Matter of New York City Asbestos Litig.
2016 NY Slip Op 05064
Decided on June 28, 2016
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on June 28, 2016

No. 85

[*1]In the Matter of New York City Asbestos Litigation.

Ruby E. Konstantin, & c., Respondent,

v

630 Third Avenue Associates, et al., Defendants, Tishman Liquidating Corporation, Appellant.

Kathleen M. Sullivan, for appellant.

Seth A. Dymond, for respondent.

Business Council of New York State et al.; John Crane Inc., amici curiae.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs, and the certified question not answered as unnecessary.

In the 1970s, plaintiff's decedent, Dave John Konstantin, worked as a carpenter at two Manhattan construction sites where defendant Tishman Liquidating Corporation (TLC) was [*2]the general contractor. Konstantin worked in close proximity to other workers who sanded and swept joint compound containing asbestos, and Konstantin was thereby exposed to asbestos dust. In 2010, Konstantin was diagnosed with mesothelioma, and he subsequently endured several surgeries, radiation, and chemotherapy until his death in 2012.

Before his death, Konstantin and plaintiff commenced the present action against TLC, among others. Konstantin's case was assigned along with nine other cases, including *Matter of New York City Asbestos Litigation (Dummitt v A.W. Chesterton et al.)* (— NY3d —, 2016 NY Slip Op __ [decided today]) to an in extremis trial calendar. The 10 plaintiffs, all of whom were represented by the same firm, subsequently requested a joint trial pursuant to CPLR 602 (a). All defendants jointly opposed that motion. Supreme Court ordered that seven of the 10 cases, in which the plaintiffs had developed mesothelioma, would be tried together, and the remaining three cases, in which the plaintiffs had developed lung cancer, would be tried together. Thus, the court's order required the cases of Konstantin and Dummitt, who had both developed mesothelioma, to be tried with five others.

Before trial, however, the other five cases settled, leaving only *Konstantin* and *Dummitt* to be tried together. The jury found TLC 76% liable for Konstantin's injuries and awarded damages. Supreme Court denied TLC's posttrial motion to set aside the verdict in relevant part, holding that the joint trial was not improper, but reduced the jury's damages award (*see* 37 Misc 3d 1206[A], 2012 NY Slip Op 51905[U], *12, *14-16 [Sup Ct, NY County 2012]).

The Appellate Division considered the *Dummitt* and *Konstantin* appeals together (121 AD3d 230 [1st Dept 2014]). TLC contended, among other things, that Supreme Court abused its discretion in holding a joint trial. The Appellate Division determined that the issue was reviewable and concluded that Supreme Court did not err in holding a joint trial (*see id.* at 241-246). The Appellate Division rejected TLC's remaining contentions and

affirmed the judgment (*see id.* at 246-248, 255). Two Justices dissented in *Dummitt* but concurred in the result in *Konstantin*. As relevant here, those Justices would have declined to address TLC's challenge to Supreme Court's pretrial order granting a joint trial on the ground that TLC failed to assemble a proper appellate record and therefore meaningful review of the court's order was impossible (*see id.* at 256-257 [Friedman, J., dissenting in part]). The First Department granted TLC's motion for leave to appeal to this Court, certifying the question whether its order was properly made.

On appeal before this Court, TLC contends that the *Dummitt* and *Konstantin* actions were improperly tried together. To the extent that TLC challenges Supreme Court's pretrial order granting the motion for a joint trial with respect to the seven plaintiffs that had developed mesothelioma, TLC has not satisfied its obligation to assemble an appellate record [*3]that would permit meaningful review of that issue (*see* CPLR 5526). We agree with the Appellate Division Justices who dissented in part that TLC's failure to assemble a proper record prevents us from reviewing Supreme Court's pretrial order (*see* 121 AD3d at 256-257 [Friedman, J., dissenting in part]).

Insofar as TLC argues that *Dummitt* and *Konstantin* were improperly tried together, TLC has failed to preserve that challenge for appellate review. TLC did not specifically challenge the joint trial of the *Dummitt* and *Konstantin* actions until its posttrial motion, which is insufficient to preserve its contention for appellate review (*see generally Grzesiak v General Elec. Co.*, 68 NY2d 937, 939 [1986]).

TLC contends that because it joined all defendants in opposing the plaintiffs' pretrial motion, it was unnecessary for TLC to renew its objection after the five other cases settled. We disagree. In its pretrial order, Supreme Court considered the plaintiffs' motion to try all 10 cases jointly and concluded that seven of those cases, in which the plaintiffs had developed mesothelioma, should be tried together. The court therefore considered whether seven of those cases shared common questions of law or fact (*see* CPLR 602 [a]), and whether the defendants would be prejudiced by a joint trial of all seven (*see generally Matter of Vigo S. S. Corp.*, 26 NY2d 157, 161-162 [1970], *cert denied* 400 US 819 [1970]). If, after five of those seven cases settled, TLC believed that Supreme Court should consider the propriety of a joint trial anew — by conducting a particularized assessment of whether *Dummitt* and *Konstantin* shared common issues of law or fact and of whether defendants would be prejudiced by the two-case joint trial — it was incumbent upon TLC

to object, raise the specific arguments it now asserts with respect to these two cases, and ask the court to conduct that analysis in order to preserve its challenge for appellate review. TLC did not do so, and we therefore cannot consider whether Supreme Court abused its discretion as a matter of law in trying *Dummitt* and *Konstantin* together.

Finally, we reject TLC's contention that the Appellate Division applied the wrong legal standard in assessing whether Supreme Court's reduced damages award deviated materially from reasonable compensation. Neither CPLR 5501 (c) nor CPLR 5522 requires the Appellate Division to expressly compare the damages award in the judgment appealed from with damages awards in other cases in its written decision. In any event, the Appellate Division thoroughly explained its decision to uphold Supreme Court's reduced damages award (*see* 121 AD3d at 255). To the extent TLC contends that the damages award is excessive, we have no power to review that contention (*see Rios v Smith*, 95 NY2d 647, 654 [2001]).

* * * * * * * * * * * * * * * * * *

Order affirmed, with costs, and certified question not answered as unnecessary, in a [*4]memorandum. Judges Pigott, Rivera, Abdus-Salaam, Stein, Fahey and Garcia concur. Chief Judge DiFiore took no part.

Decided June 28, 2016

Return to Decision List