

**Katechis v Allied Bldg. Prods. Corp.**

Supreme Court of New York, New York County

June 15, 2022, Decided

INDEX NO. 190330/2019

**Reporter**

2022 N.Y. Misc. LEXIS 3712 \*; 2022 NY Slip Op 31926(U) \*\*

**[\*\*1]** AGATHI KATECHIS, Plaintiff, - v - ALLIED BUILDING PRODUCTS CORP., AMERICAN BILTRITE, INC., BIRD INCORPORATED, BURNHAM CORPORATION, CERTAIN-TEED CORPORATION, CRANE CO., DAP, INC., DOMCO PRODUCTS TEXAS, INC., KAISER GYPSUM COMPANY, INC., KAMCO SUPPLY CORP., KOHLER CO., METROPOLITAN LIFE INSURANCE CO., SHERWIN-WILLIAMS COMPANY (THE), UNION CARBIDE CORPORATION, WEIL MCLAIN, BUILDERS FIRSTSOURCE, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO, AND/OR PARENT COMPANY AND ALTER-EGO OF, THE STROBER ORGANIZATION, INC., STROBER BUILDING SUPPLY, THE CONTRACTOR YARD, AND U.S. COMPONENTS, CONTRACTOR YARD (THE), INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE STROBER ORGANIZATION, INC., DYKES LUMBER COMPANY, INC., PROBUILD HOLDINGS, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO AND/OR PARENT COMPANY AND ALTER-EGO OF, THE STROBER ORGANIZATION, INC., STROBER BUILDING SUPPLY, THE CONTRACTOR YARD, AND U.S. COMPONENTS, PROBUILD HOLDINGS LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO AND/OR PARENT COMPANY AND ALTER-EGO OF, THE STROBER ORGANIZATION, INC., STROBER BUILDING SUPPLY, THE CONTRACTOR YARD, AND U.S. COMPONENTS, STROBER BUILDING SUPPLY, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE STROBER ORGANIZATION, INC., STROBER ORGANIZATION, INC. (THE), U.S. COMPONENTS, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE STROBER ORGANIZATION, INC., Defendant.DYKES LUMBER COMPANY, INC., Plaintiff, -against- MANVILLE PERSONAL INJURY SETTLEMENT TRUST, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL

REPORTS.

**Core Terms**

compound, deposition testimony, summary judgment motion, deposition, worksites

**Judges:** **[\*1]** PRESENT: HON. ADAM SILVERA, J.S.C.

**Opinion by:** ADAM SILVERA

**Opinion**

**DECISION + ORDER ON MOTION**

**[\*\*2]** The following e-filed documents, listed by NYSCEF document number (Motion 002) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 139

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is hereby ordered that Defendant Allied Building Products Corp.'s (hereinafter referred to as Allied) motion for summary judgment is denied for the reasons set forth below.

Plaintiff Agathi Katechis individually and as executrix of the estate of Anastasios E. Katechis (decedent) commenced this action claiming personal injuries against Allied due to alleged exposure to **asbestos**. After a left pleural biopsy, decedent was diagnosed with malignant mesothelioma on December 16, 2019. See Notice of Motion, Exh. C. Decedent subsequently died on May 14, 2021. Plaintiff claims decedent was exposed to **asbestos** through joint compound while working for Mamais Construction (hereinafter referred to as Mamais), between 1967 and 1971, as a painter. Decedent testified that the joint compound was manufactured by USG, Kaiser, Georgia Pacific, and

Gold Bond. Decedent's duties would include scraping old walls [\*2] and then using scrapers to apply multiple coats of joint compound, with sanding in between each coat. Decedent further testified that when he worked with the joint compound, there was a lot of dust. Vice President / Corporate Vice President of Allied Building George Jones testified at the time he was working at Allied, the company never used joint compound. Allied contends that they never sold, distributed, manufactured, or otherwise offered any joint compound at the time Decedent was working at Mamais. Conversely, Plaintiff contends that not only did decedent identify Allied as a supplier of the joint compound in which he used to paint, but defendants [\*3] concede that they did not exclusively supply roofing materials. Allied moves for summary judgment and Plaintiff opposes. No reply papers were filed.

Pursuant to [CPLR 3212\(b\)](#), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering [\*3] sufficient evidence to demonstrate the absence of any material issues of fact". This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action'. [Jacobsen v New York City Health and Hosps. Corp., 22 NY3d 824, 833 \(2014\)](#) (internal citations omitted). "The moving party's 'ffailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers". [Vega v Restani Constr. Corp., 18 NY3d 499, 503 \(2012\)](#) (internal emphasis omitted).

In the instant matter, Allied relies upon the deposition testimony of Mr. Jones regarding the impossibility of Allied delivering joint compound to decedent's worksite. Mr. Jones also testifies that during his employment as vice president and corporate vice president between 1969 to the early 1970's, the main nature of Allied's business was roofing. Plaintiff argues that "[a]gainst the cogent testimony of Mr. Katechis that Allied supplied **asbestos**-containing joint compound to his worksites between 1967 and 1972, Defendant's assertion that it did not [\*4] sell joint compound during Mr. Katechis's period of exposure is based exclusively on the 21-year-

old deposition, testimony of its corporate representative, George W. Jones, given in an unrelated case [\*4] venued in New Jersey. But under New York law, this deposition is not competent evidence, admissible-in-form, and thus cannot be used against Plaintiffs herein." Affirmation In Opposition To Defendant Allied Building Products Corp.'s Motion For Summary Judgment, p. 5-6, ¶ 14 (internal citations and emphasis omitted). Pursuant to [CPLR § 3117\(a\)\(2\)](#), "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with. . . the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence". Here, Plaintiff raises the issue [\*5] that Mr. Jones' deposition testimony is not admissible for Allied since they are not an adversely interested party at the time the deposition testimony was taken. Furthermore, the use of Mr. Jones' deposition testimony is clearly inadmissible herein as plaintiffs were neither noticed for such deposition nor present during it. See [CPLR § 3117\(a\)\(3\)](#). Allied proffers no evidence to the contrary. Thus, Mr. Jones' deposition cannot be relied upon to meet the heavy burden Allied bears to establish its *prima facie* case.

Moreover, assuming *arguendo* Allied met its burden, Plaintiff provides sufficient evidence to raise a genuine issue of material fact. "The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint". [Dollas v W.R. Grace and Co., 225 AD2d 319, 321 \(1st Dept 1996\)](#). In the instant matter, "Mr. Katechis testified that Allied supplied **asbestos**-containing joint compound to his worksites to which he was exposed between 1967 and 1972". Affirmation In Opposition, *supra*. [\*5] at p.8, ¶ 20. Furthermore, it is undisputed that "Mr. Katechis identified Allied as one of just four suppliers of all of the joint compound that was used at his many worksites. He observed the Allied name on [\*6] the trucks as they delivered the joint compound to his worksites". *Id.* at p.4, ¶ 10 (internal citations omitted). Conversely, Allied argues that "Mr. Katechis was not able to recall any detail about the supply companies' trucks, including as to what they looked like, the size, color —only that one of the trucks said Allied on it." Memorandum Of Law In Support Of

Defendant Allied Building Products Corp.'s Motion For Sumniary Judgment, p. 4. "The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact". *Dollas v W.R. Grace and Co.*, *supra*, at 321. Here, Allied's contentions do not refute the sufficiency of decedent's testimony, since the adequacy of testimony are a genuine issue of fact that must be resolved by a jury. As genuine issues of material facts exist, Allied's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

**6/15/2022**

**DATE**

/s/ Adam Silvera

**ADAM SILVERA, J.S.C.**

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