Brown v Bell & Gossett Co.
2015 NY Slip Op 30336(U)
March 12, 2015
Supreme Court, New York County
Docket Number: 190415/12
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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,

Plaintiff,

- against -

BELL & GOSSETT COMPANY, *et al.*,

Defendants.

----------x

Index No. 190415/12

Mot. seq. no. 018

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Alani Golanski, Esq.
Weitz & Luxenberg, PC
700 Broadway
New York, NY 10003
212-558-5500

For defendant Con Edison:
Timothy M. McCann, Esq.
Consolidated Edison
4 Irving Pl.
New York, NY 10003
212-460-2164

By notice of motion, plaintiff administratrix moves for an order granting leave to reargue and/or renew her opposition to defendant Consolidated Edison Company of New York, Inc.'s post-trial motion for an order setting aside the jury verdict rendered against it, and upon renewal and reargument, vacating the decision and order dated August 29, 2014, and denying Con Edison's motion.

In moving for leave to renew, plaintiff offers portions of the full appellate record in two decisions on which I relied in my opinion, claiming that I "may not have had access to" them, and that as a result, I misconstrued both decisions. (NYSCEF 465). In moving for leave to reargue, plaintiff claims that I misapprehended certain appellate decisions, and erroneously reduced the award for loss of consortium. She also seeks modification and vacatur of that part of my order holding that she waived any defect in Con Edison's motion. (*Id.*).

I. MOTION FOR LEAVE TO RENEW

A. Decision

In my decision, I held, in pertinent part, that "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." (NYSCEF 466). I specified as follows:

> 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]).

(NYSCEF 466).

B. Contentions

Although plaintiff acknowledges that counsel's argument to the motion court on behalf of the plaintiff in *Tortorella* was partly based on the same specification (MP 5620 R-2) in issue here, she now proffers the record on appeal in that case, claiming that the specification is not annexed (NYSCEF 476), and that therefore, the evidence presented to the trial court and to the Appellate Division does not mirror the evidence before the jury here and thus, cannot be squarely on point (*id.*). Plaintiff levels the same allegation with respect to *Philbin*. (NYSCEF 465).

In opposition, Con Edison argues that as it had relied on both appellate decisions in its pre-trial motion for summary judgment, in its motion for a directed verdict during trial, and in its post-trial motion, the proffered records on appeal do not constitute new facts of which plaintiff could not or should not have been aware when she opposed its post-trial motion. Con Edison thus claims that plaintiff offers no reasonable excuse for not including the records on appeal in her opposition. In any event, it maintains that plaintiff's assertion that the specification in issue here was not in issue in *Tortorella* or in *Philbin* is false, as the law firm representing plaintiff here represented the plaintiffs in *Tortorella* and in *Philbin*. Con Edison also argues that plaintiff

offers no authority for the proposition that a contract specification requiring the use of an asbestos-containing product constitutes evidence of control of the means and methods of the work performed sufficient to prove supervision and control within the meaning of Labor Law § 200. Thus, it argues that the alleged new evidence would not change my prior determination. (NYSCEF 493).

In reply, plaintiff maintains that she had no reason to reference the *Tortorella* or *Philbin* records on appeal in her opposition to Con Edison's post-trial motion because Con Edison only cited them as cases that were dismissed for insufficient evidence of supervision and control, without reference to specifications, and thus she could not have anticipated that I would examine the records on appeal for my decision. (NYSCEF 495).

C. Analysis

Pursuant to CPLR 2221(e), a motion for leave to renew must be based on new facts not offered in the prior motion that would change the prior determination, and must contain a reasonable justification for failure to present such facts. Although a motion to renew is generally based on newly discovered facts "that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice." (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *Sirico v FGG Prod., Inc.*, 71 AD3d 429, 433-434 [1st Dept 2010]). Even so, the Supreme Court lacks discretion to grant renewal where the moving party does not offer a reasonable justification for failing to present the new facts on the original motion. (*Sobin v Tylutki*, 59 AD3d 701 [2d Dept 2009]; *see also Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013]).

