

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

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

Index No. 40000/88

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THIS DOCUMENT RELATES TO

**ALL WEITZ & LUXENBERG CASES IN WHICH
KENTILE IS A DEFENDANT**

**DISCOVERY RULING &
RECOMMENDATION OF THE
SPECIAL MASTER**

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On May 9, 2011 the parties and the Special Master conferred by telephone regarding a dispute as to the authenticity of documents marked as exhibits and discussed during the September 14, 15 and 17, 2009 deposition of the former president of Kentile (and grandson of the founder of Kentile), Andrew Kennedy. Most of the documents at issue had been produced in a “rolling” electronic production of documents by Kentile, in early 2009. The documents were produced on 16 disks, each accompanied by a cover letter identifying the documents as “Kentile documents.”

The “authenticity objection” issue recently arose during a trial before Judge Gische when Plaintiffs, represented by Weitz & Luxenberg (“Weitz”), sought to play the video of Mr. Kennedy’s deposition. Counsel for Plaintiffs, anticipating similar objections during the trial of the April 2011 In Extremis group assigned to Judge Shulman, had requested that Kentile articulate any similar authenticity objections so that the issue could be resolved before the trial of those cases.

When Kentile failed to articulate any objections, Plaintiffs sought the above-mentioned telephonic conference. At the close of that conference, Kentile was directed to identify, by May 11, 2011, which of the Kennedy deposition exhibits it objected to on the basis of “authenticity”. On May 11, 2011, Kentile notified counsel for Plaintiffs that it objected to the authenticity of 57 of the 77 exhibits.

The documents to which Kentile objects based on authenticity include documents such as those written on Kentile letterhead by former Kentile executives and/or contain a Bates number with the prefix “SP”, indicating the documents came from file cabinets in the Kentile facility located in South Plainfield, New Jersey, and/or contain Mr. Kennedy’s signature which he verified as his and/or are government reports such as a NIOSH Health Hazard Evaluation Reports of Kentile facilities and/or are Kentile Interrogatory response attachments.

As a general rule, NYCAL procedure precludes repetitive depositions of corporate representatives. Kentile has maintained, however, that Mr. Kennedy was not deposed as a corporate representative, but was deposed as a fact witness. This position by Kentile is maintained despite Kentile having lodged objections at Mr. Kennedy’s deposition based on the assertion of an attorney-client privilege with Mr. Kennedy and despite the fact that the Kentile insurance carriers had paid for counsel for Mr. Kennedy, independent of Kentile counsel.

There is no current need, for purposes of this recommendation, to decide whether Mr. Kennedy was or was not deposed as a corporate representative as the result would be the same.

To the extent that counsel for Kentile argues that a deposition of Mr. Kennedy would be “repetitive” because Weitz had the opportunity to ask Mr. Kennedy to authenticate the documents at his earlier deposition, counsel for Kentile misapprehends the rule governing the prohibition on duplicative depositions. The prohibition is against asking the same questions twice, not against asking questions that were not interposed previously. Under counsel’s theory, a corporate witness would have to be asked every conceivable question “under the sun” whether or not the questions are relevant or the topic at issue at the time. Apparently, at the time of Mr. Kennedy’s first deposition the authenticity of the documents was not an issue or Weitz was unaware that there would be a dispute about their authenticity.

A review of Judge Gische’s rulings about the Kentile documents (provided to the Special Master by counsel for Kentile) reveals that the court made certain rulings as to their authenticity and admissibility. The Special Master is not concerned with admissibility as it is outside of her purview. However, it is the very rulings of Judge Gische, in ruling that certain documents were not self-authenticating or properly authenticated that reinforce the need for Mr. Kennedy to be deposed on the authenticity issue.

Plaintiffs also seek to take the deposition of Cynthia Weiss-Antonucci, prior counsel for Kentile, who produced the documents mentioned above and Larry Polling, whom Kentile had previously offered for deposition, who had played a role in gathering and copying most of the documents at issue. Ms. Antonucci was a recipient of the documents but had no role in collecting them and at this time it appears that a deposition of Ms. Antonucci would not be probative of the authenticity of the documents other than to state that they were produced on behalf of Kentile.

Pursuant to the New York City Asbestos Litigation Case Management Order, Sec. III B., after hearing argument of counsel for Plaintiffs, counsel for Kentile and Ms. Antonucci and after due consideration of the parties’ respective positions, the parties are directed as follows:

1. At this time, subject to further developments, Plaintiffs are not entitled to take the deposition of Cynthia Weiss Antonucci regarding Kentile’s NYCAL production of documents;
2. Plaintiffs are permitted to depose Andrew Kennedy relating to the authenticity of any document to which Kentile now raises an authenticity objection;
3. Plaintiffs are permitted to take the deposition of Larry Polling, Enviro-Tox Loss Services, 5628 SW Green Oaks Blvd., Arlington, TX 76017.

Dated: May 12, 2011

_____/s/_____
Laraine Pacheco, Special Master