

<b>Kittelstad v A.O. Smith Water Prods. Co.</b>
2018 NY Slip Op 31852(U)
July 26, 2018
Supreme Court, New York County
Docket Number: 190186/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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ARLENE KITTELSTAD, as Administratrix  
for the Estate of ROBERT S. KITTELSTAD,  
and ARLENE KITTELSTAD, Individually,

Index No. 190186/2013

Plaintiff

- against -

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff seeks damages for the decedent Robert Kittelstad's injury and death from lung cancer due to exposure to asbestos during 1968 to 2001 at various sites throughout New York City while he worked as an insulator. Although Kittelstad died before being deposed in this action, in his earlier personal injury action for pleural disease and in actions by his co-workers Michael O'Reilly and Thomas McNamara, Kittelstad previously testified regarding his exposure to asbestos through his work.

Defendant Fairbanks Company now moves for summary judgment dismissing the complaint and all cross-claims against Fairbanks Company, C.P.L.R. § 3212(b), based on the absence of evidence that any Fairbanks Company product contributed to Kittelstad's exposure to asbestos. Specifically, Fairbanks Company maintains that the testimony of Kittelstad's co-worker William Keith fails to demonstrate that any Fairbanks Company product contributed to that exposure. In opposition, plaintiff maintains that

Kittelstad was exposed to Fairbanks Company's valves while working at Indian Point Nuclear Facility as an insulator from 1968 to 1975. Plaintiff supports this claim with not only Keith's testimony from this action, but also Kittelstad's testimony from his and his other co-workers' previous actions and the deposition testimony in other actions by Eugene LeClerc, David Hickey, and John Nicholson, who each testified to working with Fairbanks Company's valves at Indian Point when Kittelstad worked there. Defendant insists that plaintiff may not rely on the testimony from any deponent except Keith because it is inadmissible under C.P.L.R. § 3117.

I. FAIRBANKS COMPANY'S PRIMA FACIE DEFENSE

To establish entitlement to summary judgment, Fairbanks Company must demonstrate unequivocally that its product did not contribute to Kittelstad's injury. Matter of New York City Asbestos Litig., 146 A.D.3d 700, 700 (1st Dep't 2017); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d 520, 521 (1st Dep't 2014). Fairbanks Company may not meet its burden by merely pointing to deficiencies in plaintiff's evidence. Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d 516, 516 (1st Dep't 2016); Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016).

Fairbanks Company merely points out that Kittelstad never testified in this action and characterizes Keith's testimony as failing to identify any exposure to Fairbanks Company's products,

without actually presenting Keith's testimony. Instead, an attorney simply summarizes the contents, which is not an acceptable substitute for the transcript itself, is inadmissible hearsay, and therefore may not support summary judgment. People v. Joseph, 86 N.Y.2d 565, 570 (1995). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51 A.D.3d 513, 515 (1st Dep't 2008). Fairbanks Company presents no evidence supporting the motion besides an attorney's affirmation and thus fails to meet the burden to obtain summary judgment, as Fairbanks Company may not just rely on deficiencies in plaintiff's evidence to carry that burden. Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d at 516; Koulermos v. A.O. Smith Water Prods., 137 A.D.3d at 576.

## II. PLAINTIFF'S USE OF DEPOSITIONS TAKEN OUTSIDE THIS ACTION

Even if Fairbanks Company met its burden, plaintiff's evidence in opposition raises factual issues requiring denial of the motion. Fairbanks Company maintains that C.P.L.R. § 3117(a)(3)(i) bars most of the deposition testimony plaintiff presents in opposition because that testimony was given in other actions where either plaintiff or Fairbanks Company was not a party.

C.P.L.R. § 3117(a)(3)(i) provides that:

the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds

. . . that the witness is dead.

Fairbanks Company admits that it was a defendant in the actions where LeClerc, Hickey, and Nicholson, all now deceased, were deposed and does not dispute that it was present at or had notice of the depositions, so they are admissible. State of New York v. Metz, 241 A.D.2d 192, 200 (1st Dep't 1998) See Rugova v. Davis, 112 A.D.3d 404, 404 (1st Dep't 2013); Matter of New York City Asbestos Litig., 21 A.D.3d 320, 320 (1st Dep't 2005); Bigelow v. Acands, Inc., 196 A.D.2d 436, 439 (1st Dep't 1993); Loschiavo v. DeBruyn, 6 A.D.3d 1113, 1114 (4th Dep't 2004). The fact that plaintiff was not a party to those actions is irrelevant, as C.P.L.R. § 3117(a)(3) requires only that the party against whom the testimony is used have been represented at or have had notice of the deposition, but does not apply this requirement to the party seeking to use the testimony.

Fairbanks Company also maintains that C.P.L.R. § 3117(a)(3)(i) precludes admission of Kittelstad's three depositions because Fairbanks Company was not a defendant in the actions where those depositions were taken and thus was not present for them. C.P.L.R. § 3212(b) governs the allowable evidence in the context of a motion for summary judgment, however, as opposed to C.P.L.R. § 3117(a), which governs allowable deposition testimony at trial. State of New York v. Metz, 241 A.D.2d at 196. C.P.L.R. § 3212(b) specifies depositions, without qualification, as evidence to be considered upon a motion for summary judgment. They are no less admissible

and perhaps more reliable than affidavits, as deponents receive an explicit warning that any misstatement may subject them to punishment for perjury and are subject to cross-examination, even if not by the same parties or on the same issues where the deposition is from an action other than where the summary judgment motion is made. State of New York v. Metz, 241 A.D.2d at 199-200. An affidavit, usually prepared by an attorney for the witness' signature, is not of the evidentiary value equivalent to a deposition, which elicits by question and answer the witness' own words, especially when adverse attorneys pose their unrehearsed questions. Id. at 200.

