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

LORRAINE ALLEN, Individually and as Executor of the Estate of PETER ALLEN, Deceased,

Plaintiffs,

- against -

AIR & LIQUID SYSTEMS CORP., *et al.*,

Defendants.

INDEX NO. 190352/2016
MOTION DATE 12/12/2018
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Aurora Pumps Inc.:

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

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Armstrong Pumps Company's (hereinafter referred to as "Aurora") motion for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint and all cross-claims asserted against it, is denied.

In July 2016 Peter Allen was diagnosed with malignant pleural mesothelioma (Opp. LaTerra Aff., Exh. 1). On October 3, 2017 Mr. Allen (hereinafter referred to as "decedent") died from the disease (Opp. LaTerra Aff, Exh. 2) Plaintiff, Lorraine Allen, the surviving spouse of the decedent alleges he was exposed to asbestos in a variety of ways. Decedent's alleged exposure - as relevant to this motion - is from exposure to crumbling asbestos insulation on Aurora pumps during his service in the United States Navy as an Electrician's Mate aboard the LST 528 (subsequently named the U.S.S. Catahoula Parish) and the U.S.S. Marquette.

The decedent testified he was exposed to asbestos while repairing motors and pumps throughout the ship by the removal and replacement of asbestos insulation. He further testified that on a daily basis he was about a foot away from Machinist Mates who worked on the pumps while he was working on the motors and observed crumbling asbestos insulation, brittle insulators and the dust that was flying during the repairs (Opp. La Terra Aff., Exh. 4, pgs 60 - 61, 65, 148 - 149, 155 -156, 161). Decedent was unable to specifically identify the manufacturer of the pumps he worked on and testified that this was because the labels were painted over with a "battleship grey" color. Decedent testified that he was exposed to asbestos from various pumps throughout the ship including bilge pumps, ventilation pumps, heating and air conditioning pumps, and water pumps (Opp. LaTerra Aff., Exh. 4, pgs. 67 and 152-153).

Aurora provided proof of compliance with paragraph XXI of the NYCAL Amended Case Management Order (CMO) by annexing a copy of e-mails dated January 18, 2018, that were exchanged with plaintiffs' attorneys, to attempt to obtain No Opposition Summary Judgment (Mot. Carni Aff., Exh. A). Aurora also

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

refers to other request made on March 30, 2017, June 5, 2017, and November 22, 2017 (NYSCEF Doc. Nos. 52, 62, 70, 79).

Aurora's motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

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]). It is only after the burden of proof is met that the burden switches to the non-moving party 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 by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

In support of its motion for summary judgment Aurora relies solely on the affirmation of its attorney, the e-mails (Mot. Carni Aff., Exh. A), Ship Records for the LST 528 provided by plaintiffs' counsel (Mot. Carni Aff., Exh. B), and the Affidavit of Charles D. Wasson their expert (Mot. Carni Aff., Exh. C).

Aurora's attorney refers to a Verified Answer filed under NYSCEF Doc. No. 13; Plaintiff's Responses to Interrogatories filed under NYSCEF Doc. No. 132 (defendant Eton Corporation's Motion for Summary Judgment, Exh. C); Decedent's Deposition testimony filed under NYSCEF Doc. Nos. 96-97 (defendant Alco Industries Inc.'s Motion for Summary Judgment, Exhs. D & E); but none of these documents are identified as exhibits or annexed to this motion.

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). Aurora relies on the hearsay affirmation of its attorney and failed to provide an affidavit from an individual with personal knowledge in support of summary judgment as required pursuant to CPLR §3212(b). A motion for summary judgment can only 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 plaintiff's deposition testimony, however, Aurora did not identify the deposition transcript as an exhibit, warranting denial of summary judgment (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]).

Alternatively, to the extent plaintiff failed to argue that Aurora's motion relied on hearsay, there remain issues of fact, warranting denial of summary judgment.

Aurora argues that decedent's deposition testimony combined with the declassified U.S. Navy records provided by plaintiffs' counsel and the expert affidavit of Charles D. Wasson establishes that there is no evidence that the decedent was exposed to Aurora pumps.

It is argued that the decedent did not specifically identify the pumps he and the Machinist Mates worked on as Aurora pumps because of the "battleship grey" paint. Aurora claims that the fresh water pumps the decedent testified he worked on were connected to the diesel engines, and those engines were located in the engine room of the LST 528 (Mot. Exh. B). Defendants argue that the declassified

documents obtained from the United States Navy, that was provided by plaintiffs' attorney, only identified Aurora pumps as located in the "Shaft Alley" which is outside the engine rooms (Mot. Carni Aff., Exh. B). Aurora also relies on the expert affidavit of retired U.S. Navy Captain Charles D. Wasson that states the LST 528 is a tank landing ship, and that the declassified records show that the pumps made by Aurora were located in the "Shaft Alley C-414E" outside of the engine rooms. Captain Wasson also states that the decedent testifed that he worked with fresh water pumps connected to the diesel engines, and that on the LST 528, those pumps were in the engine room, not the Shaft Alley (Mot. Carni Aff., Exh. C). Aurora further argues that the decedents failure to specifically identify the pumps it manufactured or their actual location on the LST528 results in no testimonial or documentary evidence of exposure, warranting summary judgment.

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need "only show facts and conditions from which defendant's liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A Plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (Oken v A.C. & S. (*In re* N.Y.C. Asbestos Litig.), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of the decedent's ability to provide a detailed description of Aurora pumps or their specific location on the LST 528. The decedent never actually connected the water pumps he worked on or near, to the engine room of the LST 528. The decedent testified that he worked with and around different types of pumps throughout the ship and identified multiple pumps (Opp. LaTerra Aff., Exh. 4, pgs. 60, 67 and 152 - 154) . Plaintiffs correctly argue that neither Aurora or Captain Wasson denied that Aurora pumps contained asbestos materials in gaskets that the decedent identified at his deposition or that the pumps with asbestos were actually on the LST 528. Plaintiffs provide evidence that the gaskets on Aurora pumps were supplied by John Crane and Aurora was notified in the 1970s or early 1980s that they contained asbestos (Opp. La Terra, Exhs. 7, 9 and Exh. 11 pgs. 12-14).

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018] citing to S.J. Capelin Assoc. v. Globe Mfg. Corp., 34 N.Y. 2d 338, 313 N.E. 2d 776, 357 N.Y.S. 2d 478 [1974]).

Plaintiff has raised triable issues of fact as to whether Aurora's liability may be reasonably inferred from his work on and around Aurora pumps on the LST 528. Decedent's deposition testimony that he worked throughout the ship, near Machinist Mates and on different types of pumps, could reasonably be inferred by the jury to include the Aurora pumps located in the shaftway of the LST 528.

Decedent's failure to provide specific identification of Aurora pumps and his references to work with pumps related to the diesel engines that were located in the boiler room does not mean that he was not exposed to the Aurora pumps as part of his work elsewhere on the ship. There remain issues of fact as to whether the decedent had exposure to the asbestos that caused his mesothelioma from working with or around Aurora pumps. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.

Accordingly, it is ORDERED that defendant, Armstrong Pumps Company's motion for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint and all cross-claims asserted against it, is denied.

ENTER:

Dated: January 11, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE