SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 190324/2020

MOTION DATE 04/28/2025, 04/28/2025, 04/28/2025

MOTION SEQ. NO. 012 013 014

JAMES PETRO,

Plaintiff,

- v -

AERCO INTERNATIONAL, INC.,AIR & LIQUID CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC.,ARMSTRONG INTERNATIONAL, INC.,ARMSTRONG PUMPS, INC.,ATLAS COPCO, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CHICAGO PNEUMATIC, ATWOOD & MORRILL COMPANY, AURORA PUMP COMPANY, BORG-WARNER MORSE TEC LLC,CARRIER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC.,SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CLEAVER BROOKS COMPANY, INC.,CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,COURTER & COMPANY INCORPORATED, CRANE CO., ELLIOTT TURBOMACHINERY CO, ELECTROLUX HOME PRODUCTS, INC.,INDIVIDUALLY, AND AS SUCCESSOR TO TAPPAN AND COPES-VULCAN, FLOWSERVE US, INC.,SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC.,NORDSTROM VALVES, INC.,EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO CHICAGO PUMP COMPANY, NORTHERN PUMP COMPANY, AND PEERLESS PUMP COMPANY, FORT KENT HOLDINGS, INC.,F.K/A DUNHAM BUSH, FOSTER WHEELER LLC,GARDNER DENVER, INC, GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INC.,GRINNELL LLC,HONEYWELL INTERNATIONAL, INC.,F/K/A ALLIED SIGNAL, INC. / BENDIX, HONEYWELL INTERNATIONAL, INC.,IMO INDUSTRIES, INC.,ITT CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO BELL & GOSSETT, KENNEDY VALVE MFG. CO. INC.,AND HOFFMAN STEAM TRAPS, JENKINS BROS., INC.,KAISER GYPSUM COMPANY, INC.,KOHLER CO., LENNOX INDUSTRIES, INC.,MARIO & DIBONO PLASTERING CO., INC.,MILWAUKEE VALVE COMPANY, INC.,MINNESOTA MINING & MANUFACTURING COMPANY, A/K/A 3M COMPANY, NASH ENGINEERING COMPANY, PSEG LONG ISLAND LLC,INDIVIDUALLY AND AS SUCCESSOR TO THE LONG ISLAND LIGHTING COMPANY, RESEARCH-COTTRELL, INC.,N/K/A AWT AIR COMPANY,

DECISION + ORDER ON MOTION

RILEY POWER, INC.,SLANT/FIN CORPORATION, SPIRAX SARCO, INC, INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, SPX COOLING TECHNOLOGIES, INC.,INDIVIDUALLY AND AS SUCCESSOR TO MARLEY COOLING TECHNOLOGIES AND MARLEY COOLING TOWERS, TACO, INC.,TISHMAN LIQUIDATING CORP., TISHMAN REALTY & CONSTRUCTION COMPANY, TREADWELL CORPORATION, TURNER CONSTRUCTION COMPANY, UNION CARBIDE CORPORATION, VELAN VALVE CORPORATION, WARREN PUMPS LLC,WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, YORK INTERNATIONAL CORPORATION, YUBA HEAT TRANSFER, LLC., ZURN INDUSTRIES, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ERIE CITY IRON WORKS, RIVERBAY CORPORATION, ECR INTERNATIONAL, INC.,INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DUNKIRK, DUNKIRK BOILERS, AND UTICA BOILERS, VIKING PUMPS, LLC,BURNHAM, LLC,THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, REDCO CORPORATION F/K/A CRANE CO.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1068, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1318, 1321, 1322, 1323, 1324, 1325, 1326, 1327

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1069, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1319, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335

were read on this motion to/for SET ASIDE VERDICT.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 1064, 1065, 1066, 1067, 1070, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265,

1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1320, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343

were read on this motion to/for SET ASIDE VERDICT.

Upon the foregoing documents, the motions to set aside the verdict are granted in part and the cross-motions for sanctions are denied.

Background

These motions arise out of a lengthy procedural history centered around the asbestos exposure and subsequent asbestosis and lung cancer of James Petro ("Plaintiff"), who over the course of his long career worked as a steamfitter in the United States Navy and at the World Trade Center.

The Weitz & Luxenberg Asbestosis Cases

In the early 1990s, Plaintiff was diagnosed with asbestosis. He retained the law firm Weitz & Luxenberg, P.C. ("Weitz"), who filed three lawsuits in New York County Supreme Court on his behalf from 1994 to 1998 (the "Weitz Cases"). There was also a fourth case filed in federal court. For each of the Weitz Cases, there were multiple named plaintiffs and defendants. Weitz also filed several bankruptcy trust proofs of claims (the "Weitz Bankruptcy Claims") related to Plaintiff's asbestosis. As would be uncovered later, there were many settlements that arose out of these cases. Several of these settlements were not listed in the interrogatory responses in the present proceeding or otherwise disclosed before trial.

This Lung Cancer Proceeding

In 2020, Plaintiff was diagnosed with lung cancer, and as represented by his current counsel Meirowitz & Wasserberg, LLP ("Meirowitz"), filed this underlying proceeding. Among the named defendants were Mario & DiBono Plastering Co., Inc., Tishman Realty and Constuction Co., Inc., and the Port Authority of New York and New Jersey (collectively, the

"Defendants"). Prior to trial, Defendants were given copies of the complaints filed in the Weitz Cases. Meirowitz also handed over to Defendants all bankruptcy trust proof of claims that had been given to them by Weitz, for a total of 6 trusts. In January of 2023, counsel for Mario DiBono requested a list of "the settled entities in this case", a list that was provided to Defendants. Trial in this matter began in July of 2023 and centered largely on Plaintiff's exposure at the World Trade Center. On August 28, 2023, the jury returned a verdict with specific findings as to apportionment of liability and a damages award of $28 million.

The Post-Trial Discovery and Ruling

This proceeding has seen substantial motion practice and activity arising out of the post-trial discovery. Relevant for these current motions, post-trial discovery uncovered a set of fifty-four bankruptcy trust claims (the "Bankruptcy POCs") that were filed on behalf of Plaintiff in October of 2023 that had not previously been disclosed. Meirowitz represented that these placeholder claims had been filed by their bankruptcy team for the purposes of preserving the statute of limitations and had been filed without consulting with the litigation team. The Bankruptcy POCs contained information about Plaintiff's possible exposures, but did not contain a sworn statement by Plaintiff. The Bankruptcy POCs were revoked by counsel for Plaintiff upon being made aware of them by counsel for Defendants. Plaintiff has stated that he has no interest in pursuing any lung cancer claims with bankruptcy trusts. They filed a proposed judgment reflecting a settlement credit for 17 additional tortfeasors with whom Plaintiff released a future lung cancer claim.

Defendants filed a series of motions seeking a judgment notwithstanding the verdict and new trial or remittitur, based on a failure by Meirowitz to disclose the Bankruptcy POCs. These motions were denied in their entirety and are currently on appeal in the First Department. Then

the Defendants filed more motions seeking to force Plaintiff to file claims with the relevant bankruptcy trusts. The Court issued an order (the "March Order") that held in part that Plaintiff could not be forced to pursue bankruptcy trusts that he might be eligible for, simply in order to provide a set-off for Defendants. The Court found that the potential for a windfall or double recovery was adequately protected against by NYCAL rules that prohibit a plaintiff from recovering from bankruptcy trusts unless certain rules regarding filing timelines and disclosure were complied with. In the course of further post-verdict discovery and motion practice, Weitz then provided a further 35 settlements (the "Weitz Settlements") originating from the asbestosis Weitz Cases. Prior to this, the Weitz Settlements were not disclosed prior to Plaintiff's current counsel and were not disclosed to Defendants or sought by them.

Standard of Review

CPLR § 5015(a)(2) permits a court to relieve a party from a judgment or order rendered on the grounds that there is "newly-discovered evidence which, if introduced at trial, would probably have produced a different result." A party moving under this provision must meet a "heavy burden" of showing that such evidence could not have been discovered earlier with due diligence." *Matter of Monique S. v. Oswald S.*, 68 A.D.3d 525, 525 [1st Dept. 2009]. CPLR § 5015(a)(3) likewise permits a party to be relieved from a judgment or order due to "fraud, misrepresentation, or other misconduct of an adverse party."

Discussion

Defendants have moved pursuant to CPLR § 5015(a)(2)-(3) or alternatively, CPLR § 2221(e), to set aside the verdict, dismiss the case, or order a new trial. Plaintiff has cross-moved for sanctions. For the reasons that follow, a new trial on the issue of apportionment and damages will be ordered, and the cross-motions for sanctions will be denied.

The March Order Does Not Fully Forestall These Motions

As a preliminary matter, Plaintiff has argued, both in opposition to the motions and in support of their cross-motions, that these motions are mooted by previous rulings by this Court, including the March Order. The Court notes that the Defendants have in their papers reiterated previous arguments about why they feel that Plaintiff should be forced to submit lung cancer bankruptcy trust claims or accept a setoff for claims that have not been submitted, arguments which the Court rejected in the March Order. To the extent that these motions seek to in essence reargue that position, the Court will not be granting them. But this is not the only form of relief sought in these motions, nor are the Bankruptcy POCs the only basis for the motions. Here, Defendants are seeking to set aside the verdict or order a new trial based on information contained in the Bankruptcy POCs and the Weitz Settlements that were not in their possession prior to trial. Therefore, these motions have not been mooted by prior rulings in this case.

There Is Newly Discovered Evidence Here

As addressed above, CPLR § 5015(a)(2) permits a court to alter a judgment or order due to newly discovered evidence that would have probably produced a different result had it been introduced at trial. The first step of analysis under this prong of the CPLR is determining whether, in fact, there has been newly discovered evidence. Defendants here are pointing to the Bankruptcy POCs and the Weitz Settlements as newly discovered evidence. Plaintiff argues correctly that the filing of the Bankruptcy POCs cannot, in and of themselves, constitute newly discovered evidence. Inherent in the CPLR § 5015 newly discovered evidence standard is the requirement that the evidence was in existence at the time of the trial. *Coastal Metal Corp. v. RJR Mech. Inc.*, 85 A.D.3d 420, 421 [1st Dept. 2011]; *see also Tribeca Lending Corp. v.*

Bartlett, 121 A.D.3d 613, 614 [1st Dept. 2014]. Therefore, the Bankruptcy POC forms do not constitute newly discovered evidence.

But the information *on* the Bankruptcy POC forms does constitute newly discovered evidence. Defendants point to specific identifying information on the forms that would implicate Plaintiff's asbestos exposures in the past. As the New York City Asbestos Litigation ("NYCAL") Coordinating Judge noted in the 2017 Case Management Order ("CMO") decision, asbestos defendants have a substantial interest in bankruptcy trusts because their existence "may lead to evidence that helps a defendant at trial place a bankrupt defendant on a jury verdict sheet." Similarly, while the Weitz Settlements may not have been admissible at trial, the parties involved could have impacted Defendants' litigation strategy regarding other sources of exposure. Defendants have adequately shown that there was newly discovered evidence that was in existence at the time of the trial.

NYCAL Discovery Standards Impact Due Diligence

The next step in a CPLR § 5015(a)(2) analysis is whether the newly discovered evidence could have been discovered earlier through the exercise of due diligence by the Defendants. *See, e.g., Nutmeg Financial Services, Inc. v. Richstone*, 186 A.D.2d 58, 59. Important for this step of the analysis is the context of this trial as an asbestos-related matter. Under the NYCAL CMO, the discovery obligations for asbestos-related lung cancer actions are somewhat different than the standard discovery rules. One requirement is for all plaintiffs to timely respond to a set of interrogatories and document demands. Document request no. 5 is for "[a]ll documents relating to any claim or demand ever made by the plaintiff" for benefits allegedly resulting from illness or injury, including claims against bankrupt entities. Interrogatory no. 29 requires the plaintiff to disclose any tort claims or suits due to medical conditions, and whether such a claim resulted in

settlement and in what amount. It also requires certain information be disclosed about such claims, including the name and nature of the entity that the claim was made against. A new CMO issued in 2017 added deadlines for filing intended bankruptcy trust claims and a further reporting requirement that plaintiffs confer with the court before filing any post-deadline bankruptcy trust claims.

In response to Defendants' arguments that Plaintiff failed to disclose information required by the NYCAL CMO, Plaintiff argues that Defendants should have taken a discovery dispute to the NYCAL Special Master. While this is a tool available to NYCAL defendants, it does not obviate a NYCAL plaintiff's obligation to disclose information relating to asbestos settlements and bankruptcy trust claims. NYCAL plaintiffs are also affirmatively obligated to disclose information about sources of asbestos exposure in other sections of the NYCAL interrogatories. These affirmative disclosure obligations placed on NYCAL plaintiffs necessarily impacts any due diligence analysis under CPLR § 5015. What is ordinary due diligence required by the parties during discovery will be somewhat different for a NYCAL case when compared to, for instance, a trip-and-fall or other tort case.

Plaintiff argues that Defendants could have discovered the Weitz Settlements with due diligence, as they were in possession of the pleadings from the Weitz cases and thus could have used the lists of named defendants to uncover other settlements. But given the affirmative disclosure obligations about prior settlements for NYCAL plaintiffs, Defendants were entitled to some degree to rely on the representations made by Plaintiff. The Defendants have shown that the newly discovered evidence could not have been uncovered by ordinary due diligence.

The Newly Discovered Evidence Could Have Changed the Trial Outcome

The final step of a CPLR § 5015(a)(2) analysis is to determine whether the evidence would have, as the CPLR puts it, "probably [] produced a different result." Or in other words, "[t]here is no requirement that the evidence must, as a guarantee, change the result, but only that it will 'in all probability' produce such a result." *Cizler v. Cizler,* 19 A.D.2d 819, 820 [1st Dept. 1963]. Plaintiff argues that because Defendants did not choose to present evidence against certain other alternative sources of exposure at trial, the knowledge of these new sources would have been immaterial. But what Defendants chose to do with the disclosed entities, some of which they did seek apportionment against, does not necessarily determine what they would have done had the Bankruptcy POCs and the Weitz Settlements been disclosed prior to trial.

Defendants describe the so-called "Big Dusties" of asbestos litigation, some of which were included in the lists of entities and alternative sources of exposure that were not disclosed. These entities were major asbestos producers, and several of the products that it appears were additional sources of exposure for Plaintiff contained amphiboles, which are more likely to cause injury. The disclosure of these newly discovered entities and products would have probably changed the apportionment of liability in the outcome, had they been part of the trial. Because Defendants have established their case under CPLR § 5015(a)(2), the Court has decided that in the interests of justice, the judgment should be altered. While the Court does not wish to set aside the verdict or dismiss the case, the Court does believe that a new trial must be ordered. CPLR § 5015 permits a court to relieve a party from a judgment or order "upon such terms as may be just." Here, all the non-disclosed information is directly relevant to the issue of apportionment. Given the facts of this case, such as the health and age of the Plaintiff, the Court finds that the new trial should be narrowed to the aspects that would have been materially impacted by the newly discovered evidence. Namely, apportionment and damages.

A New Trial Is Also Warranted Under CPLR § 5015(a)(3)

Although the Court does not need to reach the issue of whether a new trial pursuant to CPLR § 5015(a)(3) is warranted here, it will do so briefly in the interest of thoroughness. This provision permits a court to order a new trial due to "fraud, misrepresentation, or other misconduct of an adverse party." Plaintiff cites in their opposition to the standard for proving fraud on the court under CPLR § 3126. *See, e.g., CDR Créances S.A.S. v. Cohen,* 23 N.Y.3d 307, 318 [2014]. The Court largely agrees with Plaintiff that this standard would have been difficult to establish here. Plaintiff's current counsel is hampered in part by what the former law firm choses to produce, and the Court credits the explanations about the Bankruptcy POCs being filed by Meirowitz's bankruptcy department without consulting the litigation group.

But the standard under CPLR § 5015(a)(3) is somewhat different. For this provision of the CPLR, "[a]n omission of material information is sufficient to constitute fraud, misrepresentation, or other misconduct under the statute." *HSBC Bank USA N.A. v. Kantor*, 215 A.D.3d 643, 644 [2nd Dept. 2023]. An omission or misrepresentation under CPLR § 5015(a)(3) is only grounds for vacatur if it would have been material to a jury's verdict. *Ryan v. Zherka*, 140 A.D.3d 500, 500 [1st Dept. 2016]. As addressed above in the analysis under subsection (a)(2), the information contained in the Weitz Settlements and the Bankruptcy POCs would likely have been material to the apportionment aspect of the trial and the verdict. Therefore, the ordering of a new trial is also warranted under CPLR § 5015(a)(3).

The Court Declines to Issue Sanctions

Plaintiff has cross-moved on all three motions, seeking sanctions for the filing of what Plaintiff considers frivolous motions as well as for making what Plaintiff characterizes as inflammatory and unfounded accusations against Plaintiff and his counsel. The Court notes, for

example, that the discussion of Meirowitz's legal advertising in Defendants' papers was irrelevant for the purpose of these motions. But as the Court is granting the motions for a new trial, they cannot be said to have been brought frivolously. Therefore, the Court declines to issue sanctions. Accordingly, it is hereby

ADJUDGED that motions seq. 012, 013, and 014 are granted to the extent that a new trial is ordered as to apportionment and damages only; and it is further

ADJUDGED that the cross-motions on 012, 013, and 014 are denied; and it is further

ORDERED that a new trial be had on the issue of apportionment of liability and damages only.

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7/23/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**