SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

INDEX NO. 190324/2020

MOTION DATE 11/10/2023, 11/10/2023, 11/10/2023

MOTION SEQ. NO. 004 005 006

JAMES PETRO,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC.,AIR & LIQUID CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC.,ARMSTRONG INTERNATIONAL, INC.,ARMSTRONG PUMPS, INC.,ATLAS COPCO, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CHICAGO PNEUMATIC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BORG-WARNER MORSE TEC LLC,CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC.,SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC.,CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,COURTER & COMPANY INCORPORATED, CRANE CO., ELLIOTT TURBOMACHINERY CO, ELECTROLUX HOME PRODUCTS, INC.,INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC.,SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC.,NORDSTROM VALVES, INC.,EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO CHICAGO PUMP COMPANY, NORTHERN PUMP COMPANY, AND PEERLESS PUMP COMPANY, FORT KENT HOLDINGS, INC.,F.K/A DUNHAM BUSH, FOSTER WHEELER LLC,GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INC.,GRINNELL LLC,HONEYWELL INTERNATIONAL, INC.,F/K/A ALLIED SIGNAL, INC. / BENDIX, HONEYWELL INTERNATIONAL, INC.,IMO INDUSTRIES, INC.,ITT CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO BELL & GOSSETT, KENNEDY VALVE MFG. CO. INC.,AND HOFFMAN STEAM TRAPS, JENKINS BROS., INC.,KAISER GYPSUM COMPANY, INC.,KOHLER CO., LENNOX INDUSTRIES, INC.,MARIO & DIBONO PLASTERING CO., INC.,MILWAUKEE VALVE COMPANY, INC.,MINNESOTA MINING & MANUFACTURING COMPANY, A/K/A 3M COMPANY, NASH ENGINEERING COMPANY, PSEG LONG ISLAND LLC,INDIVIDUALLY AND AS SUCCESSOR TO THE LONG ISLAND LIGHTING COMPANY, RESEARCH-COTTRELL, INC.,N/K/A AWT AIR COMPANY,

DECISION + ORDER ON MOTION

RILEY POWER, INC.,SLANT/FIN CORPORATION, SPIRAX SARCO, INC, INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SPX COOLING TECHNOLOGIES, INC.,INDIVIDUALLY AND AS SUCCESSOR TO MARLEY COOLING TECHNOLOGIES AND MARLEY COOLING TOWERS, TACO, INC.,TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION COMPANY, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, YORK INTERNATIONAL CORPORATION, YUBA HEAT TRANSFER, LLC., ZURN INDUSTRIES, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ERIE CITY IRON WORKS, RIVERBAY CORPORATION, ECR INTERNATIONAL, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DUNKIRK, DUNKIRK BOILERS, AND UTICA BOILERS, VIKING PUMPS, LLC,BURNHAM, LLC,THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, REDCO CORPORATION F/K/A CRANE CO.

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 750, 751, 752, 753, 755

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 746, 747, 748, 749, 756

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 660, 661, 662, 663, 664,

665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 745, 757

were read on this motion to/for SET ASIDE VERDICT.

Background

Plaintiff James Petro ("plaintiff") commenced this action in 2020 against multiple defendants alleging that exposure to asbestos caused him to contract asbestosis and lung cancer. After serving in the United States Navy from 1955 to 1959, plaintiff joined the steamfitter's union in 1960, where he remained until his retirement in 1995. During his time with the union, plaintiff was employed by various companies at job sites across New York City, including the World Trade Center.

The only defendants remaining at the time of trial were Tishman Realty and Construction Co., INC., ("Tishman"), Mario & Dibono Plastering Co. ("Mario & Dibono"), and Port Authority ("Port Authority") (collectively "defendants"). Plaintiff alleges that these defendants were negligent in using asbestos-containing products during the construction of the World Trade Center.

In 1965, the Port Authority of New York began building the World Trade Center in downtown Manhattan. Tishman was hired as the general contractor, while Mario & Dibono was contracted to install spray fireproofing. It is undisputed that from 1969 until April 1970, Mario & Dibono used an asbestos containing fireproofing spray, Cafco Type D, inside of the towers. Mario & Dibono assert that they switched to a non-asbestos-containing fireproofing spray in May 1970, Cafco Type D-CF, in compliance with new city regulations banning asbestos use. Although Mario & Dibono claim they ceased using asbestos-containing fireproofing spray after 1970, it is undisputed they continued to use an asbestos-containing cement overspray, Mark II, which they contend they were unaware contained asbestos at the time.

At trial, the parties each presented alternative theories on when and where plaintiff was exposed to asbestos. Defendants argued that based on the documentary evidence and plaintiff's own statements, plaintiff could not have been exposed to asbestos at the World Trade Center, because plaintiff did not begin working at the World Trade Center until at least 1972, after Mario & Dibono stopped using asbestos-containing fireproofing spray. Alternatively, plaintiff's counsel argued that plaintiff was exposed to asbestos at the World Trade Center, either because he worked there prior to 1972 when they were still using asbestos containing fireproofing spray or after.

With respect to causation, plaintiff presented four witnesses CIH Pascal, Dr. Frank, Dr. Zhang, and Dr. Markowitz. CIH Paskal, an industrial hygienist, spoke to the consequences of exposure to varying levels of asbestos as well as in his opinion the potency of the level of asbestos present at the World Trade Center. Dr. Frank testified to plaintiff's medical records and the issue of whether plaintiff's smoking caused his lung cancer. Dr. Zhang. Dr. Markowitz.

After a three-month trial, the jury ruled in favor of plaintiff, finding the defendants negligence caused plaintiff's illness. The jury further concluded the defendants acted with recklessness. The Jury awarded plaintiff $13.5 million in damages for past pain and suffering and $15 million in damages for future pain and suffering. The Jury found Tishman 15 percent liable, Mario & Dibono 30 percent liable, and Port Authority 25 percent liable.

Defendants Tishman, Mario & Dibono, and Port Authority now move pursuant to CPLR 4404(a) for an order setting aside the verdict and directing that judgment be entered in defendant's favor on the grounds that the evidence is insufficient as a matter of law, that the verdict is contrary to the weight of the evidence, and in the interest of justice, that plaintiffs'

comments and arguments prejudiced defendant's rights, and that the damages awarded are excessive. Plaintiff opposes.

Standard

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial in limited circumstances. The Court can set aside a verdict where there was inadequate evidence in the record to support the jury's finding, or the verdict was so against the weight of the evidence. (See *Cohen v. Hallmark Cards, Inc.,* 45 NY2d 493, 499 [19781). While these tests are similar, they are distinct standards. *Id.* The former test requires a finding not that the evidence goes against the jury finding, but merely that there was insufficient evidence to come to the jury's conclusion. Alternatively, in. order to find that a verdict is against the weight of the evidence, 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." *Id.*

In making its determination, 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. (*See Szczerbiak v Pilat*, 90 NY2d 553 [1997]). The jury's resolution of disputed factual issues and inconsistencies in witnesses' testimonies is also entitled to deference. (See *Bykowsky v. Eskenazi*, 72 AD3d 590 [1st Dept 2010]). Thus, if "it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." *Id.*

Discussion

I. Causation

a. Plaintiff's asbestos exposure

With respect to its finding that plaintiff was exposed to asbestos while working at the World Trade Center, the Court finds the jury's determination was not so against the weight of the evidence or utterly irrational to warrant a judgment notwithstanding the verdict. Assuming the jury credited plaintiff's testimony and presentation of facts, there was sufficient evidence to support a finding that plaintiff was exposed to asbestos while working as a steamfitter at the World Trade Center during its inception.

Defendants contend that the social security records and other documentary evidence presented conclusively establish plaintiff was not exposed to asbestos at the World Trade Center, and the jury's finding is therefore wholly irrational and against the weight of the evidence. The Court disagrees.

On direct examination, plaintiff was asked by his counsel to review his prior deposition testimony and interrogatory answers. Plaintiff testified that his prior answers contained inaccuracies with respect to the exact dates he started working at the World Trade Center. Specifically, he testified that while he previously stated he started working at the World Trade Center in 1972, he now believes he began working there prior to 1970. Plaintiff attributed the inconsistencies to the passage of time and a difficulty remembering details from over fifty years ago. Plaintiff also testified to starting at the World Trade Center around the time he bought his current home, in 1970. Moreover, he recalled starting at the project site during the building of the towers foundations the towers and testified that attended a celebration for the topping off the

North Tower. In support of this, plaintiff offered into evidence a commemorative keychain he stated he received from a representative of Tishman at the party.

On cross-examination, defendants challenged plaintiff's version of events. The defense entered in evidence the deed to plaintiff's home, which listed the date of purchase as 1972, not 1970. In response, plaintiff stated that he misremembered the year he bought his house and maintained that though he may not accurately remember when he purchased his house or when he started working at the World Trade Center, he is certain he began working as a steamfitter for Sands and Courter, a contractor at the World Trade Center, in 1970. The defense also showed plaintiff his social security records and his union records from the period in question. The social security records did not list any employment in the third and fourth quarters of 1970, 1971, 1972, 1973. The union records reflect he started working at Sands & Courter in April of 1970. In response, plaintiff testified that regardless of the contents of the documents presented by the defense, be started working at the World Trade Center in 1970.

It is for the jury, not the Court, to make factual and credibility determinations. (*See Bykowsky v. Eskenazi*). Here, despite defendants' contentions, the jury was not required to disregard plaintiff's testimony and determine that the defendants' documentary evidence conclusively established plaintiff was not at the World Trade Center until 1972. First, it would not be wholly irrational for the jury to find plaintiff credible and believe his testimony that the records were inaccurate. Given that the records were from 1970, over fifty years ago and before technological advances in recordkeeping, it would not be irrational for the jury to infer that the records may be inaccurate as to specific dates. Furthermore, defendants did not present any witnesses to attest to the record keeping procedures at the social security administration or the general accuracy of such governmental records.

Regardless, the Court does not agree with defendant's characterization that the only way plaintiff could have been exposed to asbestos at the World Trade Center was if he began working there prior to 1970. Despite defendants" arguments, whether the defendants stopped using asbestos containing fireproofing spray, Cafco Type D, in April 1970 is also a question of fact for the jury to determine and they are not required to accept defendants' word for it. Plaintiff testified at length to seeing asbestos in the air each day, being shoveled out windows by defendants' employees and in large garbage bags throughout the construction site. And although plaintiff testified that he could not tell the difference between asbestos containing fireproofing spray and non-asbestos containing fireproofing spray, this again is for the jury to weigh and does not conclusively establish plaintiff was not exposed to asbestos containing fireproofing spray.

Moreover, it was undisputed that even if defendants stopped using Cafco Type D, they used Mark II which contained asbestos. Defendants argued Mr. Petro wouldn't have been exposed to Mark II, however. At trial, Mr. Petro testified that while working at the WTC he worked around the elevator shaft every day where they were being used. Again, it was not so wholly irrational for the jury to believe that Mr. Petro was exposed to Mark II.

The jury had sufficient evidence to make a determination as to plaintiff's exposure and to find their determination that plaintiff's testimony was credible is irrational would undermine the key role of the jury as fact finder. In sum, there were multiple avenues presented at trial with sufficient evidence that Mr. Petro was exposed to asbestos while working at the World Trade Center. Neither Tishman nor Mario & Dibono presented any witnesses to support their version of events.

b. Expert Testimony

Next, defendants argue that pursuant to the standard set forth in *Nemeth*, plaintiff's experts failed to establish plaintiffs' level of exposure with the requisite specificity required to uphold a finding of causation.

