State v. Howe Cleaners, Inc., No. 27-1-04 Wncv (Teachout, J., Apr. 13, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

STATE OF VERMONT	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 27-1-04 Wncv**
v.	)	
	)	
HOWE CLEANERS, INC., et al.,	)	
Defendants.	)	

DECISION
Fiore's Motion for Summary Judgment, filed April 13, 2006

The State seeks abatement and cleanup costs related to hazardous waste at a property known as 9 Depot Square in Barre that was formerly operated as a dry cleaning facility. The action is against several defendants variously connected with the property over a period of years. The motion presently before the court is that of the defendant who is the current owner, John H. Fiore, Trustee of the 9 Depot Square Realty Trust (Fiore), who acquired the property in 1999 from Banknorth following a foreclosure. Fiore has operated it as a pizzeria.

In a decision of March 10, 2006 on the State's Motion for Summary Judgment, this court, Judge Toor presiding, ruled that Fiore may be liable as an "owner" under 10 V.S.A. § 6615(a). Fiore now seeks summary judgment on three affirmative defenses that were beyond the scope of the prior ruling, and on the State's claim grounded in public nuisance. The court has reviewed the parties' respective statements of undisputed facts and many memoranda.

The State argues that Fiore's facts are inadequate to meet his burden, and seeks an opportunity for additional discovery. The court, having reviewed both parties' statements of facts and the State's arguments, concludes that there are no disputes of material fact, nor does it appear that additional time for discovery is warranted. This case was filed over three years ago and this summary judgment motion has been pending for nearly one year. The State has not cited any particular need for more discovery that it has not already had a reasonable opportunity to undertake. Both Fiore's facts and the State's additional facts are undisputed. The task for the

court is to address whether Fiore is entitled to judgment as a matter of law on those facts. For the reasons set forth below, the court concludes that Fiore is so entitled.

The site was contaminated at the time Fiore purchased it in 1999 because of a dry cleaning business that was in operation from 1947 to 1996. Waste had been disposed of on-site and was in the ground. In addition, there were hazardous materials in two storage tanks located under the floorboards. The property was bought in 1996 and operated for a brief period as a bakery before the bank took it over in foreclosure. Fiore bought it from the bank.

Before purchasing, Fiore reviewed a Phase I Environmental Site Assessment Report prepared for the bank by Griffin Engineering (Griffin Report). Griffin had information that the property had been operated as a dry cleaning establishment, but did not identify the hazardous waste problem that is the subject of investigation and cleanup and this suit.

Fiore relied on the results of the assessment in purchasing the property. He had no other information indicating the presence of hazardous waste on the property.

Since the time of purchase, Fiore has not caused any release of hazardous material as that term is interpreted in Judge Toor's March 10, 2006 ruling. Fiore has cooperated fully with the investigation and attempted cleanup of the site.

An EPA investigator inspecting the site after Fiore's purchase, and after talking with former employees of the dry cleaner's, took up a section of floor and entered a crawl space to find two underground storage tanks containing hazardous material.

Fiore seeks summary judgment based on three statutory affirmative defenses: the "diligent owner" defense, 10 V.S.A. § 6615(e); the "innocent landowner" defense, *id*. § 6615(d)(1)(C); and the "fair share" defense, *id*. § 6615(c). Fiore also argues that there is no support for liability on the State's common law public nuisance claim. The court concludes that the diligent-owner defense operates as a complete defense to statutory liability and therefore does not address the other statutory defenses. The court further concludes that the State's public nuisance claim is not cognizable in the circumstances applicable to Fiore.

"Diligent owner" defense

The diligent-owner defense is provided by statute as follows:

> Any person who is the owner or operator of a facility where a release or threatened release existed at the time that person became owner or operator shall be liable unless he or she can establish by a preponderance of the evidence that after making diligent and appropriate investigation of the facility, he or she had no knowledge or reason to know that said release or threatened release was located on the facility.

10 V.S.A. § 6615(e). The court interprets § 6615(e) to include both objective and subjective components. The objective, or reasonable person, standard applies to whether the investigation

undertaken was "diligent and appropriate" in the circumstances. Both subjective and objective standards apply to knowledge of a release following the investigation. That is, in order to qualify for the defense, there is a requirement that, following the investigation, Fiore actually did not know of the contamination, and a reasonable person would not have known or had reason to know of the contamination.

