

EXHIBIT B

FILED: NEW YORK COUNTY CLERK 02/24/2017 10:48 AM

NYSCEF DOC NO 680 SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY RECEIVED NYSCEF: 02/24/2017

PRESENT: HON. MARTIN SHULMAN

PART 1

Justice

Frank Gondar,

- v -

INDEX NO. 190079/15

MOTION SEQ. NO. 021

A.O. Smith Water Products, et al.

The following papers, numbered 1 to 5 were read on this post-trial motion:

	Papers Numbered
Notice of Motion - Affidavits - Exhibits A-S	1
Answering Affidavits - Exhibits A-T	2
Replying Affidavits - Exhibits T-Y	3
Supp. Letter Brief in Further Opp.	4
Supp. Letter Brief in Further Support	5

Cross-Motion: ☐ Yes ☒ No

In a December 7, 2016 bench decision and order on the record, this court granted the sole remaining defendant, Burnham LLC's (Burnham) post-verdict motion (CPLR 4404), in part, for remittitur of the June 25, 2016 jury verdict, but *inter alia* upheld the verdict as to the jury finding Burnham 25% liable for plaintiff, Frank Gondar's pleural mesothelioma, an asbestos-related disease. Plaintiff was then alive.

Based on a Fourth Department decision issued two weeks after the verdict (*In re Eighth Jud. Dist. Asbestos Litig. [Pienta v A.W. Chesterton Co.]*, 141 AD3d 1127 [4th Dept 2016]), and in the absence of any controlling precedent to the contrary, this court must grant Burnham's post-verdict motion to set aside that portion of the jury verdict which found Burnham had acted with reckless disregard for the plaintiff's safety. Because this court "used the charge set forth in the Pattern Jury Instructions, i.e., PJI 2:275.2, [then in use prior to the 2017 Edition of the Pattern Jury Instructions - Civil, this was in error as] that charge does not accurately reflect the standard set by the Court of Appeals in [*Matter of New York City Asbestos Litig. (Maltese)*], 89 NY2d 955, 956-957 (1997)], . . . [and] in effect reduced plaintiff's burden of proof on . . . [his] claim that [Burnham] acted with reckless disregard for . . . [his] safety. . . ." (bracketed matter added). *Pienta*, 141 AD3d at 1128. Accordingly, it is

ORDERED that the branch of Burnham's post-verdict motion for remittitur is granted setting aside the jury verdict on discrete damage awards for past and future pain and suffering and granting a new trial on the issue of damages unless, within ten days after service of a copy of this decision and order with notice of entry, plaintiff's administratrix executes a stipulation agreeing to decrease the jury's aggregate award for pain and suffering from \$22 million to \$7 million; and it is further

ORDERED that the branch of Burnham's post-verdict motion is granted setting aside the jury verdict's finding of recklessness and granting Burnham a new trial on the issue of Burnham's alleged recklessness, unless plaintiff's administratrix executes a stipulation agreeing to withdraw or discontinue the recklessness claim; and it is further

ORDERED that the remaining branches of Burnham's post-verdict motion are denied in their entirety as more fully set forth on the record (transcript attached).

Dated: February 10, 2017

Martin Shulman, J.S.C.

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

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

-----X
FRANK GONDAR,

Plaintiff,

-against-

Index No.
190079/15

AO SMITH WATER PRODUCTS, et al,

Defendants.

-----X
60 Centre Street
New York, New York
December 7, 2016

B E F O R E:

HONORABLE MARTIN SHULMAN,
JUSTICE

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VINCENT J. PALOMBO
OFFICIAL COURT REPORTER

PROCEEDINGS

THE COURT: Before the Court is a post-verdict motion by Burnham seeking, among other branches of relief, an order vacating the verdict on various grounds and a new trial and/or remittitur.

In support of that motion, Burnham submitted the affirmation of Mr. Bain, as well as a motion consisting of Exhibits A through F, as well as T through Y, one includes a memorandum of law, which is part of the record.

In opposition, I have the affirmation in opposition by Mr. Dymond, which consists of Exhibits A through R, and accompanying that opposition is Mr. Dymond's memorandum of law.

There was a further reply memorandum submitted by Burnham, as well as an October 27, 2016, letter with Exhibit tabs A through C, apprising the Court of a trilogy of Appellate Division decisions, (i.e. the Peraica, Sweberg and Hackshaw decisions) to assist the Court in addressing, if at all, the remittitur branch of Burnham's motion.

Off the record.

(Discussion held off the record.)

(Case set aside; later recalled.)

THE COURT: I have outlined the papers, did I fairly cover the papers that are the subject of this

PROCEEDINGS

motion?

MR. DYMOND: Yes.

THE COURT: So during the oral argument I may ask you to speak, I may ask questions, and/or just simply begin talking.

So, here's what we know. Essentially, the scope of the plaintiff's work from 1953 to about 1973 involved constructing finished basements. And in the scope of that work, Mr. Gondar testified to doing framing work, sheetrocking, where he constantly used joint compound and mixing same, and then applying three coats. It was described as a very dusty process.

He described doing electrical work where he installed a lot of outlets, which implicated Litolier and Progress products.

He described plumbing work.

He described painting.

He described installing floor tile, including the Amtico, Azrock and Kentile brand names.

He described installing Homasote fire retardant board used around boilers.

He described using roof shingles manufactured by Certainteed, and he described using DAP caulk around windows.

Essentially, for purposes of this motion, and

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