In *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), the Court of Appeals established the proximate cause standard for toxic-tort personal-injury actions. The Court held that "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." *Id.* In *Nemeth v. Brenntag N. Am. (183 AD3211 (1st Dep't 2020)]*, the Court expanded on *Parker*, clarifying that due to the difficult nature of quantifying an exact numerical amount of a plaintiff's exposure, plaintiffs do not necessarily need to quantify exposure levels precisely. However, the plaintiff's causation expert must offer a certain level of specificity. It is not sufficient for an expert to simply state that the plaintiff's exposure to a toxin was "excessive" or "significantly higher than others." *Id.* In other words, the expert must avoid vague or conclusory assertions and instead substantiate their conclusions with specific evidence.

The Court finds that here, plaintiff's experts causation testimony satisfies the standard set forth by the Court of Appeals. In *Nemeth*, the expert merely testified that "low levels of asbestos could cause the disease but that there are some exposures to asbestos that are trivial and don't increase a person's risk of developing mesothelioma and that mesothelioma is an essential health event means that plaintiff's mesothelioma itself shows causation to asbestos, exposure." *Id.* The Court found the expert at issue "failed to provide any foundational basis for her opinion that exposure to asbestos at a level analogous to decedent's was shown to be a substantial factor in causing mesothelioma of any kind. Her causation testimony attempted to rely on a comparison to

the exposure levels of subjects of other studies but failed to provide a specific comparison sufficient to show how the levels of plaintiffs exposure level related to those of the other subjects." (*Nemeth*).

Alternatively, here, plaintiff presented four expert witnesses, CIH Paskal, Dr. Frank, Dr. Zhang, and Dr. Markowitz. CIH Paskal, an industrial hygienist, discussed the levels of asbestos exposure associated with spray fireproofing, which he testified range from 100 million fibers per cubic meter to 100 fibers per cubic centimeter. He then testified that Mr. Petro's range of exposure to spray fireproofing while working at the World Trade Center would have been at the higher range. He also testified that exposure to asbestos at even at levels of 1 fiber per CC for an entire working year would increases the risk of lung cancer.

Dr. Frank, a board-certified physician and professor of public health, testified to the extreme toxicity of asbestos, asbestos' link to lung cancer and plaintiff's medical history. In part, Dr. Frank testified that asbestos fibers are microscopic so if a person visualizes asbestos dust in the air they are dealing with high levels of asbestos. He also explained how asbestos fibers in the lung can cause the progression of cancer and that based on his review of plaintiff's medical records, it is his medical opinion that plaintiff suffers from asbestosis and lung cancer. He also testified that based on his review of the evidence, plaintiff was exposed to nonambient levels of asbestos at the World Trade Center and that his exposure to asbestos spray fireproofing alone, to the exclusion of other exposures, would be sufficient to cause plaintiff's lung cancer. With respect to plaintiff's smoking history, Dr. Frank stated that "risk pretty much disappears" to develop lung cancer after a period of time passes since an individual topped smoking, explaining that because the body metabolizes most of the cancer-causing agents in smoking during that

period, the carcinogenicity is weak compared to asbestos, and the abnormalities in lung tissues reverts back to normal looking cells for those who did not continue to smoke.

Dr. Zhang, a board-certified physician and pathologist also testified to the medical consensus that asbestos is a cause of lung cancer, and that based on his review of plaintiff's medical records, radiology reports, and other evidence, he attributed plaintiff's lung cancer to his asbestos exposure. Dr. Markowitz, a board-certified physician specializing in occupational medicine and epidemiology testified that in his medical opinion plaintiff's lung cancer was caused by asbestos exposure, not smoking. Dr. Markowitz based his testimony on his medical training as well as his own peer reviewed studies on asbestos-related lung cancer.

In contrast, defendants presented one expert witness, Dr. Safirstein, who testified that in his medical opinion, plaintiff's smoking history was a significant contributing factor in plaintiff's development of lung cancer.

