

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1


Index Number : 190028/2014
COONEY, GEORGE
vs
AMCHEM PRODUCTS, INC.,
Sequence Number : 004
TRIAL DE NOVO

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for post-trial relief
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-F | No(s) 1
Answering Affidavits — Exhibits 1-5 | No(s) 2
Replying Affidavits Exhibits G-I | No(s) 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the decision spread upon the record on July 7, 2017 (transcript attached).

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



Dated: 7/28/17

_____, J.S.C.

HON. MARTIN SHULMAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 1

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GEORGE COONEY,

Plaintiff,

- against -

INDEX NUMBER:
190028/14

AMCHEM PRODUCTS, INC., BORG-WARNER CORPORATION,
CATERPILLAR, INC., CERTAINTIED CORPORATION,
CUMMINS ENGINE COMPANY, INC., DANA COMPANIES,

Defendants.

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60 Centre Street
New York, New York
July 7, 2017

BEFORE:

HONORABLE MARTIN SHULMAN, Justice

APPEARANCES:

WEITZ & LUXENBERG
Attorney for the Plaintiff
760 Broadway
New York, New York 10003
BY: DANNY R. KRAFT, JR., ESQ., Of Counsel
PIERRE A. RATZKI, ESQ., Of Counsel

HOLWELL, SHUSTER & GOLDBERG, LLP
Attorney for the Defendant
750 Seventh Avenue, 26th Floor
New York, New York 10019
BY: JAMES M. MCGUIRE, ESQ., Of Counsel
DANIEL M. SULLIVAN, ESQ., Of Counsel

MONICA HORVATH
SENIOR COURT REPORTER

1 Proceedings

2 THE COURT: Good morning, everybody.

3 MR. KRAFT: Good morning, Your Honor.

4 MR. RATZKI: Good morning, Your Honor.

5 MR. SULLIVAN: Good morning, Your Honor.

6 MR. MCGUIRE: Good morning, Your Honor.

7 THE COURT: I thank counsel who have come on
8 short notice this morning to accommodate the Court in an
9 effort to resolve or dispose of Caterpillar Inc.'s,
10 4404(a) motion to dismiss on a variety of grounds.

11 As stated off the record, in an effort to
12 foster judicial economy and move things along, it was
13 the Court's considered judgment to render a bench
14 decision, rather than devote a great deal of time to
15 writing an opinion here. I think it best serves the
16 parties in this case.

17 That said, because this transcript is the
18 Court's decision based on different comments or opinions
19 that I may make during the course of oral argument, I
20 requested and obtained consent of counsel to allow the
21 Court to reread the transcript for that portion of the
22 transcript of the Court's colloquy preferably to correct
23 typographical errors and things of that nature.

24 I will not in any way change or modify any of
25 the comments, arguments, statements by respective
26 counsel on this matter.

1 Proceedings

2 Bear in mind, oral argument is not what counts.
3 What counts are the motion papers, the trial transcript,
4 and the evidence that was submitted, all that is the
5 record if an appeal is taken goes up. And all that is
6 what my decision will be predicated on, notwithstanding
7 how creative, clever and charming, the arguments are at
8 this point.

9 That said, let's sort of hit the ground running
10 with Mr. Sullivan addressing what I think might be one
11 of the easier issues to address as we go through the
12 different arguments seriatim.

13 MR. SULLIVAN: Certainly, Your Honor, so --

14 THE COURT: So, I opened the door.

15 Let's talk about the Article 16 issue, first.

16 MR. MCGUIRE: That is basically mine.

17 I thought Your Honor was beginning with
18 causation.

19 THE COURT: No. There is no particular order of
20 importance.

21 MR. MCGUIRE: Okay.

22 James McGuire, for the defendant Caterpillar
23 Inc.

24 With respect to the Article 16 issue, as Your
25 Honor will recall, the sole ground that was, you know,
26 raised at trial was basically the contention that the

1 Proceedings

2 other manufacturers of the forklifts and the
3 asbestos-containing products should not be on the
4 verdict sheet for Article 16 purposes. Because there
5 weren't any hypothetical questions asked of the
6 causation expert for the plaintiff with respect to those
7 entities.

8 And, you know, our position is basically that
9 that is just a red herring. Because the -- Mr. Cooney
10 testified that he was exposed to the forklifts of the
11 other manufacturers in the exact same way. He said he
12 couldn't distinguish them in any way. His exposure to
13 their forklifts, and their asbestos-containing products
14 in any -- it wasn't in any way different. He said a
15 forklift, is a forklift, is a forklift.

16 And, so, our point is that the jury could not
17 reasonably or rationally have accepted that Caterpillar,
18 was liable without, without finding that the other
19 parties, that Mr. Skelly sought to have included on the
20 verdict sheet were also liable.

21 THE COURT: Mr. McGuire, two points or rather a
22 question and a point.

23 Correct me, if I'm wrong, but can an adverse
24 party such as Caterpillar, use an expert on the other
25 side in the affirmative to satisfy your independent and
26 discrete burden to put a particular Article 16 entity on

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