Matter of Eighth Jud. Dist. Asbestos Litig.

2015 NY Slip Op 32575(U)

December 18, 2015

Supreme Court, Erie County

Docket Number: 801886/2013

Judge: Deborah Chimes

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
EIGHTH JUDICIAL DISTRICT

In Re Eighth Judicial District Asbestos Litigation

This Document Applies to:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

JANET E. VOELKER, as Personal Representative of the Estate of WILLIAM R. VOELKER, Deceased, and Individually as the Surviving Spouse of WILLIAM R. VOELKER,

Plaintiff,

vs.

ALFA LAVAL, INC., et al.,

Defendants.

Decision and Order
Index No: 801886/2013

At the trial of this action, plaintiff recovered for William R. Voelker's personal injuries and wrongful death from mesothelioma. That disease was caused by exposure to asbestos which occurred, for purposes of this motion, during Mr. Voelker's service in the United States Navy, aboard the USS Chukawan from January 1968 to October, 1968 and the USS Suribachi from October 1968 to early 1971. Plaintiff moves to increase the jury award for past pain and suffering or in the alternative to grant a new trial on damages for past pain and suffering. Defendant John Crane, Inc. (John Crane) opposes plaintiff's motion and cross-moves for judgment notwithstanding the verdict.

In support of her motion plaintiff submitted: notice of motion for additur, dated August 6, 2015; amended notice of motion for additur, dated August 7, 2015; the affidavit of Dennis P. Harlow, Esq., sworn to August 6, 2015, with annexed exhibits.

In opposition to the motion for additur, defendant submitted the affirmation of Suzanne M. Halbardier, Esq., dated September 14, 2015.

In support of its motion for judgment notwithstanding the verdict, defendant submitted its notice of motion dated August 24, 2015; the affirmation of Suzanne Halbardier, Esq., dated August 24, 2015, with annexed exhibit;

In opposition to defendant's cross- motion, plaintiff submitted the affidavit of John P. Comerford, Esq., sworn to September 11, 2015, with annexed exhibits.

The jury trial in this matter, in which John Crane was the sole remaining defendant, began on July 10, 2015. On July 23, 2015, a verdict was rendered which found: decedent was exposed to asbestos from the use of a product manufactured and/or sold by John Crane; defendant John Crane was negligent in manufacturing, selling or supplying a product without adequate warning; and the negligence of John Crane was a substantial factor in causing injury to decedent William Voelker. The jury awarded $250,000.00 for William Voelker's pain and suffering, including loss of enjoyment of life; a stipulated amount of $422,445.35 in past medical expenses; a stipulated amount of $500,000.00 in future lost wages, and $250, 000.00 for loss of consortium to Janet E. Voelker . While the jury found that decedent was exposed to asbestos from products, equipment or work activities of other entities, it found that none of those entities were negligent for failing to warn of the dangers of those asbestos-containing products, equipment or work activities[1]. The jury held John Crane one hundred percent responsible for decedent's injuries.

---

[1] Those entities were: Combustion Engineering; Ford Motor Co.; Foster-Wheeler Energy Co., LLC.; Garlock Sealing Technologies, LLC; Honeywell, as successor to Bendix and Warren Pumps.

MOTION FOR ADDITUR

Relying on CPLR § 5501 (c), plaintiff moves for an increase in the amount awarded by the jury for decedent's past pain and suffering, asserting that the award is inadequate for Mr. Voelker's "extraordinarily horrific" suffering.

She asserts that this award deviates materially from awards throughout the state in both personal injury cases and mesothelioma cases, whether reviewed by appellate courts or awarded by a jury. She has supplied extensive submissions on these cases.

John Crane emphasizes that the verdict of a jury should be accorded considerable deference and notes that the plaintiff has the burden of proof on this issue. Defendant points out that there have been no additurs granted in asbestos cases in the past twenty years and urges the court to rely only on, for comparison purposes, asbestos awards affirmed on the appellate level and limited to those awarded in Erie County. John Crane contends the award in this case is comparable with those cases.

