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| <b>Katechis v Allied Bldg. Prods. Corp.</b>  |
| 2022 NY Slip Op 31840(U)   |
| June 10, 2022  |
| Supreme Court, New York County   |
| Docket Number: Index No. 190330/2019   |
| Judge: Adam Silvera  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA**

**PART**

**13**

*Justice*

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**INDEX NO.** 190330/2019

AGATHI KATECHIS,

**MOTION DATE** 12/09/2021

Plaintiff,

**MOTION SEQ. NO.** 001

- 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.,

**DECISION + ORDER ON MOTION**

Defendant.

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DYKES LUMBER COMPANY, INC.

Third-Party  
Index No.

Plaintiff,

-against-

MANVILLE PERSONAL INJURY SETTLEMENT TRUST

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 142

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is hereby ordered that Defendant Dykes Lumber Company Inc.'s, (hereinafter referred to as Dykes) 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 Dykes due to alleged exposure to asbestos. Plaintiff claims decedent was exposed to asbestos while working for Mamais Construction (hereinafter referred to as Mamais) between 1967 and 1971, as a painter. According to decedent's expert reports, it was concluded with reasonable degree of medical certainty that decedent has a pleural malignant mesothelioma. *See* Notice of Motion, Exh. H, Report of David Y. Zhang, MD, dated August 5, 2020. The alleged asbestos exposure resulted from a pre-mixed joint compound from the brands U.S. Gypsum, Kaiser Gypsum, Gold Bond, and Georgia-Pacific. Furthermore, it is purported that the pre-mixed joint compound was purchased by Mamais from Dykes. During decedent's deposition, he described his work duties as painting with joint compounds and working around other people who used joint compounds. Decedent further testified that when both he and his fellow colleagues sanded the joint compounds, "[i]t was like a three-time process, so the first time we would put it on we'd let it dry. We would have to scrape it off. The dust would come out. The second time we would do the same thing and then we would have to scrape it off, put it back on again. And then the third time

the same way. We did this three times. The fourth time is when we would go in and paint it.” See Affirmation In Opposition To Defendant Dykes Lumber Company, Inc.’s Motion For Summary Judgment, Exh. A, Depo. Tr. Of Anastasios Katechis, p. 36, ln. 19 - p. 37, ln. 2. Plaintiff contends that decedent’s exposure was chronic and fierce during his employment at Mamais. Conversely, Dykes contends that the exposure was *de minimus*. Dykes moves for summary judgment contending that proximate causation cannot be proven. Plaintiff opposes, and 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 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 ‘[f]ailure 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).

Dykes utilizes the opinion of their industrial hygiene expert, Neva Jacobs, who “opines that the Deceased was not exposed to a sufficient dose of asbestos that would have increased his risk of developing mesothelioma.” Memorandum Of Law In Support Of Motion For Summary

Judgment By Dykes Lumber Company, Inc., p. 4. Namely, Ms. Jacobs states that “[t]he Deceased’s potential cumulative exposure to asbestos from his work with joint compound does not exceed a working lifetime at the current 8-hour time-weighted average ACGIH guideline or OSHA standard. Further, his potential cumulative exposure to asbestos from this work is below a lifetime cumulative exposure to asbestos from breathing ambient air.” *Id* (internal emphasis omitted). However, Plaintiff contends that “relying exclusively upon the affidavit of an industrial hygienist who is plainly not qualified to opine on medical causation, Defendant has plainly failed to establish its prima facie burden as the movant.” Affirmation In Opposition To Defendant Dykes Lumber Company, Inc.’s Motion For Summary Judgment, p. 7, ¶ 21. In *Smalls v Gould*, 40 AD3d 281, 282 (1st Dept 2007), the Court found that defendants failed to provide expert affidavits to survive a summary judgment motion. The Court stated the following:

Plaintiff commenced this action against the Laboratories defendants. . . as a result of an alleged erroneous diagnosis of tuberculosis (TB). The Laboratories did not make a prima facie showing of entitlement to judgment as a matter of law with a tender of sufficient evidence to eliminate any material issues of fact. They failed to submit expert affidavits to establish that their procedures for testing and processing TB samples did not deviate from accepted laboratory practice and were not a contributing cause of plaintiff’s injuries. The deposition testimony of their employees merely explained the procedures utilized, and did not establish the adequacy of those procedures. Accordingly, their motions were properly denied regardless of the sufficiency of plaintiff’s opposition papers.” (internal citations omitted).

In *Smalls*, Defendants did not meet their prima facie burden as they failed to tender sufficient affidavits from medical experts. Similarly, the Court finds that Dykes failed to proffer affidavits with sufficient qualifications to tender medical evidence to establish that there was no proximate causation.

Furthermore, the Appellate Division, First Department in *Nonnon v City of New York*, 88 AD3d 384, 396 (1st Dept 2011) held that “so long as plaintiffs’ experts have provided a

scientific expression of plaintiff's exposure levels, they will have laid an adequate foundation for their opinions on specific causation." (internal citations and quotations omitted). Dr. Moline provides an eight-page report detailing in depth the cause of Decedent's illness, in which she concludes that "[h]is regular and frequent exposure to asbestos from each of the brands of joint compound identified above was a substantial contributing factor to the development of his mesothelioma. There is no cure for his mesothelioma, which appears to have progressed on radiological evaluations, and his prognosis is poor." Plaintiff's Affirmation In Opposition, *supra.*, Exh. I., Report of Jacqueline Moline, MD, dated November 24, 2020. Thus, Plaintiff has sufficiently laid a foundation as to causation, such that a genuine issue of triable fact has been established.

In addition, "[i]t is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation). Where we depart from the Appellate Division is that we find it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community." *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 (2006). In response, Dykes contends that "[a]lthough it is not always necessary for a plaintiff to quantify exposure levels precisely, the Court of Appeals has never dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect." Memorandum of Law In Support, *supra.*, at p. 6 (internal citations, brackets, and quotations omitted). However, the well settled burden on a motion for summary judgment rests upon Dykes "to unequivocally establish that its product could not have contributed to the causation of

plaintiff's injury" *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Only then would the burden shift to Plaintiff to show conflicting evidence to raise a triable issue of fact.

Finally, Plaintiff further argues "[t]o the extent that this Court deems it provident to consider Ms. Jacobs's industrial hygiene opinion at all, it is, at best, conflicting evidence to the expert affidavit of Plaintiff's medical causation expert, Jacqueline Moline, M.D." Affirmation In Opposition, *supra.*, at p. 9, ¶ 26. Even assuming *arguendo* Dykes has demonstrated a prima facie case, Plaintiff has provided two medical reports (Dr. Zhang and Dr. Moline) opining that there is sufficient causation. As such, a triable issue of fact has been raised.

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.

6/10/2022  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: