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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CYNTHIA S. KERN
J.S.C.

PRESENT:

PART 55

Justice

Index Number : 190374/2014
GERITANO, VINCENT A.
vs
A.O. SMITH WATER PRODUCTS
Sequence Number : 011
POST JUDGMENT OTHER

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 10/19/16

CSK, J.S.C.
HON. CYNTHIA S. KERN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION ANSWERED IN PART OTHER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
IN RE: NEW YORK CITY ASBESTOS LITIGATION
-----X

SANDRA GERITANO, Individually and as Executrix
Of the Estate of VINCENT ANTHONY GERITANO,
deceased,

Index No. 190374/2014

DECISION/ORDER

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion
for : _____

Papers

Numbered

| | |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits..... | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Defendant Burnham LLC ("Burnham") has filed the present post-trial motion pursuant to CPLR § 4401 and § 4404 for a directed verdict or an order setting aside the verdict and directing that judgment be entered in favor of Burnham, or in the alternative, for a new trial, or in the alternative, for remittitur of the jury verdict. For the reasons set forth below, Burnham's motion is granted in part and denied in part.

In or around October 2014, decedent Vincent Anthony Geritano (hereinafter referred to as "Mr. Geritano" or "decedent") instituted this asbestos product-liability action alleging that he

developed mesothelioma as a result of his exposure to asbestos-containing products manufactured, supplied or distributed by the defendants. Following Mr. Geritano's death on February 16, 2015, his wife, plaintiff Sandra Geritano ("Mrs. Geritano"), filed a First Amended Complaint as executrix of the Mr. Geritano's estate adding a claim for wrongful death.

At the time the trial commenced, there were seven remaining defendants, Burnham, Crown Boiler Co., ECR International, Inc., Kohler Co., Columbia Boiler Company of Pottstown, Crane Co. and Sid Harvey Industries, Inc. During the course of the trial, plaintiff settled the case with Columbia Boiler Company of Pottstown, ECR International, Inc., Crane Co., Sid Harvey Industries, Inc. and Kohler and the case went to verdict against Crown Boiler Co. and Burnham only. The jury rendered a verdict of no liability against Crown Boiler Co. and in favor of plaintiff and against Burnham in the amount of \$6.25 million for past pain and suffering. The jury also allocated one percent liability to Sid Harvey Industries, Inc. and nine percent liability to each of the following entities: Burnham, American Radiator Co., Columbia Boiler Company of Pottstown, Compudyne Corporation, individually and as successor to York-Shipley, Inc., Crane Co., ECR International, Inc. f/k/a Dunkirk Radiator Corporation and as successor by merger to the Utica Companies, Inc., Oakfabco, Inc., individually and as successor-in-interest to Kewanee Boiler Corporation, Kohler Co., Peerless Industries, Inc., Weil-McLain, a division of Marley-Wylain Company and Zurn Industries, LLC, individually and as successor-in-interest to Erie City Iron Works. Additionally, the jury found that Burnham did not act with reckless disregard for the safety of Mr. Geritano.

Plaintiff testified at his deposition regarding his exposure to Burnham boilers. He testified that he was exposed to asbestos from various products and equipment while he worked

as a mechanic's apprentice and mechanic for Kleen Heat Oil Company, ABC Fuel and Bayside Fuel Company from June 1962 to June 1965. Specifically, Mr. Geritano testified that when he worked as an apprentice mechanic for Kleen Heat Oil Company, he was exposed to asbestos from removing the jackets of boilers, breaking down the chambers and cleaning up the debris. He also claimed asbestos exposure from breaking off the inspection plates with a screwdriver and re-patching the area by mixing a powder of asbestos and applying it with a trowel. Mr. Geritano testified that when he worked at ABC Fuel he was exposed to asbestos while servicing residential oil burners and inspecting boilers. He claimed asbestos exposure from opening the inspection plates and resealing them with powdered asbestos. Mr. Geritano further testified that when he worked at Bayside Fuel Company, he was exposed to asbestos while removing residential and commercial boilers. Specifically, he claimed asbestos exposure from removing and building chambers, checking inspection plates, resealing the doors and cleaning up after his work. During his deposition, Mr. Geritano identified Burnham as well as ARCO, Weil-McLain, Peerless, Kewanee, Columbia, Kohler, York Shipley, Crown, Crane, Utica, Cleaver Brooks and Erie as the manufacturers of the boilers he encountered during his career. Mr. Geritano also testified that while he was working with such boilers, he saw "lots of visible dust."

Burnham makes a number of arguments in support of its motion. It argues that (1) it is entitled to a directed verdict or judgment notwithstanding the verdict because plaintiff's expert opinion was insufficient as a matter of law to establish specific causation; (2) the jury verdict should be set aside, a new trial should be ordered, or in the alternative, the jury verdict should be remitted because plaintiff's counsel made improper and misleading statements during his summation concerning the jury's formulation of damages award; (3) the jury verdict should be

set aside, a new trial should be ordered, or in the alternative, the jury verdict should be remitted because the jury verdict deviated materially from what is reasonable; and (4) the jury verdict should be set aside or a new trial should be ordered because Burnham was denied its right to a fair trial based on this court's consolidation of this case for trial with two other cases.

Pursuant to CPLR § 4404(a), "upon a motion of any party or on its own initiative, a court may set aside a verdict . . . and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence, [or] in the interest of justice." The standard for setting aside a verdict is very high. The Court of Appeals has held that a verdict may be set aside only when "there is simply no valid line of reasoning and permissible inferences" which could have led to the conclusion reached by the jury. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). The First Department has held that a verdict "will not be set aside unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence." *Pavlou v. City of New York*, 21 A.D.3d 74, 76 (1st Dept 2005). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial. See *Motichka v. Cody*, 279 A.D.2d 310 (1st Dept 2001). Where the case presents conflicting expert testimony, "[t]he weight to be accorded the conflicting testimony of experts is 'a matter peculiarly within the province of the jury.'" *Torricelli v. Pisacano*, 9 A.D.3d 291, 293 (1st Dept 2004).

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