CPLR § 5501 (c) provides, in pertinent part:

> c) Appellate division.
>
> * * *
>
> "In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

The trial court is to apply the same test as the Appellate Division; it may set aside an award for damages that deviates materially from what would be reasonable compensation (*see Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911, 912 [4th Dept. 1994]) and order a new trial on that issue unless the defendant stipulates to the modified award (*see Oakes v Patel*, 20 NY3d 633, 643 [2013]; *Kastick v U-Haul Co. of Western Michigan*, 292 AD2d 797 799 [4th Dept.

2002] ; *Fischl v Carbone*, 199 AD2d 463, 464 [2nd Dept. 1993]).

That no two plaintiffs are identical and each experience of suffering is unique was recognized in *Matter of Joint Eastern and Southern Dist. Asbestos Litig. (Consorti)*, 9 F Supp 2d 307, 312 (US Dist Ct , SD NY, 1998)[2] In evaluating a pain and suffering award for a plaintiff with mesothelioma, the court observed:

> "In choosing sufficiently analogous cases against which to measure Consorti's award, similar injuries or diagnoses are primary but not controlling criteria. To assess the pain and suffering resulting from a tragic event, the court also may consider the "causal agent itself and the circumstances surrounding the injury in determining the nature of the anguish for which the plaintiff should be compensated. The life changes that follow the ... event are also of critical importance." *Geressy*, 980 F.Supp. at 657.
>
> In evaluating whether an award is reasonable, it is almost impossible to find cases where all relevant factors are identical to those in the case at issue. Instead, the court must review 'the totality of circumstances of the proffered sample cases to ascertain whether they can provide a basis for comparison. There are almost no 'all fours' cases." *id.*

In a more recent challenge to a pain and suffering award, Justice Joan Madden, in the New York City Asbestos Litigation, while recognizing that these awards are not subject to precise mathematical quantification, evaluated other mesothelioma and lung cancer pain and suffering awards. The judge assessed the "nature, extent and duration" of plaintiff's injuries. (*In re: New York City Asbestos Lit. (Dummitt),* (36 Misc.3d 1234(A)[2012], aff'd 121 AD3d230 [2014]). Another NYCAL case, *Matter of New York City Asbestos Litig. (D'Ulisse)*, 16 Misc 3d 945, 949 (Sup Ct, New York County 2007) held that to determine whether an award deviates materially from what would be reasonable compensation the court should compare plaintiff's injuries with injuries of others in similar circumstances.

---

[2] This case is know as *Consorti IV* .

With respect to Mr. Voelker's pain and suffering, plaintiff presented decedent's video-taped trial testimony, video-taped trial testimony of his treating surgeon, Dr. Robert Cameron and testimony of his widow, plaintiff Janet E. Voelker. In addition, photographs of Mr. Voelker and his family were admitted. This undisputed evidence shows the rapid deterioration of a 65 year old healthy, active man, who worked full-time, to an essentially helpless, dependent patient. Before his diagnosis, he arose at 4:00 or 4:30 every morning and ran or swam. During the course of his illness, he endured a long painful surgery in an attempt to remove the tumor which had encased portions of the ribs, the diaphragm and even the heart sac. Portions of two ribs were also removed. During the eight hour surgery, Dr. Cameron discovered that the tumor was of a more invasive and aggressive type than originally diagnosed. The surgeon was unable to preserve a margin of healthy tissue after the cancer was removed.

