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SHORT FORM ORDER

INDEX No. 07-12165
CAL No. 11-01657OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-3-12 (#002, #003, #004)
MOTION DATE 3-13-12 (#005)
MOTION DATE 4-24-12 (#006)
ADJ. DATE 5-22-12
Mot. Seq. # 002 - MD # 005 - MG
003 - MD # 006 - XMOTD
004 - MD

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STATE OF NEW YORK,

Plaintiff,

- against -

913 PORTION ROAD REALTY CORP., MORRIS & SONS, INC., LIBERTY INSURANCE UNDERWRITERS, INC., and MERCHANTS MUTUAL INSURANCE CO.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated February 3, 2012, and supporting papers (including Memorandum of Law dated February 3, 2012); Notice of Motion/Order to Show Cause by the defendant Morris, dated February 2, 2012, and supporting papers (including Memorandum of Law dated February 2, 2012); Notice of Motion/Order to Show Cause by the defendant 913 Portion Road dated February 3,

2012, and supporting papers (including Memorandum of Law dated February 3, 2012); Notice of Motion/Order to Show Cause by the defendant Merchants, dated February 6, 2012, and supporting papers (including Memorandum of Law dated February 6, 2012); (2) Notice of Cross Motion by the defendant 913 Portion Road , dated April 11, 2012, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated April 10, 2012, and supporting papers; Affirmation in Opposition by the defendant Merchants, dated April 12, 2012, and supporting papers; (4) Reply Affirmation by the plaintiff, dated May 18, 2012, and supporting papers; Reply Affidavit by the defendant Morris, dated May 17,2012, and supporting papers; Reply Affirmation by the defendant 913 Portion Road, dated May 17, 2012, and supporting papers; Reply Affirmation by defendant Merchants, dated May 18, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that the motion by the plaintiff for partial summary judgment on the issue of liability against the defendant 913 Portion Road Realty Corp and to increase the ad damnum clause is granted; and it is further

ORDERED that the motion by the defendant 913 Portion Road Realty Corp for summary judgment in its favor is denied; and it is further

ORDERED that the motion by the defendant Morris & Sons Inc for summary judgment in its favor is denied; and it is further

ORDERED that the motion by the defendant Merchants Mutual Insurance Co. for summary judgment in its favor dismissing the cross claims of 913 Portion Road Realty Corp is denied; and it is further

ORDERED that the cross motion by 913 Portion Road Realty Corp for a judgment reforming the Merchants insurance policy is granted solely to the extent that 913 Portion Road Realty Corp is granted leave to amend its answer to assert a cross claim for reformation of the insurance policy within 30 days after service of a copy of this order with notice of entry.

In 1998, the defendant 913 Portion Road Realty Corp. (hereinafter 913 Portion Road) acquired title to real property in Ronkonkoma from Variable Sales Service Inc. (Variable Sales) and operated a gasoline station on the premises. 913 Portion Road also acquired title to the petroleum product storage and dispensing system at the premises which consisted of three underground storage tanks, dispensers and associated piping. The defendant Morris & Sons Inc. (Morris) leased a portion of the premises and operated an automobile repair business. Morris had a commercial liability insurance policy with the defendant Merchants Mutual Insurance Co. (Merchants).

On June 27, 2002, an employee of Morris was operating a vehicle undergoing repairs when the vehicle struck one of the gasoline dispensers. A small fire broke out but was extinguished by hand held fire extinguishers. There was no evidence that anyone observed a petroleum discharge at the time and the area was subsequently repaired. Morris reported the accident to Merchants which paid the cost of the repairs. In 2003, the New York State Department of Environmental Conservation (DEC) conducted an inspection of the premises and observed contaminated soil at the tank sumps and pits of two of the underground storage tanks. The DEC met with Frank Mascolo, the president of 913 Portion Road, who disclosed the 2002 incident, and the DEC directed that groundwater monitoring wells be sampled for contaminants. The results of the groundwater sampling confirmed that the groundwater at the site

exhibited high levels of MTBE and lower levels of BTEX, both of which are constituents of gasoline. In addition, monitoring wells were placed off the premises and showed high levels of petroleum contamination in groundwater sampling from wells located on University Drive and that the plume extended approximately 800 feet from the premises. In 2005, the police reported that an employee of Morris placed running garden hoses into two of the monitoring wells on the property. While the defendants claimed that this was a mistake, the DEC alleged that this would dilute the contamination in the wells. Thereafter, the DEC took over the remediation activities at the site and retained an environmental contractor to perform the work.

In 2007, the plaintiff commenced this action to recover the costs incurred in cleaning up the premises. The complaint alleges that there was a discharge of petroleum on or before June 27, 2002 which contaminated the groundwater and soil and that the defendants are strictly liable pursuant to Article 12 of the Navigation Law. The complaint also asserts a direct action against the defendants' insurers pursuant to Navigation Law § 190. The defendants asserted various cross claims against each other. In 2006, property owners along University Drive commenced a separate action against the defendants alleging that large amounts of gasoline from the premises deposited under and/or accumulated on their properties and the complaint contains a cause of action pursuant to Article 12 of the Navigation Law. This Court joined the two actions for trial solely with respect to the Navigation Law causes of action.

The plaintiff now moves for partial summary judgment on the issue of liability under the Navigation Law against 913 Portion Road and for leave to amend the ad damnum clause to reflect the increased cleanup costs after the commencement of the action. 913 Portion Road and Morris each move for summary judgment dismissing the complaint on the grounds that they are not responsible for any discharge on the premises. Merchants moves for summary judgment dismissing the cross claims asserted by 913 Portion Road on the grounds that 913 Portion Road is not an insured under the policy and failed to provide timely notice. 913 Portion Road cross-moves for a judgment reforming the insurance policy to include it as an additional insured under the Merchants policy.

The Navigation Law provides that "any person who has discharged petroleum shall be strictly liable, without regard to fault" for the costs of remediation (Navigation Law § 181[1]). A "discharge" is defined as "any intentional or unintentional action or omission resulting in" the spilling of petroleum (Navigation Law § 172[8]). The Court of Appeals has held that an owner of contaminated property who has control over activities occurring on the property and reason to believe that petroleum products are stored there may be liable as a discharger (*see* ***State of New York v Green***, 96 NY2d 403, 407 [2001]). Although liability may not be premised solely on ownership of contaminated property, "proof of fault or knowledge" is not required (*see* ***State of New York v Green***, *supra*; ***State of New York v B&P Auto Service Center***, 29 AD3d 1045 [3d Dept 2006]). An owner's liability as a discharger turns on the owner's "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill" (***State of New York v Speonk Fuel Inc.***, 3 NY3d 720, 724 [2004]). Thus, an owner is strictly liable as a discharger "even in the absence of any evidence that the owner caused or contributed to the discharge" (***State of New York v Slezak Petroleum Prods.***, 96 AD3d 1200 [3d Dept 2012] quoting ***State of New York v Denin***, 17 AD3d 744 [3d Dept 2005]). In addition, strict liability cannot be avoided by demonstrating that another party actually caused the discharge or contributed to the contamination (*see* ***State of New York v Slezak Petroleum Prods.***, *supra*; ***State of New York v Robin Operating Corp.***, 3 AD3d 767 [3d Dept 2004]). Further, strict liability "need not be premised on ownership of land or a petroleum system at the time a discharge occurs; instead such liability may be founded either upon a

potentially responsible party's capacity to prevent spills before they occur or the ability to clean up contamination thereafter" (***Matter of Huntington & Kildare Inc v Grannis***, 89 AD3d 1195, 1196 [3d Dept 2011], quoting ***State of New York v CJ Burth Servs. Inc.***, 79 AD3d 1298, 1301 [2d Dept 2010]; *see* ***State of New York v Speonk Fuel Inc.***, *supra*).

Here, 913 Portion Road was the owner of the premises, operated a gasoline station and knew that petroleum products were stored and sold at the site. Thus, 913 Portion Road had control of the use and activities that occurred at the premises. 913 Portion Road contends that it cannot be held responsible because there is no evidence that a discharge occurred on the premises as it argues that the 2002 incident did not result in a release of petroleum and that a subsequent investigation of the underground tanks did not demonstrate any leaks.

The plaintiff submits an affidavit from Kristy Salafrio, an engineering geologist, who concludes that the petroleum product storage system at the site is the source of the contamination. This is based on the detection of contaminated soil and groundwater sampling, including soil found directly adjacent to the pump that was hit in 2002. In addition, Salafrio asserts that the monitoring wells do not show any contamination migrating from an off-site source. 913 Portion Road submits an affidavit from Walter Berninger, who asserts that neither the 2002 accident nor 2003 debris from the inspection are the source of the soil or groundwater contamination. Berninger concludes that the contamination appears to be most likely from previous tanks that existed at the site or another source not yet found. However, Berninger has submitted no evidence to support his conclusory assertion that other sources could have caused the contamination. In addition, even if the contamination was caused by an earlier leak, 913 Portion Road, as owner of the premises, would still be responsible for the remediation. If the spill occurred before the owner acquired the property, it nevertheless is liable based on its ability to clean up the contamination (*see* ***State of New York v Speonk Fuel Inc.***, *supra*; ***Sunrise Harbor Realty v 35th Sunrise Corp.***, 86 AD3d 562 [2d Dept 2011]; ***State of New York v CJ Burth Servs. Inc.***, *supra*; ***State of New York v Denin***, *supra*). Therefore, 913 Portion Road has failed to raise an issue of fact as to its liability under the Navigation Law.

Morris is not the owner of the property or the operator of the gasoline station. Therefore, Morris may only be liable as a discharger if "it set in motion the events which resulted in a discharge" (***State of New York v Joseph***, 29 AD3d 1233 [3d Dept 2006] quoting ***Domermuth Petroleum v Herzog & Hopkins***, 111 AD2d 957 [3d Dept 1985]). Morris submits an affidavit from Joseph Patrick Byrnes, a geologist, who concludes that the 2002 incident did not result in a gasoline spill that caused contamination at the site. His opinion is based on the fact that the shear valve system on the pump worked as designed and there was no evidence of a discharge at the time of the accident. In addition, the inventory records at the time did not show a loss of product. Byrnes also noted that there was no evidence of damage when the underground tanks were removed. He concluded that the contamination was most likely from a previous incident. Salafrio contends that the soil sampling, which showed high concentrations of petroleum contamination directly adjacent to the pump that was hit, is consistent with a large discharge of gasoline over a short period of time. In view of the conflicting expert affidavits, questions of fact exist as to whether the 2002 incident was a cause of the contamination (*see* ***Nappi v Holub***, 79 AD3d 1110 [2d Dept 2010]).

Accordingly, the motion by the plaintiff for partial summary judgment on the issue of liability against 913 Portion Road is granted. The motions for summary judgment by 913 Portion Road and Morris are denied. The branch of the plaintiff's motion to increase the ad damnum clause is granted (*see*

Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18 [1981]; ***State of New York v Exxon Corp***., 7 AD3d 926 [3d Dept 2004]).

With respect to the insurance issues, it is well settled that coverage extends only to named entities or individuals defined as insured parties under the terms of an insurance policy (*see* ***Sanabria v American Home Assur. Co.***, 68 NY2d 866 [1986]; ***Catholic Health Services v National Union Fire Ins. Co.***, 46 AD3d 590 [2d Dept 2007]). However, a party may be entitled to reformation where "the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud" (***Cheperuk v Liberty Mut. Fire Ins. Co.***, 263 AD2d 748 [3d Dept 1999], quoting ***Leavitt-Berner Tanning Corp v American Home Assur. Co.***, 129 AD2d 199 [3d Dept 1987]). Where it is apparent that an innocent mistake occurred with respect to a named insured and it is evident that the parties intended to cover the risk, the error may be deemed mutual for purposes of reformation even though the insurer was not aware of the error (*see* ***Cheperuk v Liberty Mut. Fire Ins. Co.***, *supra*; ***Anand v GA Ins. Co.***, 228 AD2d 397 [2d Dept 1996]; ***Crivella v Transit Cas. Co.***, 116 AD2d 1007 [4th Dept 1986]; ***Court Tobacco Stores v Great E. Ins. Co.,*** 43 AD2d 561 [2d Dept 1973]). Indeed, "the name of the insured in the policy is not always important if the intent to cover the risk is clear" (***Crivella v Transit Cas. Co.***, *supra,* quoting ***Matter of Lipshitz v Hotel Charles***, 226 App Div 839 affd 252 NY 518 [1929]; *see* ***Anand v GA Ins. Co.***, *supra*; ***New York Cas. Ins. Co v Shaker Pine Inc.***, 262 AD2d 735 [3d Dept 1999]).

Here, 913 Portion Road is not identified as an additional insured in the Merchants policy but the policy does name Variable Sales, the prior owner of the premises, as an additional insured. The original lease from Variable Sales to Morris required that Morris obtain insurance naming the landlord as an additional insured. Merchants contends that it was never advised of the change of ownership and therefore 913 Portion Road has no standing under the policy. However, Merchants continued to include Variable Sales as an additional insured despite the fact that it was no longer the owner of the property and was dissolved in 1998. Thus, it appears that the intent of the parties was to include the landlord as an additional insured and Merchants does not allege that it would have discontinued coverage had it been advised of the change of ownership. In addition, Merchants was notified of the 2002 accident by Morris and paid for the repairs to the property. Therefore, the claim for reformation may have merit but 913 Portion Road did not plead or raise this claim in its answer. As such, the cross motion for a judgment is premature but amendment of 913 Portion Road's answer is warranted (*see* ***Burke v Nationwide Ins. Co.***, 108 AD2d 1098 [3d Dept 1985]). The cross motion is granted solely to the extent that 913 Portion Road is granted leave to amend its answer to assert a cross claim for reformation of the insurance policy within 30 days after service of a copy of this order with notice of entry.

Merchants also contends that, even if 913 Portion Road had standing, it failed to provide timely notice of the 2002 incident. Merchants asserts that it did not receive notice from 913 Portion Road until August 2006 and that it was prejudiced by the late notice. The Merchants policy requires that notice be given "as soon as reasonably possible" and that Merchants must be prejudiced by any delay. It is undisputed that Merchants received notice from Morris and paid for the repairs caused by the accident. Thus, Merchants was aware of the incident, which is relevant to the issue of prejudice, but was not aware of the claim for contamination to the property. 913 Portion Road contends that it did not believe that any petroleum discharge occurred as a result of the accident and Morris also argues that no discharge occurred at that time. The letters 913 Portion Road received from the DEC in 2003 and 2005 did not specifically reference the accident as a source of the contamination. Merchants was not the general liability insurer for the premises and its policy would only be implicated if the contamination was caused

by the actions of Morris. Therefore, issues of fact exist as to whether notice was provided as soon as reasonably possible and whether Merchants was prejudiced (*see* ***Kiss Nail Prods v CGU Ins. Co.***, 299 AD2d 524 [2d Dept 2002]; ***Reynolds Metal Co v Aetna Cas. & Sur. Co.***, 259 AD2d 195 [3d Dept 1999]). Accordingly, the motion by Merchants for summary judgment is denied.

Dated: 9/6/12

PETER H. MAYER, J.S.C.

TO: LITE & RUSSELL, ESQS.
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