SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

November 12, 2009

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RE: William Oliver and Deborah Oliver v. NRG Energy, Inc.
C.A. No. S08C-08-058 ESB
Letter Opinion

Date Submitted: June 23, 2009

Dear Mr. And Mrs. Oliver and Counsel:

This is my decision on NRG Energy, Inc.'s motion for summary judgment in this case where a tree on NRG's property fell on the Olivers' van during a storm. NRG owns a power plant near Millsboro, Delaware. The Olivers live next to the power plant. A storm came through the area on September 1, 2006. During the storm a tree on NRG's property fell on the Olivers' 1993 Dodge van. The Olivers have disposed of the van. They seek $42,560 in damages for the van. The Olivers' damages are based on the manufacturer's suggested retail price of $42,560 for a new 2008 Dodge van. NRG has filed a motion for summary judgment, arguing that it is not liable to the Olivers because it did not know that the tree was in danger of falling and that the Olivers can not prove their damages.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] The Court views the evidence in a light most favorable to the nonmoving party.[3] Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[4] If, after discovery, the non-moving party can not make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.[5] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.[6]

DISCUSSION

The Olivers argue that NRG should have cut the tree down before it fell on their van. NRG argues that it did not know that the tree needed to be cut down. For a property owner to be found

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[1] *Moore v. Sizemore*, *405 A.2d 679, 680 (Del. 1979)*.

[2] *Id. at 681*.

[3] *Id. at 680*.

[4] *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, *477 U.S. 317, 322-23 (1986)*.

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[6] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

negligent for a hazardous condition on its property, the plaintiff must prove that the property owner had notice of the hazardous condition.[7] Thus, the issue is whether NRG knew that the tree was in danger of falling. The Olivers admit that they did not put NRG on notice of the tree's condition. Delaware Superior Court Civil Rule 36 states that "a party may serve upon any other party a written request for admission, for the purposes of the pending action only, of the truth of any matters..." and "the matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the Court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant."[8] Delaware Superior Court Civil Rule 36(b) states that "any matter admitted under this Rule is conclusively established unless the court on motion permits the withdrawal or amendment of the admission."[9]

NRG sent 20 requests for admissions to the Olivers. NRG asked the Olivers to admit or deny the following:

> 8. William and/or Deborah liver are not in possession of a certified estimate for the costs of repairs for the damages alleged by the Plaintiffs' complaint.
>
> 12. Plaintiffs, William and/or Deborah Oliver are not in possession of a certified estimate of the fair market value of the motor vehicle referenced in Plaintiffs' Complaint on or before September 1, 2006.

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[7] *McMilin v. United States*, 290 F.Supp. 351, 355 (D.Del. 1968).

[8] Delaware Superior Court Civil Rule 36(a).

[9] Delaware Superior Court Civil Rule 36(b).

13. Plaintiffs, William and/or Deborah Oliver are not in possession of a certified estimate of the fair market value of the motor vehicle referenced in Plaintiffs Complaint after September 1, 2006.

15. At no time prior to September 1, 2006 did Plaintiff, William Oliver advise anyone at NRG Energy, Inc, that the tree that fell during the storm was a potential hazard. Was it dead? Was it rotted?

16. At no time prior to September 1, 2006 did plaintiff, Deborah Oliver advise anyone at NRG Energy, Inc, that the tree that fell during the storm was a potential hazard. Was it dead? Was it rotted?

17. William Oliver has no letter or other writing dated before September 1, 2006 advising NRG Energy that a tree on their property appeared dead, diseased/rotted.

18. Deborah Oliver Oliver [sic] has no letter or other writing dated before September 1, 2006 advising NRG Energy that a tree on their property appeared dead, diseased/rotted.

19. At no time prior to September 1, 2006 did plaintiff, William Oliver request that NRG Energy cut, trim or remover the tree that fell during the Storm Ernesto.

20. At no time prior to September 1, 2006 did plaintiff, Deborah Oliver, request that NRG Energy cut, trim or remove the tree that fell during the Storm Ernesto.

The Olivers did not respond to the NRG's request for admissions. By not responding, the Olivers admitted that they did not inform NRG about the tree's condition. Without notice of the tree's hazardous condition, NRG can not be found liable for it falling on the Oliver's van.

Moreover, the Olivers can not offer admissible evidence of their damages. In their response to NRG's written interrogatories, the Olivers stated they paid $1,700 for the van, and that the value of the van prior to the accident was in the area of $4,000.[10] Notwithstanding this, the Olivers seek damages of $42,560. Even if I were to accept the value of the van prior to the accident as $4,000, as stated by the Olivers, no certified estimate has been provided to establish the value of the van after

[10] See Plaintiffs' response to Defendant's Interrogatories, answers 11 and 16.

the accident. "...[T]he measure of damages is the value of the car just before the accident and its salvage value immediately after the accident... Estimates of such values must necessarily be produced directly from an expert witness."[11] The Olivers have not provided estimates from an expert witness concerning either value. Thus, the Olivers have no admissible evidence of their damages.

CONCLUSION

NRG Energy Inc.'s Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

[11] *Storey v. Castner*, 314 A.2d 187, 191-192 (Del. 1973) *citing Stuart v. Rizzo*, 242 A.2d 477, 480 (Del. 1968).