control over Tortorella's work and other work that was being performed on the premises, and had a duty to provide a safe place to work. (Sup Ct, New York County, June 14, 2005, Freedman, J., index No. 100297/02).

On appeal, the Appellate Division, First Department, reversed and dismissed the Labor Law § 200 claim against Con Edison, observing that the asbestos exposure at issue "would have resulted from work done by insulation contractors or [Tortorella]" that was ongoing when Tortorella was there. The Court held that:

> [t]here is no evidence that Con Edison exercised supervisory control over the work of either the insulation contractors or [the plaintiff] or that Con Edison coordinated the work of the various trades . . . Nor is there any evidence that the alleged asbestos exposure resulted from a workplace condition created by, or known to, Con Edison, rather than from the contractors' work methods.

(25 AD3d 375 [1st Dept 2006]).

Likewise, in *In re Philbin v A.C. and S., Inc.*, the Appellate Division, First Department, dismissed the plaintiff's Labor Law § 200 claim against Con Edison which was based on allegations that Philbin had been exposed to asbestos while cutting material at a Con Edison facility and that Con Edison's specifications established its supervision and control over the plaintiff's work. The Court found that there was no evidence that Con Edison had supervised or controlled Philbin's work, or that the exposure arose from a workplace condition created by or

known to Con Edison rather than from the contractor's own work methods. (25 AD3d 374 [1st Dept 2006).

Here, plaintiffs do not allege that Brown was exposed to asbestos or asbestos dust at Ravenswood from any source other than his own insulation work or that of his fellow Keasbey insulators. Thus, there is no evidence that Brown's alleged asbestos exposure resulted from a workplace condition created by or known to Con Edison rather than from his own or other Keasbey employee's work methods. (*See also Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014] [dismissing Labor Law § 200 claim as dangerous condition that caused plaintiff's accident arose from means and methods of his work]).

And even assuming that the evidence permitted the jury to conclude that the specifications at issue here were Con Edison's, rather than Combustion's, the Appellate Division in *Tortorella* and *Philbin* did not find that the specifications constituted sufficient evidence of supervision and control, nor did other courts, and plaintiffs cite no authority to the contrary. (*See Held v A.O. Smith Water Prods*., Sup Ct, New York County, September 20, 2006, Freedman, J., index No. 104048/05 ["(w)hile Con Edison . . . may have at one point included asbestos in specifications, that is insufficient to defeat summary judgment (citing *Philbin* and *Tortorella*) . . . It is the method of work, not the specifications, that give rise to liability"]; *see also Saccomano v A.O. Smith Water Prods*., Sup Ct, New York County, July 20, 2007, Freedman, J., index No. 113299/06; *Greico v A.O. Smith Water Prods.*, March 15, 2005, Friedman, J., index No. 120250/03).

Thus, absent legally sufficient evidence demonstrating, as a matter of law, that Con Edison supervised or controlled Brown's work at Ravenswood, defendant has sustained its

burden of proving that the jury could not have reached its verdict on the issue of Con Edison's liability pursuant to Labor Law § 200 on any fair interpretation of the evidence. (*See eg Griffin v Clinton Green S., LLC*, 98 AD3d 41 [1st Dept 2012] [Labor Law § 200 claims properly dismissed after trial as plaintiff's evidence legally insufficient to establish defendants' liability thereunder; no evidence that defendants had ability to control or supervise plaintiff's work]; *Lazier v Strickland Ave. Corp.*, 50 AD3d 641 [2d Dept 2008], *lv denied* 10 NY3d 717 [court properly granted motion to set aside verdict against owner on Labor Law § 200 claim absent evidence that owner had authority to supervise or control work at issue]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [1st Dept 2006] [section 200 claim should have been dismissed after trial as plaintiff failed to show owner exercised direct supervision and control over injury-producing work; work was supervised and controlled by plaintiff's employer, not owner, no evidence that defendant instructed plaintiff in manner of performing work, and defendant's employee testified that he inspected work site and reported safety violations]; *Woroniecki v Tzitzikalakis*, 304 AD2d 571 [2d Dept 2003], *lv denied* 100 NY2d 516 [verdict set aside as no showing that owners told plaintiff how to perform work or exercised supervisory control over activity that caused injury, and therefore jury's finding of liability pursuant to Labor Law § 200 not supported by legally sufficient evidence]).

In light of this result, I need not address Con Edison's other grounds for setting aside the verdict. I do so, however, to present a complete record.

C. Apportionment

1. Contentions

Con Edison argues that the jury should have apportioned liability to the other entities on

the verdict sheet based on Brown's deposition testimony that he was exposed to asbestos at other sites and facilities and from asbestos-containing products manufactured or sold by other entities. It contends that a rational jury could not have found it liable, and at the same time absolve from liability two Ravenswood contractors Allis Chalmers and Combustion and other companies whose products were admittedly used by Brown at Ravenswood. It also relies on plaintiffs' state-of-the art testimony and documentary evidence. (Mem. at 29-40).

Plaintiffs contend that the jury properly allocated fault as Con Edison failed to meet its burden of establishing the culpability of the other entities, and improperly relies solely on Brown's work exposure history. (Mem. at 25-29).

2. Analysis

At trial, the defendant bears the burden of establishing the equitable shares attributable to the settling defendants or nonparties in order to reduce the amount of its responsibility. (*Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830 [3d Dept 1995]; *Bigelow v Acands, Inc.*, 196 AD2d 436, 438 [1st Dept 1993]). As the trial defendant in *Zalinka* failed to offer evidence that the settling defendants gave no warning or that a settling defendant's warning was inadequate, the Court upheld the verdict holding the trial defendant solely responsible for the plaintiff's injuries. (221 AD2d 830).

While Brown testified that he worked with certain asbestos-containing products and saw no warnings on them, Con Edison offered no evidence establishing that the other companies did not provide an adequate warning about the dangers of asbestos or that such a failure was a substantial contributing factor in causing Brown's disease. Consequently, Brown's testimony about his exposure to other products does not satisfy Con Edison's burden of proof on the issue.

(*See eg Zalinka*, 221 AD2d 830 [plaintiff's testimony that he never saw warnings on asbestos products of settling defendants, without more, did not compel jury to conclude that there were no warnings]; *Konstantin*, 2014 NY Slip Op 05054 [apportionment of 99 percent of liability to trial defendant not against weight of evidence where defendant adduced no evidence that some 32 entities negligently failed to warn him of dangers of exposure to asbestos]). Plaintiffs' general state-of-the-art evidence does not prove a settling defendant's or non-party's liability. (*See id.*, at 10 [plaintiff's state-of-art witness testified generally about what was historically available about dangers of asbestos without opining as to whether any party or nonparty knew of dangers of asbestos]).

Moreover, even if there had been sufficient evidence of the other companies' liability, Con Edison had the burden of demonstrating their share of liability, i.e., what percentage of fault the other companies should bear, which it failed to do. And to the extent that Con Edison complains that the verdict sheet should have included other work sites, such as Lincoln Center or JFK Airport, it cites no authority for the proposition that a location or a premises, as opposed to a site owner or contractor, may be held liable.

Plaintiffs' summation remarks do not constitute an admission. (*See Rahman v Smith*, 40 AD3d 613 [2d Dept 2007] [denying motion to set aside verdict in automobile collision case where defense counsel told jury at summation that he believed jury would find both plaintiffs and defendant liable and jury found defendant not liable; statement represented counsel's opinion of evidence and jury free to adopt or reject it]).

C. Loss of consortium

1. Contentions

Con Edison argues that the loss of consortium award to Phyllis Brown deviates materially from other such awards, and that it was unwarranted based on the fact that at the time of Brown's diagnosis and subsequent death, he had been retired from work, their children were grown and no longer living at home, and he was also already suffering from stage four prostrate cancer. Moreover, while a loss of consortium award is intended to compensate a spouse for the loss of a spouse's support and services, including physical, emotional, and sexual, Ms. Brown's testimony did not include any evidence of what support and services she lost, other than the loss of Brown's love and companionship. (Mem.).

Plaintiffs contend that Ms. Brown's suffering and loss observing her husband suffer and die warrants the amount awarded. (Golanski Aff.).

2. Analysis

Pursuant to CPLR 5501(c), the court may review a money judgment to determine whether it is excessive or inadequate and whether a new trial should be granted absent a stipulation otherwise. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." (Siegel, NY Prac § 407 [5th ed] [2014]). In deciding whether an award deviates materially from reasonable compensation, courts must look to awards approved in similar cases, "bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification." (*Reed v City of New York*, 304 AD2d 1 [1st Dept 2003], *lv denied* 100 NY2d 503).