Although Con Edison cited both *Tortorella* and *Philbin* in its motion to set aside the

verdict here, it did not cite them for the proposition that a contract specification requiring the use of an asbestos-containing product is insufficient to establish supervision and control, nor did it set forth the facts underlying those decisions. In opposing the motion, plaintiff did not cite either case.

While it may be argued that plaintiff, who is represented by the law firm that represented the plaintiffs in *Tortorella* and *Philbin*, could have or should have reasonably anticipated that the records on appeal in those cases would become pertinent in this case, given the absence of prejudice to Con Edison, I consider the records on appeal as new evidence. (*Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013] [court has discretion to relax requirement and grant leave to renew based on newly discovered facts, absent prejudice to opposing party resulting from delay]; *Mejia*, 307 AD2d at 871 [same]).

The record on appeal now provided by plaintiff reflects that the specification in issue here was not among the documents annexed by the plaintiff, although it is listed in the tables of contents of the record, and was the subject of his supplemental argument and exhibits below. (*See* NYSCEF 477, ¶ 16).[1] However, as the plaintiff in *Tortorella* apparently abandoned the

---

[1] Thus, plaintiff errs in contending that the specification was not addressed in *Tortorella* below. Consequently, the only reasonable inference to be drawn from the absence of the specification from the record on appeal is that appellate counsel abandoned the argument.

Moreover, as the plaintiff's counsel in *Tortorella* cites the specification in her supplemental affirmation, she did not likely err in stating that the specification was included among the exhibits accompanying the supplemental affirmation below, and counsel's allegation that she erred lacks probative value as he neither offers the basis of his knowledge nor any supporting documentation. Again, the absence of the specification from the records on appeal was more likely the product of a determination that an argument based on it would not have succeeded.

Also, the justice who rendered the decisions below in *Tortorella* and in *Philbin*

argument based on the specification on appeal, plaintiff correctly contends that the appellate decision is not squarely on point. However, having failed to offer any authority for the proposition that a specification requiring the use of an asbestos-containing product constitutes sufficient proof of supervision and control, plaintiff has not offered new evidence that would change my decision. (*See infra*, II.3.b.).

II. MOTION FOR LEAVE TO REARGUE

Pursuant to CPLR 2221(d)(2), a motion for leave to reargue must be based on fact or law misapprehended or overlooked by the court in determining the prior motion, and shall not include facts not previously offered. Whether to grant reargument rests within the sound discretion of the court, and a motion to reargue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). Nor may the movant advance new arguments not previously presented. (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

A. Labor Law § 200

1. Decision

I also held as follows:

And even assuming that the evidence permitted the jury to conclude that the

---

subsequently decided in *Held v A.O. Smith Water Prods.* that evidence of specifications requiring the use of asbestos-containing materials was insufficient to defeat summary judgment in favor of Con Edison, citing both appellate decisions in *Tortorella* and *Philbin* in support of thereof. (Sup Ct, New York County, September 20, 2006, Freedman, J., index No. 104048/05). She too apparently believed that the Appellate Division in *Tortorella* and in *Philbin* decided that such a specification does not prove supervision and control within the meaning of Labor Law § 200. (*Id*).

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"]).

And in a footnote, I observed as follows:

When instructing a jury on a cause of action based on Labor Law § 200, "[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). 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] [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 improperly sprayed onto the floor on which the plaintiff slipped 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." Thus, as in *Cappabianca*, Con Edison's liability may be predicated solely on its control over that work.

(NYSCEF 466, n 1).

2. Contentions

Plaintiff argues that I misapprehended the decision of the Appellate Division, First Department, in *Held*, overlooked other case law on supervision and control and portions of the testimony, and failed to accord sufficient weight to other testimony that she claims proves that

the promulgation of specifications requiring the use of asbestos evidences "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." She also asserts that I failed to consider "[Con Edison's] complete responsibility for the use of asbestos products at plaintiff's work site," and that such responsibility is equivalent to exercising supervision and control. (NYSCEF 465). Plaintiff thus asserts that I inappropriately viewed the evidence in the light most favorable to Con Edison and substituted my view of the evidence for the jury's. And, according to plaintiff, no court "has ever deemed . . . a top-down mandate tortiously requiring use of the exact injury-producing materials at issue, as insufficient to sustain a jury's verdict finding Section 200 accountability." She concedes, however, that this case "is a 'work methods' case [rather than a 'dangerous condition' case] and was tried as such." (*Id.*).

Con Edison maintains that plaintiff misapprehends the relevant facts and law, that Brown never testified that Con Edison controlled the manner or performance of his work, that other trial testimony demonstrated that it only exercised general supervision over Brown's work, which is insufficient as a matter of law to hold it liable pursuant to Labor Law § 200, and that plaintiff offers no authority to support the proposition that mandating the use of an asbestos-containing product is sufficient to impose liability. (NYSCEF 493).

In reply, plaintiff maintains that my construction of the term "supervision and control" is too narrow as it implies that a plaintiff may meet the standard only upon a demonstration that a site owner "physically told him what to do while he was at work." (NYSCEF 495). She argues that by issuing the specification and requiring the use of asbestos-containing materials in its contract, Con Edison went far beyond supervision and control by "compell[ing] and creat[ing] the very hazard that infected Mr. Brown's activities at Ravenswood." She thus contends that the

evidence establishes Con Edison's "explicit and unequivocal creation of the ultrahazardous nature of plaintiff's work methods and its imposition upon plaintiff and those similarly situated of a hazardous work operation, and its authority to control that hazard," and that "[n]o New York ruling has ever deemed such evidence insufficient to impose Labor Law § 200 liability." (*Id.*).

3. Analysis

The determination on a motion to set aside a verdict as a matter of law is whether the evidence was legally sufficient to support the verdict. (CPLR 4404[a]).

a. Factual issues

I address each factual argument as follows:

1. Brown's testimony

The testimony set forth by plaintiff was addressed in my decision, and she omits Brown's testimony that he was supervised only by his employer, Keasbey. Brown's testimony that Con Edison was "in charge" of the powerhouses does not, as a matter of law, prove that Con Edison supervised and controlled his work at Ravenswood.

2. Specifications

While Con Edison's own specifications required the use of asbestos-containing materials, the evidence presented at trial, through the testimony of Lapinski, Scherer, and Marx, established that the specification used by Brown and his fellow Keasbey employees was created by the general contractor, Combustion Engineering, and not by Con Edison.

Absent any evidence that the allegedly overlooked specifications were addressed or cited in plaintiff's opposition to this motion, or that they would change my previous determination, plaintiff fails to demonstrate that I overlooked any matters of fact.

3. Testimony of Marx, DiPaola, and Scherer

Plaintiff does not address the salient points of Marx's testimony, namely, that the specification governing Brown's work was created by Combustion, not Con Edison, and that "no one from Con Edison instructed the insulators as to how to do their work." (Tr. 4912, 4915).

Although DiPaola worked as a construction inspector for Con Edison at various facilities including Ravenswood, he did not testify about his job duties at Ravenswood. Thus, his testimony was irrelevant to my consideration of whether the evidence at trial demonstrated that Con Edison exercised supervision and control over Brown's work at Ravenswood.

Plaintiff also selects the testimony given by Scherer that is most favorable to her, ignoring testimony I referenced, and failing to acknowledge that the testimony she cites was referenced in my decision. For example, plaintiff quotes the following testimony from Scherer's deposition:

> Q: And in some cases, it was just specifications from the utility; is that correct?
> A: Well, in the case of [Con] Edison, the specifications were always their specifications, yes.
> Q. And you could have specifications from the contractor, as well; is that correct?
> A: No. When they came to [Con] Edison, the specifications were theirs. They had - the insulation specification would be given to use; there was no specification from the contractor.

Scherer next testified that "[t]hey were [Con] Edison's specifications or in the case of the boiler, they were Combustion Engineering boiler specifications or turbines would be General Electric or [Allis] Chambers." (Tr. 5257).

Sensing a contradiction, the deposing attorney states, "maybe I misspoke." Follow-up questioning ensued:

> Q: Would you consider Combustion Engineering to be a contractor?
> A. Sometimes they were, yes.
> Q: And as a contractor, they would install boilers at [Con] Edison; is that correct?
> A: When they were contractors on the boiler. Mainly, they were a manufacturer of

boilers.
Q: But they did installation work at Con Ed[ison]?
A: Sometimes.
Q: And if they did the insulation work at Con Ed[ison], they had their own specification; is that correct?
A: Yes.

(Tr. 5258-9).

Thus, while plaintiff asserts that Scherer testified that Con Edison always issued and used its own specifications, a full reading of his testimony, as clarified by counsel's questioning, reveals that the specifications followed by Keasbey were actually Combustion's. Moreover, plaintiff's citations to Scherer's testimony about specifications generally is irrelevant absent any context; Scherer was asked about specifications, but not if the specification at issue was used at Ravenswood or was issued by Con Edison.

Given the pertinent legal standard, it is irrelevant whether there is "some" evidence that supports plaintiff's argument, as the evidence, taken as a whole, was insufficient to demonstrate that Con Edison exercised supervision and control over Brown's work. (*See eg Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [1st Dept 2006] [court should have set aside jury verdict finding owner liable on Labor Law § 200 claim, as no liability attaches where alleged dangerous condition arises from contractor's methods and owner exercises no supervisory control over work; evidence showed that plaintiff's work was supervised and controlled exclusively by plaintiff's employer, not by owner, and no evidence that anyone employed by owner instructed plaintiff in manner of performing his work; "since plaintiff failed to show that [owner] exercised direct supervision or control over the injury-producing work, the § 200 claim should have been dismissed"]; *Pilch v Bd. of Educ. of City of New York*, 27 AD3d 711 [2d Dept 2006], *lv denied* 8 NY3d 958 [2007] [verdict set aside on Labor Law § 200 claim as there was no

evidence at trial showing that defendants general contractor and owner directed or controlled manner in which plaintiff conducted his work]; *Bommarito v Park Ave. Plaza Co.*, 307 AD2d 944 [2d Dept 2003], *lv denied* 1 NY3d 504 [verdict set aside as plaintiff's claim pursuant to Labor Law § 200 should have been dismissed absent evidence that defendant owner exercised supervisory control over contractor's operations]; see also *Lazier v Strickland Ave. Corp.*, 50 AD3d 641 [2d Dept 2008], *lv denied* 10 NY3d 717 [in order to establish entitlement to judgment as matter of law notwithstanding verdict, defendant required to demonstrate that there was no valid line of reasoning by which jury could have concluded that it had authority to supervise or control injury-producing work]; *Jenkins v Jones*, 255 AD2d 805 [3d Dept 1998] [Labor Law § 200 claim dismissed; while plaintiff's coworkers stated that defendant owner had supervisor in charge on job site, plaintiff's attempt to raise factual issue as to direction and control was undermined by his testimony wherein he conceded that he received no instructions from anyone but his employer, and that he never spoke to supervisor nor overheard conversations between supervisor and employer, had no personal knowledge of supervisor's role on job site, and supervisor neither directed nor controlled his work nor provided him with equipment]).

b. Case law

As the court observed in *Held*, "[w]hile Con Edison (and Bechtel) may have at one point included asbestos in specifications, that is insufficient to defeat summary judgment as the First Department in *Philbin v AC&S*, 25 AD3d 374 (1st Dept 2006) and *Tortorella v AC&S*, 25 AD3d 375 (1st Dept 2006) [held]. It is the method of work, not the specifications, that gives rise to liability . . . " Plaintiff did not appeal that decision with respect to Con Edison. Thus, the Appellate Division in *Held* had no opportunity to determine whether a specification requiring the

use of asbestos-containing materials, as a matter of law, proves supervision and control under Labor Law § 200.

In arguing that Con Edison should be held summarily liable for supervising and controlling the plaintiffs' work in both *Saccomano v A.O. Smith Water Prods.*, Sup Ct, New York County, July 20, 2007, Freedman, J., index No. 113299/06, and in *Greico v A.O. Smith Water Prods.*, March 15, 2005, Freedman, J., index No. 120250/03, the plaintiffs submitted, *inter alia*, evidence of Con Edison's specifications that included the use of asbestos-containing products. (NYSCEF 102). In each case, the court granted summary judgment to Con Edison, finding in *Saccomano* that there was "inadequate evidence that Con Edison supervised or controlled the work of the various contractors who may have been using asbestos containing materials," and in *Greico* that Labor Law § 200 requires the owner to exercise "some supervision or control over the premises or work," and that inspection rights or duties are insufficient. That the court did not mention the specifications is of no moment as they were offered in evidence by the plaintiffs and were presumably found not to have constituted evidence of supervision and control.

