

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Phyllis Brown, as admn'x of the estate
of Harry Brown, + Phyllis Brown, Individually,
Bell + Gossett Company, et al.

INDEX NO. 190415/12
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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/12/17

BARBARA JAFFE, 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
In Re: NEW YORK CITY ASBESTOS LITIGATION
-----X

This Document Relates To:

Index no. 190415/12

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

DECISION AND ORDER

Plaintiff,

-against-

BELL & GOSSETT COMPANY, *et al.*,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiffs:
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At issue here is what percentage of liability should be allocated to defendant Consolidated Edison Company of New York (Con Edison) following a jury verdict finding it partially liable for the death of Harry Brown, plaintiff's decedent whose death was proximately caused from exposure to asbestos. The parties submit competing judgments.

I. BACKGROUND

In her complaint, plaintiff advanced a claim against Con Edison pursuant to Labor Law § 200, and stated in her pleading that "having sustained a 'grave injury' as defined in Section 11 of the Workers' Compensation Law, the limitations on liability set forth in Article 16, at CPLR 1601(1), do not apply, by virtue of CPLR 1602(4), to the extent of the equitable share of

plaintiff's employer, against whom plaintiff is barred from asserting a cause of action because of the applicability of the Workers' Compensation Law." (NYSCEF 538).

At trial, plaintiff proved that between 1965 and 1966, Brown worked at Con Edison's Ravenswood powerhouse while employed by non-party Robert A. Keasbey Co. (Keasbey), and that between 1959 and 1964, he worked for another entity, Asbestos Construction, and other employers and at other worksites and other times where and when he was exposed to asbestos-containing products manufactured by entities including Keasbey, for whom he also worked at other locations during the 1970s.

Based on these facts, Con Edison sought to include Keasbey on the verdict sheet as an article 16 entity not only in its capacity as a manufacturer of asbestos-containing products but also as a contractor that employed workers who exposed Brown to asbestos while he worked nearby when he was not employed by Keasbey. As the parties had already agreed to list Keasbey on the verdict sheet as a manufacturer and given Con Edison's failure to raise the issue of Brown's so-called bystander exposure in a timely fashion, I denied its request. At no time did any party assert that the inclusion of Keasbey on the list of article 16 entities as a manufacturer of asbestos-containing products was barred by the Workers' Compensation Law (WCL). Keasbey thus appears on the verdict sheet solely in its capacity as a manufacturer of an asbestos-containing product for the purpose of apportionment.

The jury was duly instructed as to Con Edison's liability pursuant to Labor Law § 200, and on the verdict sheet, it answered the following questions in the affirmative:

- (1) was Brown exposed to asbestos at Con Edison's Ravenswood powerhouse?
- (2) did Con Edison exercise supervision and control over workers at the powerhouse?

- (3) did Con Edison fail to exercise reasonable care to make the powerhouse reasonably safe?
- (4) was Con Edison's failure to exercise reasonable care to make the powerhouse reasonably safe a substantial contributing factor in causing Brown's injuries?

The jury was also duly instructed that the defendants bear the burden of proving that the article 16 entities sold, manufactured and/or used defective products which were a substantial contributing factor in causing Brown's injury, and was asked to answer the following questions on the verdict sheet and move on to each subsequent question upon answering either "yes" or "no" to the prior question:

- (1) Was Brown exposed to asbestos from products made, sold, distributed and/or used in connection with products or equipment by any of the [article 16 entities]?
- (2) If yes, did any of the [entities] fail to exercise reasonable care by not providing an adequate warning to Brown about hazards of asbestos?
- (3) If yes, were these [entities'] failures to provide an adequate warning a substantial contributing factor in development of Brown's mesothelioma?

The jury was then duly directed to apportion liability among the defendants it found liable, including Con Edison and any non-party entities, including Keasbey, that it found liable. It found that Con Edison was 30 percent liable, Keasbey 35 percent liable, and two other entities were liable for the remaining 35 percent.

Following an appeal on other grounds, plaintiff submitted a proposed judgment in which she asserts that in addition to its 30 percent liability, Con Edison should also be held liable for Keasbey's 35 percent liability; Con Edison submitted a proposed counter-judgment which caps its liability at 30 percent. (NYSCEF 537, 542).

II. APPLICABLE LAW

Pursuant to CPLR 1601(1),

[n]otwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . .

However, the limitations set forth in section 1601 do not

apply to claims under the workers' compensation law or to a claim against a defendant where claimant has sustained a "grave injury" as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which any person may be held liable.

(CPLR 1602[4]).

Thus, the equitable share of a defendant for non-economic loss, even if its liability is found to be fifty percent or less, is not reduced by the relative culpability of another defendant or entity where a claim is made that a grave injury as defined in WCL § 11 was sustained if that defendant or entity cannot be sued by virtue of the workers' compensation law.

For a party to avoid a reduction of the liability of a defendant or entity under CPLR 1602(4), it must both "allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies." (CPLR 1603).

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