SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SUZANNE J. ADAMS** **PART** **39TR**

Justice

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SINAR SEEN,

Plaintiff,

- v -

KAISER GYPSUM COMPANY, INC.,

Defendant.

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INDEX NO. 190225/2018

MOTION DATE N/A

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 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, 579, 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, 641, 642, 643, 644, 645

were read on this motion to/for MISCELLANEOUS.

Defendant Kaiser Gypsum Company, Inc. ("Kaiser"), moves pursuant to CPLR 4404 and § 5501(a) for (1) a judgment notwithstanding the verdict; (2) an order for a new trial; or alternatively, (3) a remittitur of a clearly excessive verdict. Plaintiff opposes the motion. Upon the foregoing documents, and for the reasons set forth hereinbelow, it is ordered that defendant's motion is denied in its entirety.

Background

Decedent Munir Seen commenced this action in August, 2018, for damages sustained due to asbestos exposure, naming as defendants 26 different entities that did not include Kaiser. Prior to Kaiser's involvement in the action, decedent appeared for depositions, including a videotaped trial preservation deposition on March 15, 2019. In April, 2019, Kaiser was impleaded into this action as a third-party defendant; upon answering, it noticed a deposition of decedent, which took

place on June 11, 2019. Decedent passed away on July 3, 2019, at age 69. Plaintiff filed a Fourth Amended Complaint on July 31, 2019, adding Kaiser as a direct defendant.

Kaiser remained as the sole defendant in this matter when it was tried in this court in July 2022. The principal claim at trial was that Kaiser was negligent in the use of asbestos and failure to warn of the alleged hazards of asbestos within their joint compound, which allegedly caused the decedent's mesothelioma. The jury returned a unanimous verdict for plaintiff and awarded damages in the amount of $15,000,000 for past pain and suffering, allocating 70% of the fault to Kaiser and 30% to a settled party.

Legal 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, where the verdict is contrary to the weight of the evidence or in the interest of justice. In order to find that a verdict is against the weight of the evidence, the court must determine that 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 N.Y.2d 493, 499 (1978). 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.* at 499).

A jury verdict should not be set aside as against the weight of the evidence "unless the jury could not have reached its verdict on any fair interpretation of the evidence," and "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses." *Desposito*

v. City of New York, 55 A.D.3d 659, 660-61 (2nd Dep't 2008). The jury's resolution of disputed factual issues and inconsistencies in witnesses' testimonies is also entitled to deference. *Bykowsky v. Eskenazi*, 72 A.D.3d 590 (1st Dept 2010), *lv. denied* 16 N.Y.3d 701 (2011).

Discussion

A. Judgment Notwithstanding the Verdict

Plaintiff's experts testified at trial, in sum, that the decedent's exposure in the course of his employment to joint compound manufactured by Kaiser was a substantial and contributing factor to his contracting mesothelioma, as the product contained talc and was contaminated with an unknown amount of fibrous, amphibole asbestos. Kaiser maintains that plaintiff's expert proof at trial in this regard was defective and insufficient as a matter of law, citing the holding of, *inter alia*, *Nemeth v. Brenntag N.A., Inc.*, 38 N.Y.3d 336 (2022) ("*Nemeth II*"). The Court of Appeals in *Nemeth II* reversed the First Department (*Nemeth v. Brenntag N.A., Inc.*, 183 A.D.3d 211 (1st Dep't 2020) ("*Nemeth I*"), finding that the "plaintiff's proof failed as a matter of law to meet our test for proving causation in toxic tort cases." *Nemeth II,* 38 N.Y.3d at 342. It reaffirmed its requirements finding causation in such cases, quoting its holding in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006): "[i]t is well-established 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)." *Nemeth II,* 38 N.Y.3d at 342-43 (quoting *Parker*, 7 N.Y.3d at 448). The Court of Appeals in *Nemeth II* held that the plaintiff's experts' opinions lacked an adequate foundation and were invalid; these experts included Drs. Jacqueline Moline and David Rosner, both medical doctors who also testified on behalf of plaintiff at the trial in this action. Kaiser argues that Drs. Moline and Rosner offered the same insufficient basis for causation here as they

did in *Nemeth I*, and that industrial hygiene expert Steven Paskal's testimony was essentially the same as that proffered by Sean Fitzgerald in *Nemeth I*, also rejected in *Nemeth II*.

