SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER *Justice* PART 30

CAROL E. SAWYER, Individually and as Executrix of the Estate of DONALD F. SAWYER,

Plaintiffs,

- v -

A.C. & S., INC., et al.

Defendants.

INDEX NO. 111152/99

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing, it is ordered that this motion is decided in accordance with the memorandum decision dated September 6, 2011.

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

Dated: Sept 6, 2011

SHERRY KLEIN HEITLER *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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CAROL E. SAWYER, Individually and as Executrix of the Estate of DONALD F. SAWYER,

Index No. 111152/99
Motion Seq. 003

Plaintiffs,

DECISION AND ORDER

-against-

A.C. & S., Inc., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

Defendant Crane Co. moves pursuant to CPLR 5015(a)(4) to vacate this court's June 24, 2011 decision herein (seq. #002), which denied Crane Co.'s motion for summary judgment ("*Sawyer* decision"), on the ground that since the case had previously settled the court lacked jurisdiction to determine the matter. For the following reasons, Crane Co.'s motion is denied.

BACKGROUND

Donald Sawyer was diagnosed with asbestos-related lung cancer in September 1997. He died two months later in November 1997. The underlying action was commenced in 1999 by Carol E. Sawyer, individually and as executrix of the estate of Donald F. Sawyer, to recover for personal injuries allegedly caused by Mr. Sawyer's exposure to asbestos-containing products while working as a plumber at the State University of New York at Oswego. This case was included in the July 2010 FIFO Trial Group and by order dated September 14, 2010 was transferred to Justice Paul Feinman of this court for trial.

On or about February 4, 2011, Crane Co. filed a motion for summary judgment to dismiss this action against it on the ground that it did not manufacture or supply any product used in

conjunction with its valves in respect of which Mr. Sawyer could have been exposed to asbestos. Plaintiffs opposed on the ground that Crane Co. had a duty to warn of the hazards associated with asbestos because it knew, recommended, endorsed, and specified that its valves should integrate and be insulated with asbestos-containing materials. The summary judgment motion was fully submitted to this court on April 5, 2011.

On or about June 6, 2011, during jury selection for the trial of this matter before Justice Feinman, counsel for the parties informally agreed to settle this case. Crane Co., the proponent of the summary judgment motion then pending before this court, did not advise this court that the case had settled. Moreover, the terms of the settlement were neither placed on the record nor filed with the New York County Clerk's Office via stipulation pursuant to CPLR 2104.[1]

Almost three weeks later, and without prior knowledge of the proposed settlement, this court issued the *Sawyer* decision which denied Crane Co.'s summary judgment motion, copies of which were faxed to the parties on June 27, 2011. On authority of *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, (1st Dept 2001), this court found that Crane Co. had a duty to warn of the hazards associated with asbestos because it knew or should have known that its valves would be used in conjunction with asbestos-containing materials. The *Sawyer* decision was entered in the County Clerk's office on June 30, 2011.

On July 20, 2011, Crane Co. filed the instant motion by which it seeks to vacate the *Sawyer* decision, arguing that by reason of the settlement, it had lost its right to appeal from same. Plaintiffs oppose on the ground that Crane Co. has failed to establish any factual predicate for such a motion

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[1] CPLR 2104 provides that, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."

insofar as there is no evidence of a binding stipulation between the parties. Plaintiffs further argue that Crane Co.'s failure to notify the court of the prior settlement agreement between the parties bars it from seeking vacatur on equitable grounds.

DISCUSSION

Pursuant to CPLR 5015(a), a court may vacate a judgment or order on grounds of excusable neglect; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order. In addition to the grounds set forth in CPLR 5015(a), a court may exercise its inherent equity powers to vacate its own judgment "for sufficient reason and in the interests of substantial justice." *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 (2003); *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:11, at 223-24.

Crane Co. argues that since the alleged disposition of the case on June 6, 2011 rendered any issues between the parties moot, the court no longer had jurisdiction over the case when it issued the *Sawyer* decision several weeks later. CPLR 5015(a)(4). Fatal to this assertion, however, is defendant's failure to offer proof that it filed the terms of the agreement with the County Clerk's office and/or paid the requisite filing fee. Crane Co. merely offers an electronic docket sheet which shows that the case was marked "disposed" on June 6, 2011. This is not evidence that the parties entered into an enforceable settlement agreement.

CPLR 2104 provides that a stipulation between parties or their counsel is not enforceable by the court unless it takes one of three forms: (1) an oral agreement between counsel in open court on the record; (2) a writing subscribed by the parties or counsel; or (3) an order entered by the court. These statutory requirements are to be strictly construed. *See Bonnette v Long Island College*

Hosp., 3 NY3d 281, 286 (2004). Not one of these three requirements has been met herein. Insofar as Crane Co. has failed to show that an enforceable settlement between the parties exists, the court could not have been stripped of its jurisdiction of the matter, and on this ground alone Crane Co.'s motion is denied.

The court is also unpersuaded by Crane Co.'s position that it has lost its right to appeal. The First Department decision on which this court relied in the *Sawyer* decision, namely, *Berkowitz*, *supra*, was issued in 2001. Clearly the issue whether Crane Co. should be held responsible for asbestos containing materials used in conjunction with its products by third parties is not novel. Indeed, over the past decade Crane Co. has had many opportunities to re-visit *Berkowitz*, as hundreds of plaintiffs have claimed to have been exposed to asbestos-containing materials used with Crane Co. products. Moreover, in my most recent decision on this issue, *Defazio v A.W. Chesterton*, Index No. 127988/02 (Sup. Ct. NY Co. Aug. 12, 2011), I denied Crane Co.'s motion for summary judgment for the same reasons as discussed in the *Sawyer* decision.

As Crane Co. has provided no evidence of an enforceable settlement stipulation between the parties, and in light of the fact that Crane Co. has not lost its appellate opportunities, this court declines to vacate the *Sawyer* decision.

Accordingly, it is hereby

ORDERED that Crane Co.'s motion to vacate this court's June 24, 2011 decision is denied in its entirety.

This constitutes the decision and order of the court.

DATED: September 6, 2011

SHERRY KLEIN HEITLER
J.S.C.