Grant Ave. & Standart Ave. Dev., LLC. v Petr-All Petroleum Consulting Corp.
2008 NY Slip Op 33762(U)
October 3, 2008
Supreme Court, Cayuga County
Docket Number: 2004-0730
Judge: Mark H. Fandrich
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STATE OF NEW YORK
SUPREME COURT COUNTY OF CAYUGA

GRANT AVE. & STANDART AVE. DEVELOPMENT, LLC.,

Plaintiff,

vs. Index No. 2004-0730

PETR-ALL PETROLEUM CONSULTING CORP., PAUL BORER, FRANCIS E. BORER, IHOR DILAJ, CAYCO, INC. d/b/a HENDRICKS OIL, AETNA CASUALTY & SURETY COMPANY, and THE CONTINENTAL INSURANCE COMPANY (as successor in interest to FIREMENS INSURANCE COMPANY OF NEWARK, NEW JERSEY).

Defendants.

BEFORE: HON. MARK H. FANDRICH
Acting Supreme Court Justice, Cayuga County

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MEMORANDUM DECISION AND ORDER

Fandrich, Mark H., Acting Justice

FACTS

This is an action to recover response costs and related damages plaintiff allegedly incurred to clean up petroleum contamination at or near real property commonly known as 149 Standart Avenue (a/k/a 135 - R Grant Avenue) and 153, 157 and 163 Grant Avenue in the City of Auburn, County of Cayuga and State of New York (hereinafter "the site"). The site is a 2 ½ acre parcel of land on the corner of Grant Avenue and Standart Avenue in the City of Auburn. It consists of four tax parcels, 149 Standart Avenue, and 153, 157 and 163 Grant Avenue.

149 Standart Avenue was operated as a gas station and car wash from 1970 through approximately 1992 and was commonly referred to as Wood Acres Car Wash and Mobil Gas Station. The plaintiff purchased the site from the defendant Ihor Dilaj on September 23, 2003. The plaintiff claims that between 1984 and 2003, each of the non-insurance company defendants either owned the site or operated a gas station at the site, including owning and/or operating the underground petroleum storage and dispensing systems. Plaintiff contends that at its own cost and expense, it fully investigated and remediated contamination at the site, including153 Grant Avenue, which was a former restaurant; 157 Grant Avenue, which was a diner and ice cream stand; and 163 Grant Avenue which was vacant at the time the plaintiff purchased it. The parcels were then combined to form one parcel and improved with an Eckard drug store.

The site was contaminated with gasoline. The gasoline contamination was discovered in 1990 when fumes were found coming from a man hole cover adjacent to the Standart Avenue apartment complex. The spill was reported to the New York State Department of Environmental

Conservation (hereinafter "DEC"). A spill number was issued and the DEC undertook to investigate and clean up the petroleum contamination. The DEC determined at that time that the contamination at the apartment building came from the adjacent Wood Acres gas station.

In 1993, the DEC and the defendant Ihor Dilaj entered into a stipulation in which Mr. Dilaj agreed to clean up the contamination. Allegedly, Mr. Dilaj defaulted and the DEC sued him to cover the cost of investigation and placed a lien on the property. The plaintiff purchased the property in 2003, completed the site investigation and remediated it at, allegedly, the plaintiff's sole expense. The plaintiff has submitted an affidavit from Dr. Neil Peterson in which he opines based upon one soil sample and one ground water sample from the site, that the soil sample contained gasoline that was produced no later than 1985 and from a ground water sample that gasoline was on the site that was produced at the earliest in 1994.

The plaintiff seeks partial summary judgment on strict liability against Petr-All Consulting Corp., Paul Borer, Francis Borer, Ihor Dilaj, and Cayco, Inc. as discharger defendants pursuant to its first cause of action [Navigation Law §181(5)] and its second cause of action [Navigation Law §176(8)] and against defendant Continental Insurance on plaintiff's seventh cause of action [Navigation Law §190].