Nemeth II, and the recently decided *Matter of New York City Asbestos Litig.*, 207 A.D.3d 415 (1st Dep't 2022) ("*Olson*"), both involved plaintiffs who alleged that their mesothelioma was the result of exposure to cosmetic talcum powder products. In *Nemeth II*, the Court of Appeals found that the basis for Dr. Moline's opinion that the decedent's exposure to the contaminated talcum powder was a substantial contributing factor in causing her mesothelioma "did not meet our requirements for establishing exposure to a toxin in an amount sufficient" to cause the mesothelioma. 38 N.Y.3d at 344. The Court held that the "glove box" test relied upon by Dr. Moline – in which Mr. Fitzgerald shook a vintage sample of the talcum powder at issue to determine the number of fibers released into a box to determine if that asbestos was releasable – "failed to provide any scientific expression linking decedent's actual exposure to asbestos to a level know to cause mesothelioma." *Id.* at 346. The Court noted that Mr. Fitzgerald could not estimate the amount of asbestos that would be inhaled based on this test, and determined that "his identification of the number of released fibers and description of those fibers as of 'an inhalable size' [did not] establish causation by demonstrating that decedent's exposure was comparable to similar exposures proved to be causally related to the development of mesothelioma." *Id.*

The facts and circumstances of the instant matter, and the testimony presented to the jury at trial, differ significantly from those in *Nemeth II*, such that a judgment notwithstanding the verdict is not warranted. Initially, the court notes that *Nemeth II* did not change or heighten the requirements for establishing causation; rather, it rejected the experts' opinions as "insufficient" – as failing to establish that the plaintiff was exposed to sufficient levels of asbestos so as to cause mesothelioma. The experts in *Nemeth II* relied on a glove-box simulation in an attempt to estimate

the plaintiff's exposure to cosmetic talc in her home. Here, in contrast, plaintiff's expert proof was sufficient to establish causation: it was grounded in historical industrial hygiene data and decedent's testimony as to his actual contact with Kaiser's joint compound. Dr. Moline reviewed studies reporting actual measurements from work with joint compounds and exposure levels associated with different tasks, gathered from real-world monitoring of people doing actual drywall work. TR2 179:23 – 180:15, 181:2-20, 182:19-23 – 183:23. She provided estimated numerical levels of exposure to the joint compound for the tasks decedent performed, per his testimony, based on the historical data. TR 183:23 – 184:19. She reviewed and relied upon Mr. Paskal's report, whose numerical exposure estimates for decedent's work with joint compound, including Kaiser's, comport with the historical data. TR 188:7- 9, 189:4-12.

Plaintiff, through its experts, then demonstrated that decedent's exposure to Kaiser's joint compound was sufficient to have caused his mesothelioma. The experts relied on studies showing increased incidents of mesothelioma among drywall workers with exposures similar to decedent's exposures, and they showed how decedent's exposures exceeded those reported levels shown to be sufficient to cause mesothelioma. *See, e.g.*, TR 195:15 – 196:17, 215:20 – 216:13.

In short, plaintiff's expert's opinions as presented at trial met the standards of *Nemeth II* and its predecessors, and there was a sufficient factual basis for the jury's determination that exposure to Kaiser's product was a contributing factor in decedent's contracting mesothelioma. As such, there is no basis for this court to grant a judgment notwithstanding the verdict.

B. New Trial

Kaiser cites three reasons why it should be granted a new trial. First, Kaiser maintains that decedent's *de bene esse* deposition was improperly admitted for use at the trial. CPLR 3117(a)(3)(i) provides that, if "the witness is dead," his deposition "may be used by any party for

any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules." The *de bene esse* deposition, taken on March 15, 2019, was held prior to Kaiser's being impleaded into the action as a third-party defendant, so the notice requirement – understood to be *advance* notice of a deposition – could not have been met. *See* Siegel, N.Y. Prac. § 358 (5th ed., 2014). However, once it joined the action, Kaiser had the opportunity to depose decedent before his death, and indeed did so several months after the videotaped deposition, apparently choosing to forego the videotaping of its own deposition. In light of its having had the opportunity to cross-examine decedent before his death, Kaiser has failed to establish that it was prejudiced by the admission of the *de bene esse* deposition at trial. *See, generally, Bianchi v. Federal Ins. Co.*, 142 Misc. 2d 82 (Sup. Ct., N.Y. Cty. 1988).

Kaiser next maintains it was prejudiced by the court's preclusion of its cross-examining plaintiff's expert, Dr. Moline, regarding her opinion about the specific other companies identified in her expert report. Dr. Moline's direct testimony at trial pertained solely to specific causation as it related to Kaiser. At the time she finished testifying, Kaiser had not laid any foundation for proving the elements needed to apportion fault to those other companies. The preclusion of cross-examination of Dr. Moline was in keeping with First Department holdings regarding the scope of such questioning, particularly *In re New York City Asbestos Litig. (Idell)*, 164 A.D.3d 1128, 1129 (1st Dep't 2018), which is directly on point. Moreover, Kaiser was in no way prevented from asserting an apportionment defense at trial. Accordingly, a new trial on these grounds is not warranted.

Finally, Kaiser argues that plaintiff "ambushed" it with their talc contamination theory, which it contends was not disclosed pursuant to CPLR § 3101(d)(1)(i). This argument is without merit. Plaintiff's § 3101 disclosure dated January 10, 2019, annexed to the opposing papers as

Exhibit 21, set forth, *inter alia*, that Dr. Moline would be testifying that decedent's mesothelioma was caused by his exposure to asbestos-containing products, including all forms of asbestos "as well as any and all fibrous asbestiform minerals and materials including, but not limited to, talc and industrial talc." Likewise, an exhibit attached to said disclosure containing Dr. Rosner's opinion listed articles supporting his opinion that specifically related to asbestos in talc. *See* Exhibit 22 to the opposing papers. Plaintiff's expert disclosure thus complied with CPLR requirements. Additionally, plaintiff's other disclosure during the course of this litigation gave notice that plaintiff would be introducing evidence of talc as a source of asbestos in Kaiser's joint compound. *See* Exhibits 15, 18, 23, 24, and 25 to the opposing papers. Thus, there is no indication that Kaiser could have been blindsided regarding the topic of talc in its joint compound, justifying a new trial.

C. Remittitur

Pursuant to CPLR 5501(c), the court may review a money judgment to determine whether the award is excessive or inadequate and whether a new trial should be granted, unless the parties stipulate to the entry of a different award. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." Siegel, N.Y. Prac. § 407 (5th ed., 2014). In deciding whether an award deviates materially, 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 [citation omitted]." *Reed v. City of New York*, 304 A.D.2d 1, 7 (1st Dep't 2003), *lv. denied,* 100 N.Y.2d 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[citation omitted]." *Ortiz v. 975 LLC*, 74 A.D.3d 485, 486 (1st Dep't 2010).

In support of its request for a remittitur of the jury's award in this action, Kaiser cites to numerous mesothelioma cases in which the trial court or the First Department reduced the damage award, including *In re New York City Asbestos Litig.* ("*Peraica*"), No. 190339/2011, 2013 WL 6003218 (Sup. Ct., N.Y. Cty. Nov. 6, 2013), and *In Re New York City Asbestos Litig.* ("*Macaluso*"), 173 A.D.3d 529, 530-31 (1st Dep't 2019). In *Peraica*, the damages were reduced to $4,250,000 for approximately 17.5 months of past pain and suffering, or roughly $242,857 per month. In *Macaluso*, after the damages were reduced by the First Department, the plaintiff stipulated to a $4,000,000 damage award for approximately 15 months of pain and suffering, or roughly $266,667 per month. Meanwhile, greater damage awards have been sustained by the courts. For example, in *In re New York City Asbestos Litig.*(*D'Ulisse*), 16 Misc. 3d 945 (Sup. Ct., N.Y. Cty. 2007), this court upheld an award of $10,000,000 for past pain and suffering, representing approximately $300,000 per month. The court in *In re New York City Asbestos Litig.* (*Koczur*), Index No. 122340/1999 (Sup. Ct., N.Y. Cty. 2011) sustained an award of $6,000,000 for approximately five and half months of pain and suffering (or around $1,000,000 per month), while the court in *In re New York City Asbestos Litig.* (*McCarthy*), Index No. 100490/1999 (Sup. Ct., N.Y. Cty. 2011) upheld an $8,000,000 verdict for 24 months of pain and suffering (approximately $333,000 per month).

The jury in this action awarded plaintiff the total amount of $15,000,000 for the decedent's 43 months of pain and suffering, which is approximately $348,847 per month and within the range of awards as cited above. As such, and in light of the deference that New York courts traditionally

accord a jury's deliberation in a subjective analysis of pain and suffering, the court does not find a basis for remittitur in this action.

Conclusion

Accordingly, it is hereby

ORDERED that defendant Kaiser's motion is denied in its entirety.

This constitutes the decision and order of the court.

3/15/2023
DATE

SUZANNE J. ADAMS, 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