SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Index Number : 190415/2012
BROWN, HARRY E.
vs.
BELL & GOSSETT COMPANY
SEQUENCE NUMBER : 018
RENEWAL

INDEX NO. 190415/12
MOTION DATE
MOTION SEQ. NO. 018

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 464-491

Answering Affidavits — Exhibits ____ | No(s). 493-493

Replying Affidavits ____ | No(s). 495

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 3/12/15

BARBARA JAFFE, J.S.C.
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

PHYLLIS BROWN, as Administratrix of the Estate of HARRY E. BROWN, and PHYLLIS BROWN, Individually,

Plaintiff,

- against -

BELL & GOSSETT COMPANY, *et al.*,

Defendants.

----------x

Index No. 190415/12

Mot. seq. no. 018

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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Weitz & Luxenberg, PC
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212-558-5500

For defendant Con Edison:
Timothy M. McCann, Esq.
Consolidated Edison
4 Irving Pl.
New York, NY 10003
212-460-2164

By notice of motion, plaintiff administratrix moves for an order granting leave to reargue and/or renew her opposition to defendant Consolidated Edison Company of New York, Inc.'s post-trial motion for an order setting aside the jury verdict rendered against it, and upon renewal and reargument, vacating the decision and order dated August 29, 2014, and denying Con Edison's motion.

In moving for leave to renew, plaintiff offers portions of the full appellate record in two decisions on which I relied in my opinion, claiming that I "may not have had access to" them, and that as a result, I misconstrued both decisions. (NYSCEF 465). In moving for leave to reargue, plaintiff claims that I misapprehended certain appellate decisions, and erroneously reduced the award for loss of consortium. She also seeks modification and vacatur of that part of my order holding that she waived any defect in Con Edison's motion. (*Id.*).

I. MOTION FOR LEAVE TO RENEW

A. Decision

In my decision, I held, in pertinent part, that "absent legally sufficient evidence demonstrating, as a matter of law, that Con Edison supervised or controlled Brown's work at Ravenswood, defendant has sustained its burden of proving that the jury could not have reached its verdict on the issue of Con Edison's liability pursuant to Labor Law § 200 on any fair interpretation of the evidence." (NYSCEF 466). I specified as follows:

> Squarely on point here is *Matter of New York City Asbestos Litig. (Tortorella)*. There, the plaintiffs alleged that Con Edison was liable for Tortorella's mesothelioma pursuant to Labor Law § 200 based on Tortorella's exposure to visible asbestos dust at Con Edison's Astoria powerhouse, which emanated from leaks in the building's ducts and coverings. In opposition to Con Edison's motion for summary judgment dismissing the claim against it, the plaintiffs argued that Con Edison could be held liable for failing to maintain a safe work area, observing that asbestos dust permeated the air when Tortorella was there, that only Con Edison could have taken precautions to ensure the safety of workers in its plant, and that Tortorella did not use asbestos-containing products in his work at the premises. Then, the plaintiffs added, by supplemental opposition, that Tortorella was exposed to asbestos through his own electrical work handling asbestos-containing products, and asserted that Con Edison supervised and controlled the work by providing him and his co-workers with asbestos-containing materials, by overseeing and correcting the work, and by furnishing specification MP 5620 R-2, reflecting that Con Edison retained supervision and control over workers, including the ability to reject materials or work not in compliance with drawings or specifications. The motion court denied Con Edison's motion, finding that Con Edison had general control over Tortorella's work and other work that was being performed on the premises, and had a duty to provide a safe place to work. (Sup Ct, New York County, June 14, 2005, Freedman, J., index No. 100297/02).
>
> On appeal, the Appellate Division, First Department, reversed and dismissed the Labor Law § 200 claim against Con Edison, observing that the asbestos exposure at issue "would have resulted from work done by insulation contractors or [Tortorella]" that was ongoing when Tortorella was there. The Court held that:
>
> > [t]here is no evidence that Con Edison exercised supervisory control over the work of either the insulation contractors or [the plaintiff] or that Con Edison coordinated the work of the various trades . . . Nor is there any evidence that the alleged asbestos exposure resulted from a workplace condition created by, or

known to, Con Edison, rather than from the contractors' work methods.

(25 AD3d 375 [1st Dept 2006]).

Likewise, in *In re Philbin v A.C. and S., Inc.*, the Appellate Division, First Department, dismissed the plaintiff's Labor Law § 200 claim against Con Edison which was based on allegations that Philbin had been exposed to asbestos while cutting material at a Con Edison facility and that Con Edison's specifications established its supervision and control over the plaintiff's work. The Court found that there was no evidence that Con Edison had supervised or controlled Philbin's work, or that the exposure arose from a workplace condition created by or known to Con Edison rather than from the contractor's own work methods. (25 AD3d 374 [1st Dept 2006]).

(NYSCEF 466).

B. Contentions

Although plaintiff acknowledges that counsel's argument to the motion court on behalf of the plaintiff in *Tortorella* was partly based on the same specification (MP 5620 R-2) in issue here, she now proffers the record on appeal in that case, claiming that the specification is not annexed (NYSCEF 476), and that therefore, the evidence presented to the trial court and to the Appellate Division does not mirror the evidence before the jury here and thus, cannot be squarely on point (*id.*). Plaintiff levels the same allegation with respect to *Philbin*. (NYSCEF 465).

In opposition, Con Edison argues that as it had relied on both appellate decisions in its pre-trial motion for summary judgment, in its motion for a directed verdict during trial, and in its post-trial motion, the proffered records on appeal do not constitute new facts of which plaintiff could not or should not have been aware when she opposed its post-trial motion. Con Edison thus claims that plaintiff offers no reasonable excuse for not including the records on appeal in her opposition. In any event, it maintains that plaintiff's assertion that the specification in issue here was not in issue in *Tortorella* or in *Philbin* is false, as the law firm representing plaintiff here represented the plaintiffs in *Tortorella* and in *Philbin*. Con Edison also argues that plaintiff

offers no authority for the proposition that a contract specification requiring the use of an asbestos-containing product constitutes evidence of control of the means and methods of the work performed sufficient to prove supervision and control within the meaning of Labor Law § 200. Thus, it argues that the alleged new evidence would not change my prior determination. (NYSCEF 493).

In reply, plaintiff maintains that she had no reason to reference the *Tortorella* or *Philbin* records on appeal in her opposition to Con Edison's post-trial motion because Con Edison only cited them as cases that were dismissed for insufficient evidence of supervision and control, without reference to specifications, and thus she could not have anticipated that I would examine the records on appeal for my decision. (NYSCEF 495).

C. Analysis

Pursuant to CPLR 2221(e), a motion for leave to renew must be based on new facts not offered in the prior motion that would change the prior determination, and must contain a reasonable justification for failure to present such facts. Although a motion to renew is generally based on newly discovered facts "that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice." (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *Sirico v FGG Prod., Inc.*, 71 AD3d 429, 433-434 [1st Dept 2010]). Even so, the Supreme Court lacks discretion to grant renewal where the moving party does not offer a reasonable justification for failing to present the new facts on the original motion. (*Sobin v Tylutki*, 59 AD3d 701 [2d Dept 2009]; *see also Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013]).

Although Con Edison cited both *Tortorella* and *Philbin* in its motion to set aside the

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