The amount of damages awarded for a personal injury is generally and primarily a jury question, "which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony." (*Ortiz v 975 LLC*, 74 AD3d 485 [1st Dept 2010]).

> The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more . . . the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough . . . The loss of companionship, emotional support, love, felicity and sexual relations are real injuries . . . There may not be a deterioration in the marital relationship, but it will certainly alter it in a tragic way.

(*Millington v Southeastern Elev. Co.*, 22 NY2d 498 [1968]).

A review of the pertinent case law reflects that the award for loss of consortium, here of 40 percent of the estate's award for pain and suffering, and at an amount equivalent to approximately $55,000 per month, deviates materially from other awards. In *Didner v Keene Corp.*, the trial court reduced an award of $1.5 million for 27 months of lost consortium to $500,000, where the decedent's award for pain and suffering was $3,650.000. (1990 WL 10626462 [Sup Ct, New York County 1990], *affd* 188 AD2d 15 [1993], *affd as mod* 82 NY2d 342). There, as here, the spouse testified that her marriage was happy, that her husband was her best friend, that she depended upon him emotionally during the marriage, and that she became a nurse to a complete invalid and witness to his pain and suffering.

Similarly, in *Penn v Anchem Prods.*, the Court reduced the jury's loss of consortium award from $1,670,000 to $260,000. (85 AD3d 475 [1st Dept 2011]). The record in that case reflects that the award covered 13 months of the loss of consortium, and that defendant argued, pursuant to *Didner*, that the award should be reduced to $20,000 per month of lost consortium. (2009 WL 9056677). The Appellate Division apparently agreed. (85 AD3d 475).

In *Lustenring v AC&S, Inc.*, the loss of consortium award was reduced from $1.5 million to $750,000, for 17 months or approximately $44,000 per month. (13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]; *see also Caruolo v A C & S, Inc.*, 1999 WL 147740 [SD NY 1990], *affd in part and vacated on other grounds* 226 F3d 46 [2d Cir 2000] [loss of consortium award of $500,000 representing 75 months, or approximately $6,500 per month]; *but see Koczur* [$1.9 million for loss of consortium reduced to $500,000 for four to six months, or approximately $83,000 per month]; *Martin v A C & S, Inc.*, Sup Ct, New York County, Kornreich, J., index No. 100016/1999 [$18 million for about six years of pain and suffering, $7 million for loss of consortium, equaling approximately $100,000 per month]).

In other cases, the courts have reduced awards to amounts representing between 10 to 25 percent of the main pain and suffering award. (*See Matter of New York City Asbestos Litig. [Maltese]*, 225 AD2d 414 [1st Dept 1996], *affd* 89 NY2d 955 [1997] [granting judgment of approximately $300,000 for pain and suffering and approximately $38,000 for loss of consortium]; *In re Joint Eastern and Southern District Asbestos Litig. [McPadden]*, 789 F Supp 925 [ED NY 1992], *revd on other grounds* 995 F2d 343 [2d Cir 1993] [loss of consortium award of $400,000 upheld based on pain and suffering award of $4.5 million, and another loss of consortium award of $365,000 based on main award of $1.25 million]; *D'Ulisse*, 16 Misc 3d 945 [court upheld awards of $10 million for pain and suffering and $2.5 million for loss of consortium]).

Based on the foregoing, Ms. Brown's loss of consortium award is reduced to $360,000.

D. Motion procedure

As a schedule for post-trial motions was set after the trial ended by agreement of the

parties and the court, and no oral argument was required, a notice of motion was not necessary. (See CPLR 2214[a] [notice of motion shall specify time and place of hearing on motion]). In any event, plaintiffs waived any defect by opposing the motion on its merits. (2 Carmody-Wait 2d § 8:35 [2014] [lack of required notice of motion may be waived by opposing motion on merits]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Consolidated Edison's motion to set aside the verdict pursuant to CPLR 4404 is granted, and the verdict is hereby set aside, judgment in favor of plaintiffs as against defendant is vacated, and judgment as a matter of law dismissing the complaint as against defendant is granted, and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: August 29, 2014
New York, New York