

[Cite as *K. Michael Deem Invest. Corp., Inc.*, 2004-Ohio-5925.]

IN THE COURT OF CLAIMS OF OHIO

K. MICHAEL DEEM INVESTMENT :
CORPORATION, INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF :
REHABILITATION AND CORRECTION :

Defendant :

.....

CASE NO. 2003-07588
Judge Fred J. Shoemaker

DECISION

{¶ 1} Plaintiffs¹ brought this action against defendant alleging various claims of property damage due to defendant’s negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} In 1992, plaintiffs purchased a parcel of real estate located at 403 South Ewing Street in Lancaster, Ohio. The property was formerly owned by Anchor Hocking Corporation. When Anchor Hocking Corporation sold the property to plaintiffs, it left behind several thousand hardwood pallets. In order to come into compliance with Environmental Protection Agency (EPA) regulations, plaintiffs were required to dispose of the pallets.

{¶ 3} At approximately the same time in 1992, defendant began a mulching operation at the Southeastern Correctional Institution in Lancaster, Ohio. The mulching operation was managed by employees of Ohio Penal Industries (OPI). In 1995, K. Michael Deem, through a company known as MTD Industrial Services, and defendant, through OPI, entered into an agreement known as the “Pallet Recovery Project” whereby Deem donated the pallets located on the Ewing Street property to

¹The term “plaintiffs” shall be used throughout this decision to refer to two corporations that were owned by K. Michael Deem: K. Michael Deem Investment Corp., Inc. (KMD) and Real Estate Association of Lancaster.

defendant for its mulching operation. Defendant, in turn, supplied inmate labor at no cost to remove the pallets from plaintiffs' property. The project started on April 17, 1995, but without a specific end date. Inmates worked six hours per day, weather permitting; OPI employees removed pallets from ten acres of plaintiffs' property in approximately one year.

{¶ 4} In 1996, defendant entered into a second agreement whereby OPI was to occupy plaintiffs' property to operate its mulching facility and to process new and used pallets for resale or mulching. Another company owned by Deem, United Pallet, Inc. (UPI),² bought repaired pallets from OPI. The second agreement began on April 15, 1996, and was to end on April 15, 1997; however, the parties to the agreement continued with the business after the agreement had expired. Pursuant to the second agreement, defendant agreed to process up to 100,000 cubic yards of pallet waste on plaintiff's property. This arrangement benefitted both parties in that plaintiffs disposed of the pallets and defendant was provided with a source of material for its mulching operation, after which defendant then sold the mulch to various state agencies.

{¶ 5} In March 2001, defendant ceased its mulching operation on plaintiffs' property. Defendant admits that while occupying the property, inmates working at the facility caused damage to a cinder block wall, a debris dumpster, and two EPA monitoring wells. Plaintiffs also claim that inmates caused damage to the limestone base of the driveway on the property and fire damage to a building; however defendant denies these claims.

{¶ 6} Deem testified that in August 1999, UPI stopped paying defendant for pallets and that in December 1999, defendant sent him a letter regarding UPI's past due account. (Defendant's Exhibit O.) After a meeting on January 31, 2000, with defendant's representatives Robert Starkey and Rick Stevens, Deem agreed to make payments on the debt in exchange for defendant's making certain repairs, including repairing the block walls on the maintenance building, replacing the dumpster, and repairing broken EPA monitoring wells.

²The court notes that UPI is not a party to this case but that defendant has filed a complaint against UPI in another court.

{¶ 7} Deem testified that defendant's bulldozers removed the limestone base under the parking area when it performed its final clean-up of the premises in 2001. He further testified that defendant agreed to repair the limestone base in 2002 but that no repairs had been made.

{¶ 8} Deem also testified that a fire occurred on June 22, 1997, in a concrete bay at the facility where scrap wood and pallets had been stored. Deem testified that he did not know how the fire started but that he had been having problems with teenagers trespassing on his property around that time. Deem further testified that he was not aware that pallets had been stored in that bay.

{¶ 9} Keith Shull testified that he worked at the mulching plant as an employee of OPI where he supervised a crew of approximately 8-10 inmates. Shull admitted that inmates damaged the dumpster and the block wall of the maintenance building with front-end loaders; however, he was not aware of any damage to the limestone base.

{¶ 10} Shull further testified that he drove past the facility when the fire occurred and that he saw that the gate was open. Shull filed an incident report regarding the fire but did not know how the fire started. He further testified that inmates were not allowed to smoke on the premises and that the fire occurred on a Sunday, when the mulching plant was closed. Shull also stated that he had obtained Deem's permission to store the pallets in the concrete bay in order to keep them clean and dry.

{¶ 11} Robert Starkey, Jr. testified that he was the workshop superintendent at OPI's mulching facility in 1997. Starkey explained that when UPI got behind in its bills, he attended a meeting with Deem and Stevens where property damage was discussed. Starkey admitted that inmates under OPI's control had damaged the block wall, the dumpster, and at least two EPA monitoring wells. As to the matter of the fire, Starkey was not employed by OPI when it occurred and he therefore had no personal knowledge about that event.

{¶ 12} According to Starkey, an agreement was reached at the meeting regarding repairs and UPI's debt; that UPI owed defendant approximately \$40,000 and that Deem had estimated that the damage to plaintiffs' property totaled \$31,000. Starkey stated that he and Deem agreed to allow inmates to perform repairs in exchange for UPI's making payments toward the debt. Starkey opined that since it would use inmate labor, defendant could make the repairs for approximately one-quarter to one-half of the \$31,000 estimate.

{¶ 13} Starkey referred to a number of exhibits to show that repairs were either made or contemplated by defendant. Defendant's Exhibits W, Z, AA, BB, CC, and EE show that the issues of fire hydrant repair, yard waste removal, fence repair, culvert pipe replacement, and stump and firewood debris removal were all addressed and resolved by the parties in conjunction with the agreement reached at the meeting.

{¶ 14} Starkey also testified that exhibits EE through II show that defendant intended to repair the damage to the block wall of the maintenance building, replace the dumpster, repair the EPA monitoring wells, repair the limestone base and repair the fire damage, but that these repairs were not made because UPI did not continue to make payments towards its debt. Starkey added that even though agreements were drafted in anticipation of repairs of the fire damage and the limestone base, defendant had not admitted responsibility for either problem; rather, defendant agreed to make those repairs in order to get UPI to make payments on its debt.

{¶ 15} Rick Stevens testified that he had 27 years of experience at OPI and that he was the production manager at OPI during the time that the mulching plant was operating on plaintiffs' property. Stevens testified that he was not present when the fire took place, but that he visited the site a few days after the fire and that he never assumed responsibility for the fire on behalf of defendant.

{¶ 16} Stevens stated that he attended the meeting with Deem and Starkey and that at the meeting, they reached some "gentlemen's agreements" to serve as good faith attempts at resolving their disputes. Stevens explained that he advised Deem to make a list of his complaints and that they agreed that when defendant would repair something on the list, UPI would pay an invoice. According to Stevens, this agreement was successful approximately three times but when the replacement dumpster became available, Deem did not return his phone calls regarding delivery. After that incident, negotiations broke down and no other repairs were made.

{¶ 17} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. The court finds that defendant owed plaintiffs the common law duty of reasonable care while it

occupied plaintiffs' premises to conduct its mulching facility. See 1 Restatement of the Law 2d, Torts (1965) 2, Section 298.

{¶ 18} Plaintiffs' claims regarding damage caused by the fire are barred by the two-year statute of limitations found in R.C. 2743.16(A), which states: "[s]ubject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The fire occurred on June 22, 1997. Plaintiffs filed Case No. 2002-03872 regarding this incident on April 12, 2002, dismissed that case, and then filed the present case on July 9, 2003. Pursuant to R.C. 2743.16(A), any claim regarding the fire should have been filed by June 22, 1999. Therefore, any claim regarding the fire cannot be considered by the court.

{¶ 19} Based upon the evidence presented, plaintiffs have proven by a preponderance of the evidence that defendant breached its duty of reasonable care when the inmates under its control damaged the block wall of the maintenance building, the debris dumpster, and the EPA monitoring wells. The court further finds that plaintiffs have failed to prove by a preponderance of the evidence that defendant or inmates under its control caused the alleged damage to the limestone base.

{¶ 20} For the foregoing reasons, the court finds that plaintiffs have proven their claim for property damage regarding the block wall of the maintenance building, the dumpster, and the EPA monitoring wells. Accordingly, judgment shall be rendered in favor of plaintiffs.

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JUDGMENT ENTRY

Defendant :
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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiffs in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

FRED J. SHOEMAKER
Judge

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