Mr. Voelker recovered for nine days in the hospital post-surgery. While in the hospital he had tubes inserted into his body to drain fluid so it would not prevent the lung from expanding and healing. The decedent was left with a thirty-five inch scar on his chest and back. Decedent was then hospitalized for two rounds of chemotherapy, the first was a hospital stay of five days. This round left him short of breath and unable to walk across the room without difficulty. He also had difficulty breathing while sleeping and sitting and was put on oxygen. Mr. Voelker developed thrush and was unable to swallow and eat food. His weight dropped from 205 to 147 pounds. Mr. Voelker had a bad reaction to the second round of chemotherapy and after his return home, he "spiked" a fever which required a hospital stay of ten days as the doctors tried various antibiotics. His doctors decided to discontinue the chemotherapy. The possibility of radiation treatments were explored, but Mr. Voelker deteriorated rapidly. Toward the end of his life, Mr. Voelker was largely confined to a wheelchair or a lift chair in the living room, he was unable to sleep in a bed. He lost the ability to walk without assistance and he had

to be carried in and out of his house. He was on pain medication and had to be assisted in the bathroom and when bathing.

Mr. Voelker and his wife had been married 2 days shy of 45 years at the time of his death. They had three children and six grandchildren. The evidence admitted at trial demonstrated that the Voelkers were a very close family, that decedent was very involved in his grandchildrens' sports and other activities and was responsible for a variety of household chores.

After reviewing an array of pain and suffering awards, and where possible, the details of the plaintiffs' circumstances, in both mesothelioma and non-mesothelioma cases, limited to the Eighth Judicial District, this court finds that the jury's award of damages for decedent's conscious pain and suffering deviates materially from what would be reasonable compensation. Therefore, the award of damages for pain and suffering is vacated and a new trial on damages for conscious pain and suffering only is ordered unless defendants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the verdict for conscious pain and suffering to $600,000 in which event the verdict will be modified accordingly.

Defendant John Crane moves pursuant to CPLR § 4404 (a) for judgment notwithstanding the verdict. First, John Crane seeks relief from the jury's finding that it was solely responsible for the injuries to Mr. Voelker, arguing that the jury's allocation of fault was against the weight of the evidence. Specifically, it argues that defendant Garlock should be allocated a twenty percent share of the liability. It emphasizes that even plaintiff's counsel, in his summation, conceded that defendant Garlock was partially responsible. Further, defendant maintains that it's proof against Garlock was 'strikingly similar ' to the proof offered against it by plaintiff and inexplicably discounted or ignored by the jury. Second, defendant contends that the complaint must be dismissed as mandated by Nebraska law.

CPLR 4404 (a) provides that after a trial, the court may either set aside the verdict or judgment and direct judgment as a matter of law or order a new trial where the verdict is contrary to the weight of evidence or contrary to the interest of justice. A court may not set aside a verdict as a matter of law based upon insufficiency of the evidence unless no valid line of reasoning and permissible inferences could possibly lead rational jurors to the conclusion they reached (*see Cohen v Hallmark Cards, Inc.* 45 NY2d 493, 499 [1978]; *Zane v Corbett*, 82 AD3d 1603, 1606 [4th Dept. 2011]). Evidence adduced at trial in a case such as this must be viewed in the light most favorable to the plaintiff (*see Penn v Amchem Prods.*, 85 AD3d 475, 476 [4th Dept. 2011]).

John Crane maintains that the evidence at trial mandated that the jury find Garlock, Inc., a gasket manufacturer[3], negligent in manufacturing and selling its products without a warning and that Garlock's negligence was a substantial factor of decedent's mesothelioma. Further, John Crane moves that a 20% share of responsibility be allocated to Garlock.

With respect to John Crane's claim that the jury's allocation of fault was not supported by the evidence, questions of negligence and apportionment of fault are for the fact-finder, and must be upheld on any fair interpretation of the evidence (*see Rhoden v Montalbo*, 127 AD2d 645, 646 [2nd Dept. 1987]; *Ryan v New York City Health and Hosps Corp.*, 220 AD2d 734,736 [2nd Dept. 1995]).

Here, as the jury was instructed, John Crane had the burden of proving that decedent was exposed to products of the other entities on the verdict sheet, that those entities were negligent in failing to warn and that this negligence was a substantial factor in causing decedent's injuries.

