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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

PETER TYTELL and TIKVA TYTELL,

Plaintiffs,

- against -

AIW - 2010 WIND DOWN CORP., *et al.*,

Defendants.

INDEX NO. 190135/2017
MOTION DATE 10/08/2019
MOTION SEQ. NO. 005
MOTION CAL. NO.

MOLE - RICHARDSON CO.,

Third-Party Plaintiff,

- against -

TIMES SQUARE STAGE LIGHTING CO., INC.,

Third-Party Defendant.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Mole- Richardson Co.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6 - 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant and third-party plaintiff Mole-Richardson Co.'s (hereinafter "MRC") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint, all claims and cross-claims asserted against it, is denied.

Plaintiff, Peter Tytell was diagnosed with mesothelioma on February 16, 2017. (Opp. Exh. B). Mr. Tytell was deposed over a course of two days on December 5 and 6, 2017 (Mot. Exh. D and Opp. Exh. 4). It is alleged that Mr. Tytell was exposed to asbestos in a variety of ways during his work as a stagehand from 1961 through 1970. His alleged exposure - as relevant to this motion - was from his work with stage lighting - specifically his exposure to MRC's asbestos containing power cable products - also known as an asbestos containing "pigtail" - during the summer of 1969 (Mot. Exh. D, pgs. 100-110).

Mr. Tytell testified as to the manner in which he would "dress cables." He stated that asbestos containing power cables run from stage lights would be insulated with asbestos. Mr. Tytell stated that he would knot the asbestos containing cables, tie them and wrap them around scaffolding or pipe to prevent them from being dislodged (Mot. Exh. D, pgs. 39-44).

Mr. Tytell claims that during the summer of 1969 he worked setting up lighting - including lighting towers - at various locations for the New York City Parks Department, using mobile trucks. He stated that he worked on between five and ten festivals and that the mobile trucks were part of the City's effort to facilitate street festivals and block parties, which were considered a big thing at that time. He described his work as setting up a portable stage with lighting, working with the

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

towers, dressing the cables out of the way so that neighborhood talent could perform and then collapsing the assembly and pushing it onto the truck for transport (Mot. Exh. D, pgs. 42,100-105, 302-303).

Mr. Tytell described the stage as "smallish," approximately twenty (20) feet long and fifteen (15) feet wide. He stated that the light towers consisted of two, two level poles for hanging lights, with four to eight MRC six inch fresnels on each side (Mot. Exh. D, pgs. 307 and 313-314). Mr. Tytell testified that he mounted the MRC lights on crossbars and that he handled the MRC asbestos containing pig tail power cords on the lamp. Mr. Tytell described MRC lighting as having a unique maroon color. He also claimed that he was exposed to asbestos while loading the MRC lamps and power cords onto the truck. He recalled being exposed to dust created from the lights when the coating came off the cables. Mr. Tytell claimed he could see the particles in the air and that he breathed them in (Mot. Exh. D, pgs. 311-317 and 342-343).

Two of plaintiff's co-workers were also deposed, Mr. Spencer Mosse on February 27, 2018 and Mr. Edward Bourke on April 12, 2018 (Mot. Exhs. E and F).

Mr. Mosse was responsible for designing the lighting for the street festivals. He would be present at the beginning of the festivals and was aware that Mr. Tytell worked as an electrician doing the lighting, and that he also did other work. Mr. Mosse stated that Mr. Tytell would be considered one of the "cross-lines" (Mot. Exh. E, pgs. 41 and 51-53). Mr. Mosse described the MRC lighting products as a rustic kind of reddish, a unique color. He recalled seeing Mr. Tytell doing electric work, using MRC six inch fresnels. He testified that he saw Mr. Tytell work with a light; hanging it onto a pipe that was on a stanchion and running a cable to it and then plugging it in. Mr. Mosse stated that he knew the MRC cable attached to the lighting was asbestos because during that time period all the leads coming out of lighting equipment had asbestos (Mot. Exh. 5, pgs. 20, 59-60, 64 and 66-67).

Mr. Bourke claimed to work with Mr. Tytell in at least 25 parks in New York City, starting around 1964. Mr. Bourke stated that he believed Mr. Tytell was exposed to asbestos from hanging lights that had asbestos cable (Mot. Exh. F, pgs. 36-37, 41-42). He last worked with Mr. Tytell on a play or two in the summer of 1968 . He thought he worked with Mr. Tytell in 1968 on summer stock at the Tappan Zee Playhouse. Mr. Bourke claimed he graduated from high school in June of 1968 and was drafted into the army in September of 1968. He served in the army through 1971 (Mot. Exh. F, pgs. 19-20 and 25). Mr. Bouke was not present to witness Mr. Tytell's alleged exposure to MRC's asbestos containing power cable or lighting products during the summer of 1969.

Plaintiffs commenced this action on April 21, 2017 to recover for damages resulting from Mr. Tytell's exposure to asbestos (Mot. Exh. A). MRC's Acknowledgment of Receipt was uploaded on June 29, 2017 (Molt. Exh. B).

MRC now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it. MRC argues that plaintiffs are unable to raise a triable issue of fact against it on the issue of causation.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

In support of its motion for summary judgment MRC relies on the affirmation of its attorney, the pleadings, plaintiffs' Answers to Interrogatories, Mr. Tytell's deposition transcripts, the deposition transcripts of Mr. Mosse and Mr. Bourke, unsworn or unaffirmed expert reports, copies of a photograph taken from Mr. Tytell's 1960 yearbook, and a copy of an article published in September of 1935 (Mot. Exhs. A, B, C, D, E, F, G, H, I, J, K and L).

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (Kase v. H.E.E. Co., 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1st Dept., 2012] citing to Zuckerman v. City of New York, 49 N.Y. 2d 557 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as a plaintiff's deposition testimony (See Aur v. Manhattan Greenpoint Ltd., 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept.,2015] and Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept. 2009]).

MRC provides deposition transcripts from Mr. Tytell and Mr. Mosse as individuals with personal knowledge of the facts. MRC provides a photograph taken from Mr. Tytell's 1960 yearbook, of two students, that were not the plaintiff, holding a fresnel lamp with a cord. Mr. Tytell stated the cable was asbestos similar to what was identified as manufactured by MRC (Mot. Exh. G, and Exh. D, pgs. 338-341). The remainder of the evidence submitted to establish lack of causation - which includes all of the expert reports that are either unsworn or unaffirmed - is inadmissible hearsay and fails to make a prima facie case on the issue of causation.

MRC relies on the unsworn and unaffirmed May 11, 2019 expert report of Dr. Michael Graham, M.D., Professor of Pathology at Saint Louis University (Mot. Exh. H). Dr. Graham's report is in the form of a letter addressed to the defense attorney and does not affirm the statements in the report to be "true under the penalties of perjury" rendering it inadmissible as evidence on this motion for summary judgment (See Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991], Frees v. Frank & Walter Eberhart L.P. No. 1, 71 AD 3d 491, 896 NYS 2d 71 [1st Dept. 2010] and Offman v. Singh, 27 AD 3d 284, 813 NYS 2d 56 [1st Dept. 2006]). MRC provides no excuse for the failure to provide Dr. Graham's expert affidavit in proper form, and instead inappropriately attempts to "incorporate" a corrected affidavit and report as part of the reply papers. This does not cure the defect (see Accardo v. Metro-North Railroad, 103 AD 3d 589, 959 NYS 2d 696 [1st Dept., 2013]).

The unsworn September 6, 2019 expert report of James L. Poole, Ph.D., CIH, doctor of Industrial Hygiene and Safety Management, a board certified industrial hygienist, is also in letter form, inadmissible, and not competent evidence on causation (Mot. Exh. I). The September 6, 2019 report is not subscribed before a notary or other authorized official and is hearsay (see CPLR §2106, Shinn v. Catanzaro, 1 AD 3d 195, 767 NYS 2d 88 [1st Dept. 2003], Arce v. 1704 Seddon Realty Corp., 89 AD 3d 602, 935 NYS 2d 1 [1st Dept. 2011] citing to Mazzola v. City of New York, 32 AD 3d 906, 821 NYS 2d 247 [2nd Dept., 2006]). MRC's attempts to "incorporate" a corrected affidavit and report into the reply papers fails to cure the defect (Accardo v. Metro-North Railroad, 103 AD 3d 589, supra).

MRC annexes copies of the unsworn and unaffirmed reports of plaintiffs' experts. The unsworn and unaffirmed July 12, 2017 letter report of plaintiffs' expert, Dr. Sanford M. Ratner is addressed to plaintiff's counsel. Dr. Mark Ellis Ginsburg's report dated January 2, 2019 is also addressed to plaintiffs' counsel (Mot. Exhs. J and K). To the extent MRC relies on plaintiffs' expert reports, they are inadmissible hearsay, and do not establish lack of causation or make a prima facie showing. MRC provides a copy of an article published in 1935 titled "No Half Way Measures in Dust Control," about quartz and silica, to correct a quotation in Dr. Ginsburg's report, this article alone does not make a prima facie case on the issue of causation (Mot. Exh. L).

There is no need to address plaintiffs' evidence and any defects that are similar to those of MRC. It is of no consequence whether there are defects in plaintiffs' evidence, because MRC failed to make a prima facie showing with evidence in admissible form on its motion for summary judgment (Offman v. Singh, 27 AD 3d 284, supra).

ACCORDINGLY, it is ORDERED that defendant and third-party plaintiff Mole-Richardson Co.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint, all claims and cross-claims asserted against it, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 10, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE