Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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THE CITY OF NEW YORK,

Plaintiff(s),

- against -

ARGON MANAGEMENT CORPORATION, PENDE CORPORATION, ARGYRI AVDOULOS and THEODORE AVDOULOS,

Defendant(s).

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ARGON MANAGEMENT CORPORATION, PENDE CORPORATION, ARGYRI AVDOULOS and THEODORE AVDOULOS,

Third-Party Plaintiffs,

-against-

JUDLAU CONTRACTING INC.,

Third-Party Defendant.

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Index Number: 24196/03

Motion Date: 02/27/07

Motion Cal. Number: 1

Motion Seq. No. 3

The following papers numbered 1 to 12 read on this motion by plaintiff The City of New York for summary judgment pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Supplemental Affirmation-Exhibits.....	5-6
Memo of Law.....	7
Affidavit.....	8
Affirmation in Opposition-Exhibits.....	9-11
Reply Memo of Law.....	12-13

Pursuant to the stipulation dated February 9, 2007, which

was faxed to chambers on February 27, 2007, the within third-party action was discontinued with prejudice.

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment, pursuant to CPLR 3212, against defendants is denied.

In order to obtain summary judgment, the movant must make a prima facie showing of entitlement to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The City has failed to meet its initial burden.

The City seeks to recover from defendants the costs it incurred to clean up underground petroleum contamination allegedly discovered on October 19, 2000 near 13-24 Jackson Avenue in Queens County during the course of excavations being undertaken for the replacement of water mains. The City alleges that pursuant to §181(1) of the New York State Navigation Law and §24-604 of the New York City Administrative Code, defendants are strictly liable.

Where the proponent for summary judgment relies upon the findings of its own experts, those findings must be in admissible form – either affidavits or, where allowed, affirmations – and not unsworn reports in order to make a prima facie showing of entitlement to summary judgment (see Marsh v. Wolfson, 186 AD 2d 115 [2nd Dept 1992]).

The motion is supported, inter alia, by the affidavit of Angelo Elmi, a licensed professional engineer specializing in environmental engineering. Elmi was the project director for the Environmental Health and Safety Services section of the New York City Department of Design and Construction (DDC)in charge of the environmental oversight of the 13-24 Jackson Avenue site of the City's Williamsburg Trunk Main Project.

He avers that he was alerted by the project manager that there was soil contamination at the site. He went to the site and detected a petroleum odor and saw a large petroleum stain in the open excavation pit. He stated that consultants were called from ATC Associates, Inc. to collect soil samples to take back to their lab for analysis. He states that the results of the soil test indicated elevated levels of organic compounds that exceeded industry standards and New York State Department of Environmental Conservation regulations. Based upon this finding, he opines that

the origin of the contamination was defendants' taxi headquarters that had fuel pumps located only a few feet away from the site.

His conclusion as to the existence of unacceptably high levels of petroleum contamination, in the first instance is based upon the soil sample analysis performed by ATC. However, this report, annexed as Exhibit "E" to the motion is not in proper evidentiary form, since it is unsworn and, therefore, is inadmissible hearsay lacking in probative value (see Toussaint v. Ferrara Bros. Cement Mixer, 33 AD 3d 991 [2nd Dept 2006]; Reed v. NYC Transit Authority, 299 AD 2d 330 [2nd Dept 2002]; Marsh v. Wolfson, 186 AD 2d 115 [2nd Dept 1992]). Consequently, the affidavit of Elmi may not properly rely upon the soil analysis report of ATC (see Philippe v. Ivory, 297 AD 2d 666 [2nd Dept 2002]; Wagman v. Bradshaw, 292 AD 2d 84 [2nd Dept 2002]).

Elmi's statement that he smelled a strong odor of petroleum and saw a petroleum stain is not a scientific finding and cannot form the basis of his conclusion that there was, in fact, contamination. In the absence of any scientific evidence, in admissible form, of the presence of petroleum in levels that exceed industry standards and DEC regulations, his affidavit is speculative.

The conclusory statement of John Gearrity, project manager, in his affidavit (Exhibit "V") that he personally saw petroleum contamination in the soil is of no probative value, since he neither sets forth any scientific objective basis for such conclusion nor, indeed, does he establish himself as an expert. Indeed, the City's attorney stated in Gearrity's deposition, "I like point out Mr. Gearrity is a fact witness and not an expert" [sic] (transcript p. 57, Exhibit "C").

None of the other laboratory reports annexed to the motion are in admissible form.

Therefore, since the City has failed to establish a prima facie entitlement to summary judgment as a matter of law, this Court need not consider the sufficiency of defendants' opposition papers(see Marquez v. Oballe, 14 AD 3d 667 [2nd Dept 2005]).

Dated: March 12, 2007

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KEVIN J. KERRIGAN, J.S.C.