Defendants Petr-All Petroleum Consulting Corp., Paul Borer and Francis E. Borer oppose plaintiff's motion for summary judgement and cross move for summary judgment. These Defendants claim that the plaintiff cannot satisfy its evidentiary burden to show that they are liable as petroleum dischargers. They also claim that the results of the plaintiff's expert report should not be accepted because the report fails the Frye test, in that the scientific method utilized by the plaintiff's expert is allegedly not generally accepted in the scientific community and therefore should

not be admissible. Finally, defendant states that the plaintiff's motion should be dismissed with prejudice because the plaintiff suffered no damage.

The defendant Continental Insurance Company is the successor in interest to Fireman's Insurance Company of Newark, New Jersey. Defendant, Continental Insurance Company opposes plaintiff's motion for partial summary judgment on grounds that the plaintiff has not produced evidence it is entitled to maintain the action, or that plaintiff is entitled to relief demanded pursuant to New York State Navigation Law and that the plaintiff is not entitled to any relief under the policies in question. Continental further argues that the plaintiff should not be permitted to maintain the action because plaintiff has been dissolved and no longer exists, that plaintiff is not entitled to pursue first party coverage under the Continental insurance policies and there is no coverage for the plaintiff under the first party property parts of the policy.

Travelers Casualty and Surety Company has also filed a motion for summary judgement That motion has been adjourned for 60 days after this court issues a decision with respect to the instant summary judgment motions.

Defendant Ihor Dilaj and Cayco Inc. d/b/a Hendricks Oil did not submit any papers in connection with the plaintiff's motion, but Mr. Dilaj did personally appear at the time of the motion disclaiming responsibility.

DISCUSSION

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." ***Napierski v. Finn, 229 AD2d 869, 870, (3rd Dept. 1996)***. All evidence must be viewed in the light most favorable to the opponent of the motion. ***Amidon v.***

Yankee Trails, Inc., 17 AD3d 835, (3rd Dept. 2005); Crosland v. New York City Transit Auth., 68 NY2d 165 (1986). Graziadei v. Mohamed, 23 AD3d 1100 (4th Dept. 2005).

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. *Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 (1988).*

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. *Zuckerman v. City of New York, 49 NY2d 557 (1980).* In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Id. at 562*).

A party opposing a summary judgment motion must come forward with evidence that raises a triable issue of material facts; mere conclusions and unsubstantiated assertions are insufficient to defeat a summary judgment motion. *Id; see also Jellinick v. Joseph Naples & Associates, Inc. et al., 296 AD2d 75,77 (4th Dept. 2002); Goldstein v. County of Monroe, 77 AD2d 232 (4th Dept. 1980).*

Plaintiff's Motion for Summary Judgment against Petr-All and the Borers

A review of the submissions by the plaintiff and defendant Petr-all Petroleum Consulting Corp. and the Borers show that there is a question of fact as to whether Petr-All and the Borers are dischargers and, therefore, the plaintiff's motion for summary judgment must be denied with respect to these defendants. Plaintiff cannot rely on the information raised for the first time in reply papers to meet its prima facie burden in moving for summary judgment. Plaintiff's motion for summary

judgment is premature since discovery was outstanding at the time the motion was made. ***Roberto Rengifo v. City of New York 7AD3d 773 (2nd Dept 2004)***. The plaintiff's failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposition papers. ***GJF Construction Corp. et al v. Cosmopolitan Decorating Co., Inc. 35 AD3d 535 (2nd Dept. 2006)***

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An owner's claim for reimbursement under Navigation Law §181(5) requires proof that the other party "actually discharged or contributed to the discharge" to establish liability. Submissions here leave unanswered the question of fact as to whether there was a discharge when Borers/Petr-All allegedly owned and/or operated the property thus requiring denial of the summary judgment motion. ***State of New York v. Metro Resources, Inc. 14 AD3d 982 (3rd Dept. 2005)***. Mere prior ownership of the property in question is not enough to establish liability. The Court of Appeals has refused to impose liability based solely on the ownership of the contaminated land. ***State of New York v. Green 96 NY2d 403 (2001).***

Plaintiff's Motion for Summary Judgment against defendants Dilaj and Cayco, Inc.

Defendants, Dilaj and Cayoco, Inc. d/b/a Hendricks Oil have not offered any proof, in admissible form, in opposition to the plaintiff's motion and considering the DEC had already determined that these defendants were liable for at least one spill, plaintiff's motion for summary judgment is granted as against defendants Dilaj and Cayco, Inc. d/b/a Hendricks Oil.

Plaintiff's Motion for Summary Judgment against Continental Insurance Co.

In regards to the plaintiff's motion for summary judgment on its seventh cause of action

against Continental Insurance Company, it must be denied since the Borers and Petr-All have not yet been found to be dischargers. A review of Navigation Law §190 and its legislative history does not appear to preclude the plaintiff from making a claim for first party benefits if there is coverage. On the question whether the statute creates a direct cause of action, New York Navigation Law Section 190 is explicit in providing that any claim for damages by an injured person may be brought directly against the insurer ***Snyder v. Newcomb Oil Co., Inc., 194 AD2d 53 (4th Dept. 1993)***. Whether such coverage existed would be subject to any defenses that the insurer would have to the claim including whether the discharge was sudden and accidental. ***Northville Industries Corp v. National Union Fire Ins. Co. 89 NY2d 621 (1997)***.

New York Navigation Law §190 permits a plaintiff to seek recovery from an insured's carrier despite the failure of the insured to provide timely notice of the accident, and while the plaintiff is under a duty to give timely notice, its failure to do so may be excused if it is shown that it had not been reasonably possible to give notice within the prescribed time and that it was given as soon as it was reasonably possible. Furthermore, what constitutes a reasonable time is liberally construed and ordinarily a question for the fact finder if an excuse is offered for the delay. ***State of New York vs. Zurich Insurance Co. 199 AD2d 916 (3rd Dept. 1993).*** Ignorance of an insured's identity constitutes a reasonable excuse for delay in notifying a carrier of a Navigation Law §190 claim. ***State of New York v. Taugo, Inc. 213 AD2d 831 (3rd Dept. 1995)***. Navigation Law §190 allows a third party to seek recovery from an insured carrier despite the failure of the insured to provide timely notice of the accident. ***State of New York v. American National Fire Insurance Co. 193 AD2d 996 (3rd Dept. 1993).***

Defendants Petr-All Consulting Corp and Borers' motion for summary judgment against Plaintiff

In regards to Petr-All Consulting Corp. and Borers motion for summary judgment, since there is a question of fact as to whether the Petr-All and the Borer defendants are petroleum dischargers, Borer's and Petr-All's motion is denied.

Plaintiff's expert testimony is not subject to the test under Frye

The Court finds that Neil Peterson's expert affidavit and the test methodology utilized was conducted in a manner which has received general acceptance in its particular field in order to be reliable. The Court is only required to conduct an inquiry concerning general acceptance pursuant to ***Frye v. United States 293 F. 1013 (D.C. Ct. of Ap. 1923)*** when the party seeks to rely on novel scientific, technical, or other concepts involving expertise.

An expert's general acceptance in his particular field may be established by a showing that (1) the expert has the requisite background; (2) the expert and/or his methodology has been accepted by the Courts; or (3) the methodology is accepted by the relevant scientific community. The plaintiff's affidavits establish that Neil Peterson has the requisite background to qualify as an expert, that the methodology utilized by him has been accepted by courts in the past and that the methodology utilized is accepted by the relevant scientific community. ***State of New York v Moon 228 AD2d 826 (3rd Dept. 1996)***. The dispute between the parties experts as to the scientific basis for each other's opinions raises credibility issues outside the scope of a motion for summary judgment. Applying the legal principles discussed above to the facts and accepting that issues of credibility and conflicting expert opinions are generally not amenable to resolution on summary