There is no dispute that Fiore never had any actual knowledge of contamination prior to purchase. The issues are the objective ones: whether Fiore's investigation was diligent and appropriate under the circumstances, and whether, following the investigation, a reasonable person should have known about or had reason to know about the contamination.

The investigation consisted of, essentially, Fiore's lay-person visual inspection of the premises and his review of the Griffin Report. There is no dispute that a reasonable visual inspection would not have revealed the contamination to an ordinary person. The pollution was largely in the ground, and the storage tanks were hidden underneath the floorboards.

The Griffin Report was produced in October 1998 at the request of Banknorth. The purpose of the Report is described as follows:

> This report on the Phase 1 Environmental Site Assessment (ESA) of the 9 Depot Street property in Barre, Vermont, has been prepared by Griffin International, Inc., (Griffin) for Granite Savings Bank and Trust. The property is owned by Granite Savings Bank and Trust. The objective of this study is to identify recognized environmental conditions in association with the property as defined and described in the American Society of Testing and Materials (ASTM) Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment (ASTM E 1527-97). This report has been completed in accordance with ASTM E 1527-97 so that Granite Savings Bank and Trust may appropriately analyze any identified conditions with respect to potential liability and effect on property values.

Griffin Report at 1. Banknorth made the Report, which looks professional and is detailed, available to Fiore. The dry cleaning history is noted with particularity in the Report. In the cover letter, after recommending the removal of some construction debris, Senior Staff Geologist Timothy Kelly concluded: "No other significant environmentally hazardous conditions were identified on the subject property. Accordingly, no further investigative work is recommended at this time, based on currently available data." The Report includes a certification in which Kelly certifies that the Report is a "complete and accurate record of [his] findings."

Both Fiore and the State take the position that if Griffin actually had produced the Report in accord with applicable professional standards, as it purported to do, then the Report would not have concluded, as it did, that there was no need for further investigation; either the contamination or the need for further investigation would have been discovered.

The State argues that Fiore does not qualify for the diligent-owner defense because it was not reasonable for him to rely on the Griffin Report, and he should have undertaken more

inquiry. However, the only fact that the State identifies that would have given any good faith prospective purchaser any basis whatsoever for concern about potential contamination on the property is the mere fact of the past use of the property as a dry cleaning facility.

The court concludes that it is reasonable for a person to rely on a recently produced, professional Phase 1 environmental report, such as the Griffin Report in this case, and that such reliance is sufficient to constitute diligent and appropriate investigation as a matter of law. Unless there were other facts to put Fiore on notice of either existing contamination or a faulty investigation or report by Griffin, it was reasonable for Fiore to rely on the Griffin Report. The State has not identified any circumstances that would have given an ordinary person such as Fiore any reason whatsoever to doubt the findings and conclusions in the Griffin Report, or any reason to question whether it conformed to professional standards or was negligently undertaken. Without such evidence, in the circumstances of this case, the court concludes that Fiore is entitled to the full benefit of the diligent-owner defense as a matter of law, precluding any statutory liability. Fiore was not required to "look behind" the Report.

Public Nuisance

As an alternative to statutory liability, the State seeks to impose liability on Fiore under the common law doctrine of "public nuisance." In general, "[a] public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). In the comments, the following is said specifically with regard to pollution:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

Restatement (Second) of Torts § 821B cmt. g. The mere fact of pollution migrating offsite is not itself an adequate showing of public nuisance.

In any case, the State has not identified any specific public right that Fiore has interfered with that suggests potential liability outside the scope of 10 V.S.A. § 6615. That is, the liability that the State seeks to impose under the public nuisance doctrine is identical to liability under 10 V.S.A. § 6615. There is a difference, however, which is that in enacting the statute, the legislature made the diligent-owner defense available. Section 6615 specifically provides that "*[e]xcept insofar as expressly provided in this section,* nothing in this chapter shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person." 10 V.S.A. § 6615(f)

(emphasis added). The diligent owner defense is "expressly provided in this section." The State may not seek to nullify the statutory diligent-owner defense by resorting to the alternative theory of the common law doctrine of public nuisance.

ORDER

For the foregoing reasons, Fiore's motion for summary judgment filed April 13, 2006 is *granted*.

Dated at Montpelier, Vermont this _____ day of April 2007.

_____
Mary Miles Teachout
Superior Court Judge