

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BORGE DEVELOPMENT, INC., a)
California corporation,)
Plaintiff,)
v.)
CITY OF CHICO, CALIFORNIA; BUTTE)
COUNTY, CALIFORNIA; and BALDWIN)
CONTRACTING COMPANY, INC., a)
California corporation,)
Defendants.)
No. 2:06-CV-02228 JAM GGH
ORDER GRANTING CITY OF
CHICO'S MOTION FOR SUMMARY
ADJUDICATION

Borge Development, Inc. ("Borge") brought this action against the City of Chico, California ("Chico"), Butte County, California ("Butte County"), and Baldwin Contracting Company ("Baldwin") for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, contribution under CERCLA, 42 U.S.C. § 9613, and other state law violations. Chico brought a motion for summary adjudication. Borge opposed the motion. Both Butte County and Baldwin partially joined in Chico's Motion for Summary Adjudication. For the reasons

1 stated below, Chico's Motion for Summary Adjudication is GRANTED.¹

2 BACKGROUND

3 Borge owns two parcels of real property, APN 002-180-086 and
4 APN 002-180-084, located in Chico, California ("Borge Property").
5 Statement of Undisputed Facts ("SUF") ¶ 2. Borge obtained title to
6 APN 002-180-086 on November 3, 2004. Id. ¶ 4. Borge obtained
7 title to APN 002-180-084 on July 19, 2005. Id. ¶ 5. Both of these
8 parcels are located within an area referred to as the Humboldt Road
9 Burn Dump Area ("HRBD"). Id. ¶ 3.

10 Borge alleges that the Borge Property was contaminated through
11 Chico's operation of a dump in the HRBD until 1965. Id. ¶ 16. In
12 1980, Chico sold the dump to George Scott. Id. ¶ 17. Borge was
13 aware that the Borge Property was contaminated before purchasing
14 it. Id. ¶ 7. Borge was ordered by a state regulatory agency to
15 clean up the contamination. The cost to remediate the Borge
16 Property was more than \$490,000.00. On December 16, 2005, the
17 Regional Water Quality Control Board certified that all remediation
18 on the Borge Property had been completed. Id. ¶ 10.

19 One of the parcels contained Butte County meadowfoam, an
20 endangered species. Id. ¶¶ 11-12. As a result, Borge was required
21 to undertake a meadowfoam survey, which was completed in March
22 2006. Id.

23 OPINION

24 Chico seeks summary adjudication on three discrete issues:

25 1. Whether Borge is a liable party under CERCLA Section 107;
26 2. Whether Borge is entitled to recover damages for lost

27 _____
28 ¹ This motion was determined to be suitable for decision
without oral argument. E.D. Cal. L.R. 78-230(h).

1 profits; and

2 3. Whether Borge can maintain its claim for dangerous
3 condition of public property.²

4 Summary judgment is appropriate if "the pleadings, the
5 discovery and disclosure materials on file, and any affidavits show
6 that there is no genuine issue as to any material fact and that the
7 movant is entitled to judgment as a matter of law." Fed.R.Civ.P.
8 56(c). The moving party bears the initial burden of demonstrating
9 the absence of a genuine issue of material fact. See Celotex Corp.
10 v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party
11 will have the burden of proof on an issue at trial, the movant's
12 burden may be discharged by pointing out to the district court that
13 there is an absence of evidence to support the nonmoving party's
14 case. See id. at 325. Summary judgment for a defendant is
15 appropriate when the plaintiff fails to make a showing sufficient
16 to establish the existence of an element essential to its case, and
17 on which [he] will bear the burden of proof at trial. Id. at 322.

18 If the moving party sustains its burden, the burden then
19 shifts to the nonmoving party to go beyond the pleadings and by his
20 or her own affidavits, or by the depositions, answers to
21 interrogatories, and admissions on file, designate specific facts
22 showing that there is a genuine issue for trial. See Celotex, 477
23 U.S. at 324 (citing Fed.R.Civ.P. 56(e)). "If the nonmoving party
24 fails to produce enough evidence to create a genuine issue of
25 material fact, the moving party wins the motion for summary
26 judgment." Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.

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28 ² Both Butte County and Baldwin joined Chico in the Motion for
Summary Adjudication regarding the first and second issues. Docket
at 54, 56.

1 210 F.3d 1099, 1103 (9th Cir. 2000). Summary judgment is
2 appropriate if, viewing the evidence and the inferences therefrom
3 in the light most favorable to the nonmoving party, there are no
4 genuine issues of material fact in dispute and the moving party is
5 entitled to judgment as a matter of law. Valandingham v.
6 Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989).

7 BORGE LIABILITY UNDER CERCLA SECTION 107

8 Borge is a liable party under CERCLA. To establish a prima
9 facie cause of action under CERCLA, a plaintiff must show: 1.
10 defendant fits into one of the four classes of responsible parties
11 in 42 U.S.C. § 9607(a), 2. the site is a facility, 3. there is a
12 release or threatened release of hazardous substances at the
13 facility, and 4. the plaintiff incurred costs responding to the
14 release or threatened release that were consistent with the
15 National Contingency Plan. See 3550 Stevens Creek Assocs. v.
16 Barclays Bank, 915 F.2d 1355, 1358 (9th Cir. 1990). Section 107(a)
17 of CERCLA includes in the definition of covered persons, "the owner
18 and operator of a vessel or a facility." As Borge concedes that it
19 owns the Borge Property, it is a responsible party under CERCLA.
20 Furthermore, Borge concedes that the Borge Property is a facility
21 and that it contained hazardous materials. Finally, Borge admits
22 that Chico incurred response costs consistent with the National
23 Contingency Plan. SUF ¶ 14. Therefore, Chico has established a
24 prima facie case of liability against Borge.

25 CERCLA creates an exception to liability for "innocent
26 landowners." See 42 U.S.C. § 9601(35). However, as Borge concedes
27 that it knew the Borge Property contained hazardous material before
28 it purchased it, it cannot claim to be an innocent landowner. See

1 42 U.S.C. § 9601(35)(A)(i) (Requirement that "[a]t the time the
2 defendant acquired the facility the defendant did not know and had
3 no reason to know that any hazardous substance which is the subject
4 of the release or threatened release was disposed of on, in, or at
5 the facility."). As a current owner of contaminated property,
6 Borge meets the definition of a party who is liable for response
7 costs under CERCLA. Accordingly, summary adjudication for Chico on
8 this issue is granted.

9 BORGE DAMAGES FOR LOST PROFITS

10 Next, Chico argues that as a matter of law, Borge is not
11 entitled to recover lost profits as damages. Chico has
12 sufficiently demonstrated that Borge suffered no damages for lost
13 profits due to the delay caused by remediation. Remediation of the
14 property was completed in 2005. However, Borge did not complete
15 its meadowfoam survey, a prerequisite to development, until 2006.
16 Therefore, Borge has failed to show that the remediation caused any
17 delay.

18 Borge also argues that it lost profits because it spent money
19 allocated for development on remediation. However, Borge has
20 produced no evidence to support this other than the Declaration of
21 Thomas Borge. In his Declaration, Borge states:

22 Plaintiff's payment of \$490,000.00 in remediation costs
23 effectively depleted Plaintiff's working capital, making it
impossible to take any additional steps to timely develop the
24 Borge Property. The unanticipated remediation costs of
\$490,000.00, together with the delay in development, have
25 adversely impacted the profits anticipated to be realized from
the development of the Borge Property.

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27 Borge Decl. ¶ 14. The Ninth Circuit has noted that "courts have
28 been reluctant to admit evidence of lost profits for real estate

1 ventures" because they are inherently speculative. Landes Constr.
2 Co. v. Royal Bank of Canada, 833 F.2d 1365, 1373 (9th Cir. 1987).
3 Borge has failed to provide any concrete examples of ways in which
4 lack of funds prevented it from developing the Borge Property.
5 Furthermore, Borge raises this argument for the first time in its
6 opposition to summary adjudication, and in direct contradiction to
7 the deposition testimony of Mr. Borge in this case and Borge's
8 interrogatory answers from May 2008. Borge's conclusory statements
9 in its opposition to Chico's motion herein that it suffered lost
10 profits is insufficient to raise a triable issue of fact.
11 Accordingly, summary adjudication on this issue is granted in favor
12 of Defendants.

13 BORGE'S EXISTENCE OF A DANGEROUS CONDITION CLAIM

14 Finally, Borge cannot support its claim for the Existence of a
15 Dangerous Condition on Public Property under California Government
16 Code § 835. This statute provides that "a public entity is liable
17 for injury caused by a dangerous condition of its property if the
18 plaintiff establishes that the property was in a dangerous
19 condition at the time of injury." The undisputed facts reveal that
20 because Chico sold its property in 1980, it did not own any
21 property in the HRBD at the time of Borge's injuries in 2004 and
22 2005. Therefore, Chico cannot be held liable under this statute.

23 Borge claims that Chico should be held liable because the
24 Chico Redevelopment Agency repurchased land in the HRBD in order to
25 remediate the property prior to Borge's acquisition of the Borge
26 Property. However, the Chico Redevelopment Agency is a separate
27 legal entity from Chico and has not been named as a party in this
28 lawsuit. See County of Solano v. Vallejo Redevelopment Agency, 75

1 Cal.App.4th 1262, 1267 (1999) (Redevelopment agencies are generally
2 separate legal entities from the cities that established them).
3 The ownership of the property by the Chico Redevelopment Agency
4 does not create liability on behalf of Chico. Since Borge cannot
5 demonstrate that Chico owned land in the HRBD at the time of its
6 injury, it cannot maintain a claim against Chico for Existence of a
7 Dangerous Condition on Public Property pursuant to California
8 Government Code § 835 and summary adjudication in Chico's favor is
9 granted on this issue.

10 ORDER

11 For the reasons stated above, Chico's Motion for Summary
12 Adjudication is GRANTED in its entirety.

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14 IT IS SO ORDERED.

15 Dated: April 20, 2009



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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