judgment motion [*Cooper v City of Rochester, 16 AD3d 1117 (4th Dept. 2005); Pittman v. Rickard, 295 AD2d 1003, 1004 (4th Dept. 2002)*] the Court concludes that the parties' submissions raise triable questions of fact. Although to be sure, each movant has vigorously challenged the methodologies, observational analysis and scientific conclusions reached by the opposing expert affiants, this court cannot conclude that either set of opposing opinions is fatally conclusory, "unsupported by any evidentiary foundation" or otherwise defectively constituted as a matter of law ***Plainview Water District v. Exxon Mobil Corp, 2006 NY Misc. Lexis 3730 (Sp. Ct., Nassau Co. 2006).*** A criticism of the Peterson report in the Petr-All and Borer moving papers creates a question of fact and is not entitled to summary judgment as a matter of law.

A defendant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. Once that showing is made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. The plaintiff's expert affidavit does not indicate that a discharge occurred during defendants Borer and Petr-All ownership and/or operation of the site. Dr. Peterson does opine that the soil sample in question came from gasoline produced no later than 1985. This does not establish, as a matter of law, that a discharge occurred in 1984 or 1985 at the site. Since there is no proof of any discharges earlier than the one caused by Dilaj, speculation is insufficient to resolve questions of fact. ***Hilltop Nyack Corp v. TRMI Holdings, Inc. 272 AD2d 521 (2nd Dept. 2000).***

A party challenging expert testimony must make a prima facie showing that a particular concept, principle or methodology underlying a proposed expert opinion has not been generally accepted in the relevant scientific community and, therefore, represents a novel theory. The burden

then shifts to the proponent of such evidence to establish general acceptance. ***Lara v. New York City Health & Hosp. Corp., 305 AD2d 106 (1st Dept. 2003); Lewin v. County of Suffolk, 18 AD3d 621 (2nd Dept. 2005); Del Maestro v. Grecco, 16 AD3d 364 (2nd Dept. 2005); Pauling v. Orentreich Med. Group, 14 AD3d 357 (1st Dept. 2005); Selig v. Pfizer, Inc., 185 Misc2d 600, aff'd 290 AD2d 319 (1st Dept. 2002), lv denied 98 NY2d 603 (2002)***. The admissibility of expert testimony is a determination that rests in the sound discretion of the Court. ***People v. Cronin, 60 NY2d 430 (1983).***

Standing

The plaintiff's complaint and the affidavits submitted by Joseph Kane establish that plaintiff did indeed expend money for investigation/remediation of the site and that plaintiff has the ability to wind down its affairs and pursue this litigation. NY Limited Liability Company Law § 703(b). On that basis, the plaintiff has shown it suffered some injury and has standing to bring this lawsuit. Therefore, defendants Borer and Petr-All are not entitled to summary judgment on that issue. ***AMCO International, Inc. et al v. Long Island Railroad Company 302 AD2d 338 (2nd Dept. 2003).***

Conclusion

In conclusion, plaintiff's motion for summary judgment on its first and second causes of action against Petr-All, Paul Borer, and Francis Borer is denied. Plaintiff's motion for summary judgment on its first and second causes of action against Ihor Dilaj and Cayco, Inc d/b/a Hendrick's Oil is granted. Plaintiff's motion for summary judgment on its seventh cause of action against Continental Insurance Co as successor in interest to Firemen's Insurance Co of Newark, New Jersey is denied. Defendants Petr-All, Paul Borer, and Francis Borer's motion for summary judgment dismissing the plaintiff's complaint is denied. Defendants Petr-All, Paul Borer, and Francis Borer's

motion to exclude plaintiff's expert testimony and/or require a Frye hearing is denied.

This constitutes the Order of the Court.

Dated: October 3 , 2008

Mark H. Fandrich

Hon. Mark H. Fandrich
Acting Supreme Court Justice, Cayuga Co.