---

[3] Garlock, Inc. is in bankruptcy and is not a defendant herein. However, it did appear on the verdict sheet as a possibly responsible entity (Gen. Oblig. L.§15-108).

"The absence of evidence of knowledge specific to the Article 16 companies is a sufficient basis for the jury to have concluded that Crane did not meet its burden of showing that those other companies were negligent " *(Dummitt, supra* at 25 citing *Matter of New York City Asbestos Litig.[Marshall] supra* and *Matter of New York City Asbestos Litig.[Rosini*]). Upon review of the evidence, the defendant failed to prove wether Garlock knew or should have known of the dangers of asbestos. Further the defendant failed to meet its burden in establishing that the verdict is contrary to the weight of the evidence[4]. Therefore the court finds the apportionment of 100% against John Crane to be a fair interpretation of the evidence.

Defendant maintains that this case should be governed by Nebraska law. According to defendant, the jurisdiction with the greatest interest in the litigation is Nebraska. That state has a statute of repose providing that no claim could be brought against a manufacturer, more than 10 years after sale of that product. Defendant claims that in Voelker's case, this would be 1981.

Defendant further claims that because Nebraska has a statute of repose and New York doesn't, an actual conflict is created and the jurisdiction with the greatest interest should prevail. Reasoning that decedent's injury occurred in Nebraska where the mesothelioma manifested itself, John Crane urges application of the third *Neumeier* rule (*Neumeier* v *Kuehner,* 31 NY2d 121 [1972]), that the "law of the place of injury should apply".

Plaintiff argues that Mr. Voelker was born and raised in New York. Voelker was a New York resident when he joined the Navy, married his wife in New York and returned to New

---

[4] Paintiff's counsel's suggestion, in his summation, that the jury find Garlock partially responsible for Mr. Voelker's injuries was not binding on the jury. As they were instructed: "...what is said in summations is not evidence..."NYPJI 1:5. The suggestion also did not constitute a judicial admission. "...[C]ounsel's statement was not one of fact, nor was it made with sufficient formality and conclusiveness. Instead, counsel merely presented his opinion as to what he believed the evidence had showed." *Rahman v Smith* 40 AD 3D 613, 615 (2nd Dept. 2007)

York when he finished his service. Plaintiff also maintains that decedent's injury occurred when he was exposed to asbestos, not diagnosed with an asbestos-related disease and points out that the location of his naval exposure varied, but his New York residency during his initial exposure did not. Plaintiff contends that this is a disguised summary judgment motion and is too late. Further, plaintiff argues that the assertion that defendant is entitled to avail itself of Nebraska's statute of repose should have been pled as an affirmative defense. Finally, plaintiff takes issue with defendant's interpretation of the Nebraska statute of repose, citing its 1981 revision.

Choice or conflict of law may be brought before the court in a motion in limine as it was here (see *Matter of New York City Asbestos Litig.[Konopka],* 32 Misc 3d 161 [Sup Ct, New York City, (2011)] and need not be pled as an affirmative defense. (*see Edwards v Erie Coach Lines Co.*, 17 NY3d 306 [2011]). This court previously ruled that New York is the state with the greatest interest because it is the state where the plaintiff was domiciled at the time of his initial exposure. Defendant affords no basis for amending this determination. It is noted, that in New York, injury occurs when plaintiff is exposed to asbestos. (*see Consorti v Owens-Corning Fiberglas Corp.*, 86 NY2d 449 (1997); *Matter of Eighth Judicial District Asbestos Litig. [Chrabas]*, 273 AD2d 863 [4th Dept 2000]).

Hence, the argument that Nebraska law should apply has no merit.

Wherefore, it is hereby,

ORDERED, that plaintiffs motion is granted and defendant's cross motion is denied.

SO ORDERED

Dated: Buffalo, New York
December 18, 2015

Deborah A. Chimes, J.S.C.

GRANTED
DEC 18 2015
COURT CLERK
MARY PAZIK