In support of their motion for a judgment notwithstanding the verdict, defendants argue, among other things, that plaintiff's expert testimony is insufficient because New York courts no longer allow plaintiffs to show causation with expert testimony regarding the "visible dust theory." However, while the Court of Appeals has rejected the "visible dust theory" as the sole basis for causation, the Court has not ruled that experts cannot testify to the consequences of visible asbestos dust, but rather found that plaintiff's need to support causation with more than just testimony that they saw asbestos fibers in the air. Moreover, defendants cite no case law where the court has overturned a finding of causation solely because the plaintiffs offered the visible dust theory as well as more specific and qualitative data. Here, the combined testimony of plaintiff's experts provided the jury with both quantitative and qualitative "scientific expressions"

linking plaintiff's actual exposure to asbestos to a level known to cause lung cancer, satisfying the standard under *Nemeth*.

Moreover, a jury may entirely reject the testimony of experts and the credibility of such witnesses, the weight and sufficiency of their evidence are for the jury, and not for the court to decide (*Lipson v Bradford Dyeing Assn of L.S.A*, 266 App Div 595 [1st Dept 1943]). To be against the weight of the evidence, a verdict must be palpably wrong. Here, the jury's finding of causation was supported by multiple qualified experts who testified at length to plaintiff's levels of exposure while working at the World Trade Center and testified that plaintiff's significant asbestos exposure, not smoking, caused his lung cancer. The jury's determination is not palpably wrong, and therefore must stand.

II. Negligence

Tishman contends that even if plaintiff established causation, plaintiff failed to establish that Tishman had control over plaintiff and the use of asbestos, and therefore Tishman cannot be held liable. Tishman argues the evidence showed that Tishman did not choose, specify, or supply the asbestos-containing materials, did not use the asbestos-containing materials, and did not direct or control Mario and Dibono's use of asbestos containing materials, nor did Tishman have notice at any time that plaintiff was exposed to asbestos-containing fireproofing. Moreover, Tishman contends the evidence at trial showed that Tishman acted reasonably on the job site and Tishman acted responsibly when it was made aware of unsafe conditions.

In contrast, plaintiff argued that Tishman's contract specifically stated that Tishman should supervise, direct, and coordinate the progress of various contractors, ensuring compliance with plans and specifications. Plaintiff also presented previous deposition testimony of a

Tishman represented who, when asked about Tishman's role, indicated that Tishman provided supervision on the project site.

At trial, the defendants presented evidence showing that the Port Authority, Tishman, and Mario & Dibono participated in preconstruction safety meetings and later engaged the New York State Department of Labor to assess the conditions at the World Trade Center job site. Tishman introduced evidence that in September 1969, it advised the Port Authority to prohibit Mario & Dibono from performing work unless they made a conscientious effort to contain the fireproof material within the building's envelope. Tishman also urged the Port Authority to reconsider any contrary directives. Additionally, Tishman provided evidence that a representative met with doctors in the same year and followed their recommendations. Further, Tishman submitted letters and documents from the late 1960s and early 1970s reflecting positive feedback from medical professionals about Tishman's commitment to on-site safety. The plaintiff, however, argued that these meetings highlighted the defendants' negligence, asserting that despite being aware of asbestos hazards, they continued using the material. The plaintiff presented testimony indicating that the bags containing asbestos at the project site had warnings about the dangers of asbestos and that protective gear was advised for their own employees, not for contractors like the plaintiff.

The Court cannot conclude that the jury's finding lacked any logical basis. It is the jury's prerogative to weigh the evidence and make credibility determinations. The jury was not obligated to accept the defendants' evidence as credible. It is not unreasonable for the jury to infer that the defendants might have merely pretended to comply with safety measures or that, despite some efforts, their overall response could still be deemed negligent. By defendants' own admissions, they were aware of the hazards of asbestos as they sought out advice from medical

professionals and the asbestos companies. The jury was presented with various narratives and factual presentations, and their decision was based on their assessment of the evidence and the credibility of the witnesses. In the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. (*See McDermott v. Coffee Beanery, 9 AD3d 195 [1st Dep't 2004]*).

III. Recklessness

Under New York law, a personal injury defendant found responsible for 50% or less of a plaintiff's injury cannot be held jointly and severally liable for more than its proportionate share of that plaintiff's non-economic loss unless one of the exceptions in CPLR § 1602 applies.