Thus, although Fairbanks Company had no opportunity to cross-examine Kittelstad at those three depositions, they are admissible in opposition to a motion for summary judgment under C.P.L.R. § 3212(b). An affidavit is a sworn statement from a witness unexamined altogether and is admissible in support of or in opposition to a summary judgment motion under C.P.L.R. § 3212(b). Just as an unexamined affidavit admissible under C.P.L.R. § 3212(b) is not ordinarily admissible at trial, neither is an unexamined deposition admissible except in limited circumstances. C.P.L.R. § 3117(a). E.g., People v. Settles, 46 N.Y.2d 154, 166 (1978). The exclusion of Kittelstad's depositions that Fairbanks Company seeks based on any prejudicial effect and inadmissibility of the testimony at trial is relief that Fairbanks Company may seek preliminary to or during the trial. State of New York v. Metz, 241 A.D.2d at 198.

Finally, even if these circumstances demonstrate grounds to exclude the depositions at trial, plaintiff still may oppose Fairbanks Company's motion for summary judgment with evidence inadmissible at trial if the evidence is not the only basis for determining the motion. Rugova v. Davis, 112 A.D.3d at 404; Matter of New York City Asbestos Litig., 21 A.D.3d at 320; Matter of New York City Asbestos Litig., 7 A.D.3d 285, 285 (1st Dep't 2004). Here, plaintiff does not rely solely on Kittelstad's three depositions, which may be excluded at trial. Plaintiff also relies on Keith's testimony, which Fairbanks Company does not challenge, the testimony by the three other workers at Indian Point Nuclear Facility, Fairbanks Company's answers to interrogatories, and its catalogs. Therefore the court considers Kittelstad's three depositions and the depositions of LeClerc, Hickey, and Nicholson at this juncture, along with plaintiff's other evidence in opposition to summary judgment, without prejudice to a motion by Fairbanks Company to exclude any of these depositions at trial. C.P.L.R. § 3212(b); Rugova v. Davis, 112 A.D.3d at 404; Matter of New York City Asbestos Litig., 21 A.D.3d at 320; Matter of New York City Asbestos Litig., 7 A.D.3d at 285; State of New York v. Metz, 241 A.D.2d at 199-200.

### III. PLAINTIFF'S EVIDENCE IN OPPOSITION

In O'Reilly v. AC&S, Index No. 103255/2002 (Sup. Ct. N.Y. Co.), Kittelstad testified that from 1968 to 1970 he worked in Unit 2 of the Indian Point Nuclear Facility in Buchanan, New York, where he worked with insulation, fittings, and pipe .

covering. Aff. of Peter Tambini Ex. B, at 20-21. Kittelstad also testified that he performed the same work at Indian Point Nuclear Facility Unit 3 from 1972 to 1975. Id. at 61-62.

William Keith testified in this action that insulators at Indian Point Unit 2 insulated valves and that Kittelstad was exposed to asbestos when he inhaled dust released from cutting and fitting insulation for the valves. Tambini Aff. Ex. E, at 118-19. Keith also testified that Kittelstad worked around steamfitters as they cut and fit gaskets for valves at Indian Point Unit 2. Id. at 119-20.

Finally, Eugene LeClerc testified in LeClerc v. Amchem Products, Inc., Index No. 62659/2016 (Sup. Ct. Westchester Co.), that he worked as a boilermaker at Indian Point Unit 3 in 1968, where he worked with valves manufactured by Fairbanks Company. Tambini Aff. Ex. F, at 118-19, 769-70. David Hickey testified in another Supreme Court action in Westchester County for exposure to asbestos that he worked in the maintenance department at Indian Point during the late 1960s and through the 1970s, repairing Fairbanks Company valves. Tambini Aff. Ex. G, at 72, 116. This work included removing and replacing insulation on the valves; removing, cutting, and changing the valves' gaskets; and scraping valve parts clean. Id. at 109-10. John Nicholson testified in a third Supreme Court asbestos action that he worked at Indian Point Units 2 and 3 as an electrician from 1969 to 1975, when he was exposed to asbestos while working with and around valves, which he identified as Fairbanks Company valves.



Tambini Aff. Ex. I, at 78-79, 86.

Finally, Fairbanks Company's answers to interrogatories admit that Fairbanks Company manufactured valves that may have contained "Teflon impregnated with asbestos gaskets and packing." Tambini Aff. Ex. K, at 5, 8. Therefore plaintiff's evidence demonstrates that Fairbanks Company's valves were used in Indian Point Units 2 and 3 during the time Kittelstad worked there, that these valves may have contained asbestos, and that Kittelstad was exposed to asbestos while working with and around valves. This evidence establishes a reasonable likelihood that Kittelstad was exposed to asbestos from Fairbanks Company's valves when he worked with them or near others who did so. Tronlone v. Lac d'Amiante Du Quebec, 99 N.Y.2d 647, 647 (2003); Knee v. A.W. Chesterton Co., 52 A.D.3d 355, 356 (1st Dep't 2008); Petteys v. Georgia Pac. Corp., 214 A.D.2d 363, 363 (1st Dep't 1995). See Matter of New York County Asbestos Litig., 52 A.D.3d 300, 301 (1st Dep't 2008). Fairbanks Company presents no affidavits, testimony, or other evidence even in reply establishing that Fairbanks Company valves did not contain asbestos or that Kittelstad was not exposed to Fairbanks Company valves.

IV. CONCLUSION

For all the reasons explained above, the court denies defendant Fairbanks Company's motion for summary judgment.

C.P.L.R. § 3212(b).

DATED: July 26, 2018



LUCY BILLINGS, J.S.C.