Comes v N.Y. State Elec. & Gas Corp. is not only on point, but supports the construction of the term "supervision and control" utilized in my decision. There, the plaintiff was injured when he lifted a steel beam; no evidence was offered that the premises owner exercised supervisory control or "had any input" into how the beam was to be moved. The Court thus held that the owner could not be liable even though it hired a construction inspector to visit the worksite, as the inspector's duties were limited to observing the work and reporting safety violations. It stated that, "[w]here the alleged defect or dangerous condition arises from the

contractor's methods and the owner exercises no supervisory control," the owner may not be held liable. (82 NY2d 876 [1993]).

In *Rizzuto v L.A. Wenger Contr. Co.*, the Court found a triable issue as to whether the site owner had "control over the methods of the subcontractors and other worksite employees" by virtue of its ability to coordinate the workers' activities, its capacity to exclude workers from working in certain areas of the work site, or its authority to direct workers to refrain from working while another potentially hazardous activity was taking place in a particular immediate area. (91 NY2d 343 [1998]). Not only is *Rizzuto* distinguishable, but it does not support a broader construction of the term "supervision and control." In any event, the evidence in *Rizzuto* is absent here. (*See Tortorella*, 25 AD3d at 375 [no evidence that Con Edison exercised supervisory control over work of either contractors or decedent, or that it coordinated work of various trades or had authority to exclude workers from particular sites]).

Similarly, the Appellate Division, First Department, in *Hughes v Tishman Constr. Corp.*, observed that general supervisory authority does not constitute supervisory control, and that "it must be demonstrated that the [owner or contractor] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." (40 AD3d 305 [1st Dept 2007] [emphasis in original]). Here, no evidence was offered that Con Edison controlled the manner in which Brown performed his work.

Thus, plaintiff has not shown that I misapprehended the law in finding that Con Edison's general supervisory authority at Ravenswood was insufficient to hold it liable here. (*See eg, Francis v Plaza Const. Corp.*, 121 AD3d 427 [1st Dept 2014] [no evidence that contractor's employees ever gave specific instructions to plaintiff or his subcontractor-employer]; *Griffiths v*

FC-Canal, LLC, 120 AD3d 1100 [1st Dept 2014] [plaintiff testified that only person who gave him instruction over his work was his supervisor]; *Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014] [plaintiff testified that he worked solely under supervision of his employer's foreman and did not receive direction from anyone else]; *Pipia v Turner Constr. Co.*, 114 AD3d 424 [1st Dept 2014] [plaintiff testified that his supervisor was person who instructed him on how to do his work]; *Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013] [plaintiff testified that no one directed the manner in which he performed his work]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co.*, 104 AD3d 446 [1st Dept 2013] [plaintiff worked under direction of his own employer's foreman, and was not supervised by anyone else]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [no evidence that contractor gave anything more than general instructions on what needed to be done, not how to do it]).

And again, plaintiff does not and did not cite authority for the proposition that requiring the use of asbestos-containing materials is equivalent to controlling the manner of the performance of an employee's work. In any event, such a proposition is untenable, given the absence of any evidence here that asbestos-containing materials, in and of themselves, are dangerous. Rather, it was alleged that their use and manipulation created a dangerous condition.

Plaintiff appears to conflate "supervision and control" with creating a dangerous condition, which plaintiff concedes is not the issue here. Certainly, a premises owner may be found liable for creating a dangerous condition on the premises. Here, however, Con Edison created no condition. Rather, it was Brown's conduct in mixing asbestos-containing cement and cutting asbestos-containing pipe covering that created the asbestos dust he inhaled. As I observed in my decision, "[l]ike the water that improperly sprayed onto the floor on which the

plaintiff slipped in *Cappabianca* [*v Skanska USA Bldg. Inc.*, 99 AD3d 139 (1st Dept 2012)], the asbestos dust 'would not have been present but for the manner and means of [Brown's] injury-producing work' [and therefore] as in *Cappabianca*, Con Edison's liability may be predicated solely on its control over that work." (*See also Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456 [1st Dept 2014] [plaintiff slipped and fell on water that froze on floor of worksite; evidence established that general contractor did not exercise supervisory control over means and methods of work, as work required that subcontractor use water, and ice would not have formed absent required use of water]).

Thus, even if Con Edison required the use of asbestos-containing materials, it did not thereby create a dangerous condition, and did not exercise supervision and control over Brown's work sufficient to satisfy the standards set forth in the Labor Law. (*See Tortorella* [where decedent's exposure to asbestos resulted from contractors' work, no evidence that it resulted from workplace condition created by, or known to, Con Edison rather than from contractor's work methods]). Plaintiff therefore fails to establish that I misapprehended the law in determining the proper standard applicable to Labor Law § 200 supervision and control cases.

To the extent that plaintiff claims that requiring the use of asbestos-containing materials constitutes the creation of a danger arising from the materials themselves rather than from the methods of work, supervision and control is nonetheless required for liability. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993] ["where (Labor Law § 200) claim arises out of alleged defects or dangers arising from a subcontractor's methods *or materials*, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation"] [emphasis added];

Cappabianca, 99 AD3d at 139 [even though worker claimed that defective saw allowed water to spray onto floor, which water caused him to slip and fall, where injury is caused by manner and means of work, including equipment used, owner liable only if it actually exercised supervisory control over injury-producing work]; *see also Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013] [claim dismissed against defendants who did not exercise supervision or control over plaintiff's work; irrelevant whether injury was caused by tripping hazard on sidewalk as hazard created by plaintiff's employer's placement of materials on sidewalk]).

B. Loss of consortium

Plaintiff argues that in reducing the jury's award of $1 million for her loss of consortium, I misapplied the standard set forth in CPLR 5501 and failed to address the evidence of what support and services she lost, other than the loss of Brown's love and companionship. (NYSCEF 465). Having compared the jury's award here with other such awards in asbestos cases, the relevant case law was applied and the relevant facts were considered. *In re New York City Asbestos Litig. (D'Ulisse)*, 16 Misc 3d 945 (Sup Ct, New York County 2007), is not on point because there, the defendant failed to explain its reduction of the award, and cited no relevant case law. Here, by contrast, defendant cited relevant case law.

While jury awards ought not be lightly set aside, equally important is whether the courts have sustained verdicts or found them to deviate materially from what would be reasonable compensation. Thus, while the jury in *Assenzio v A.O. Smith Water Prods.*, Index No. 190008/12 (Sup Ct, New York County), awarded $10 million for the plaintiff's loss of consortium, on the defendant's motion to set it aside, the trial court reduced it to $500,000, or $25,000 per month. In the same post-trial motion, the court in *Levy v A.O. Smith Water Prods.*, Index No. 190200/12

(Sup Ct, New York County), reduced the award from $10 million to $650,000, thereby awarding approximately $15,500 per month.

For all of these reasons, plaintiff has failed to establish that I overlooked or misapprehended any facts or law in deciding to remit her loss of consortium award.

III. PLAINTIFF'S WAIVER

That portion of my decision finding that plaintiff had waived the issue of whether Con Edison should have filed a notice of motion is hereby vacated absent any opposition by Con Edison.

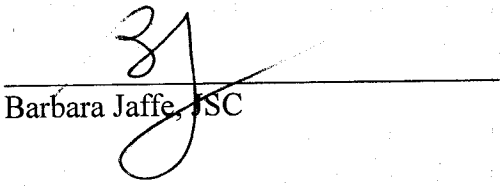
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to renew is denied; and it is further

ORDERED, that plaintiff's motion for leave to reargue is denied, except to the extent of vacting that portion of the prior decision finding that plaintiff waived the issue of whether Con Edison should have filed a notice of motion, and is otherwise denied.

ENTER:



Barbara Jaffe, JSC

DATED: March 12, 2015
New York, New York