CPLR § 1602(7) provides a narrow exception where a defendant is found to have caused the plaintiff's injury "by having acted with reckless disregard for the safety of others." CPLR § 1602(7). One acts with reckless disregard for the safety of others when one has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." (*In re New York City Asbestos Litig.*, 89 NY2d 955

The level of culpability required to show reckless disregard is a "gross negligence standard, requiring that (one) has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" *Id.* In *Maltese*, the Court of Appeals found that evidence of a defendant's "general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury" was insufficient to support a finding of reckless disregard for the safety of workers. *Id.*

Here, plaintiff presented the jury with evidence that the defendants had actual knowledge of the dangers associated with asbestos use and failed to provide adequate safety materials or proper warnings. The jury's finding of recklessness is supported by rational inferences and evidence presented at trial. Despite the defendants' claims that they followed all relevant medical guidelines available at the time, plaintiff provided evidence that the industry was well aware of the severe toxicity and hazards to asbestos workers. Additionally, although defendants asserted that they completely ceased using asbestos-containing spray fireproofing after 1970, the jury was not obligated to accept this claim as credible. They were within their rights to instead believe the plaintiff's testimony and infer that asbestos was present throughout his tenure at the project site. The jury's conclusion that defendants acted with reckless disregard for the plaintiff's safety was, therefore, not irrational.

IV. Trial Determinations

Lastly, defendants argue that regardless, a new trial is required due to various erroneous trial decisions by the Court.

a. Comparative Negligence

Defendants argue the Court erred by failing to omit a charge for comparative fault on the verdict sheet. The Court disagrees. At the time of trial, defendants failed to demonstrate any evidence that plaintiff was aware of the hazards of smoking and the risk of illness. Moreover, the jury was presented with evidence regarding plaintiff's smoking habits as well as expert testimony from both sides regarding the relevance of plaintiff's smoking history to his lung cancer diagnosis. The Court reaffirms its decision not to include comparative negligence charge on the verdict sheet.

b. Dr. Castleman

Defendants argue that the Court erred in its decision to allow the testimony of Doctor Barry Castleman. Dr. Castleman is a public health worker in the field of toxic substances control with training in chemical engineering, toxicology, biostatistics, and epidemiology. He received his doctorate from Johns Hopkins School of Hygiene and Public Health and has worked for various governmental bodies, including the Environmental Protection Agency, Occupational Safety and Health Administration, and the World Health Organization.

Defendants argue Dr. Castleman should not have been permitted to testify, arguing that his testimony would mislead and confuse the jury as to the responsibility of defendants by attributing knowledge to the defendants that they allege they did not have. Defendants argue that as Dr. Castleman was allowed to testify at trial, the defendants are entitled to a new trial.

The Court finds it was not an error to permit the testimony of Dr. Castleman. Mr. Castleman testified to "what was known or knowable in the public domain or knowable about the hazards of asbestos in various products regarding the various publications over time, as it relates to public domain, public knowledge." While he provided testimony about general knowledge such as for example, British government knowledge in the 1940s concerning protecting shipyard workers near asbestos products, there is no evidence the jury was not able to understand the context of Dr. Castleman's testimony as speaking to the history of societal/industry awareness on the dangers of asbestos. Moreover, defendants had the right and opportunity to present their own witness or witnesses to controvert Dr. Castleman's testimony. Defendants called no such witnesses.

c. Expert Reports

Defendants argue the Court erred in precluding certain expert reports which discussed plaintiff's exposure to asbestos on other job sites than the World Trade Center. The Court finds defendants arguments unavailing. Plaintiff testified to, and the jury apportioned fault, to defendants who contributed to plaintiff's asbestos exposure at other job sites such as Con Edison Power Plants.

d. Pleadings and Bankruptcy Records

Defendants argued the Court erred in declining to admit into evidence plaintiff's initial complaint, subsequent complaints, and "Bankruptcy Trust Proofs of Claim." The Court finds these arguments unpersuasive for the reasons previously stated. The jury was informed of the plaintiff's potential exposure at other sites during his career, and the plaintiff presented expert testimony to support his position that his exposure at the World Trade Center was a substantial factor in his lung cancer diagnosis. Even if, arguendo, the Court's decision was erroneous, any such error would be deemed harmless.

e. Mark II

The Court finds defendants arguments regarding the Court's decision to allow plaintiff to present evidence on his exposure to Mark II and the question of Mark II exposure on the jury verdict sheet. There was ample evidence presented at trial as to plaintiff's exposure to Mark II. Plaintiff testified that he was in the elevator shafts and other areas where it was undisputed that Mark II was utilized when plaintiff was working at the World Trade Center. Defendants argue plaintiff's expert witnesses only discussed the implication of the spray technique used for Cafco Type D and not Mark II. However, plaintiff's witnesses did not specify that their testimony only pertained to Cafco Type D, not Mark II. Defendants contend that Mark II was applied in a different manner than Cafco Type D, and thus the jury's causation finding as to Mark II is

unsupported. The Court disagrees. The defendants could have presented their own witness to testify to the difference in exposure form the application methods of Mark II. They did not. Counsel's representations regarding the application of Mark II in their moving papers are not evidence and were not presented at trial.

f. Summation

The Court does not find plaintiff's counsel's statements during summation so egregious as to warrant a new trial. Although plaintiff's counsel referred to the defense counsel as "lying" in their presentation of evidence, the Court does not consider these remarks sufficient to justify overturning the jury's determination. While inappropriate, the statements were not so damaging to defendants as to necessitate a new trial. These remarks were expressions of counsel's opinion on the evidence presented by the defendants and were made during summation, not introduced as evidence. This trial included among other evidence, extensive testimony from the plaintiff and substantial expert testimony. There is no indication that the jury was unduly influenced by counsel's summation or that the verdict was based solely on this comment rather than on the entirety of the evidence presented.

To the extent that defendants argue there were other errors by the Court that warrant a new trial, the Court finds these arguments similarly unavailing.

V. Remittitur

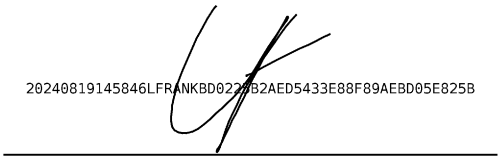
Lastly, defendants argue that if the verdict is maintained, nevertheless, plaintiff's damages were excessive and warrant remittitur. Defendants contend that not only was the jury's verdict well beyond the range of similar awards in lung cancer cases, but here plaintiff was also substantially older at the time of diagnosis and experienced fewer symptoms than similarly situated plaintiffs.

Under CPLR 5501(c), jury verdicts are reviewable where the jury's damage aware "deviates materially from what would be reasonable compensation." CPLR 5501(c). When reviewing a jury verdict under CPLR 5501, the Court "evaluate[s] whether the appealed award materially deviates from comparable awards. Such a method cannot, due to the inherently subjective nature of non-economic awards, be expected to produce mathematically precise results, much less a per diem pain and suffering rate." (*Donlon v. City of New York,* 284 AD2d 13 [2001]).

The Court finds that sufficient evidence supports the jury's verdict that plaintiff suffered extensive pain and suffering. It is undisputed that plaintiff has undergone surgery and extensive chemotherapy. Additionally, plaintiff testified about his struggles with daily tasks, his inability to drive, and his need for assistance with everyday activities. Here, the jury's award did not materially differ from comparative cases. While defendants point to lower verdict amounts in other lung cancer cases, defendants have failed to demonstrate that the verdict here substantially deviates from most recent jury verdicts for similarly situated plaintiffs. Given the deference owed to the jury's determination, the Court does not find remittitur appropriate in this matter.

Accordingly, it is hereby

ADJUDGED that defendants' motions for a judgment notwithstanding the verdict or alternatively for a new trial, are denied.



8/19/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE