State v. Howe Cleaners, Inc. No. 27-1-04 Wncv (Toor, J., Mar. 10, 2006)

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STATE OF VERMONT
WASHINGTON COUNTY, SS

STATE OF VERMONT, Plaintiff, v. HOWE CLEANERS, INC., et al., Defendants.	SUPERIOR COURT Docket No. 27-1-04 Wncv

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This is a civil enforcement action brought by the Agency of Natural Resources pursuant to Vermont's Waste Management Act, 10 V.S.A. §§ 6601–6632, for the abatement and cleanup of hazardous waste at a property in Barre City known as 9 Depot Square. The State has also asserted a claim of public nuisance. The defendants include David Benvenuti and Howe Cleaners, Inc.; both are alleged to have owned and operated the dry cleaning facility that originally generated most or all of the hazardous waste now contaminating the property. Also named as defendants are most subsequent owners of the property. Two such subsequent owners, TD Banknorth and John H. Fiore, Trustee of the 9 Depot Square Realty Trust, have filed motions for summary judgment.[1] The State also has filed a motion for partial summary judgment.[2]

[1] For the sake of simplicity, Defendant John H. Fiore, Trustee of the 9 Depot Square Realty Trust, will be referred to as "Fiore" or "John Fiore" in this opinion. TD Banknorth will be referred to as "Banknorth."
[2] Another summary judgment motion, filed by Third Party Defendant Griffin International, Inc. in response to Third Party Plaintiff Banknorth's claim against it, remains pending. The court granted the parties' stipulated motion to

Factual and Procedural Background

In the complaint, the State alleges the following facts. Defendants David Benvenuti and Howe Cleaners owned the property from approximately 1970 to 1996. During much of that time, they operated a dry cleaning business on the property, and hazardous waste, such as perchloroethylene, was released directly onto the property. In 1996, they sold the property to Elizabeth Hamm-Burns, who is not a defendant in this case. Ms. Hamm-Burns converted the property to a bakery business. In 1997, after the bakery failed, Defendant Banknorth (by a predecessor-in-interest) foreclosed and took title to the property. Several months later, Defendant Fiore purchased the property. The State generally alleges that releases or threats of releases of hazardous waste have been ongoing ever since the property was operated as a dry cleaning facility.

In his summary judgment motion, Fiore argues that the State has no admissible evidence with which to satisfy "its burden of proving that a 'release' or 'threatened release' of hazardous substances occurred during the period of his ownership." Fiore's Motion for Summary Judgment at 1 (filed June 1, 2005). There is no dispute that Fiore has never operated any business at the property other than the present pizza shop and pool hall.

In its summary judgment motion, Banknorth similarly argues that the State has no admissible evidence showing that any release or threat of release occurred while it owned the property. It seeks summary judgment on the State's hazardous waste and public nuisance claims on that basis. There is no dispute that Banknorth only owned the property for a few months between foreclosing on Hamm-Burns and selling the property to Fiore.

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stay Griffin's motion pending a decision on Banknorth's summary judgment motion against the State, which is resolved here. Stipulated Motion to Stay Banknorth's Deadline to Respond to Griffin International's Motion for Summary Judgment (granted July 13, 2005). Griffin's motion, therefore, no longer is stayed; Banknorth is ordered to file any opposition to the motion within thirty days.

The State opposes both motions essentially as misstating the applicable law, and itself seeks summary judgment on whether Fiore and Banknorth, as well as Howe Cleaners and Benvenuti, may have liability under 10 V.S.A. § 6615(a). In its statement of material facts, the State makes little more than the conclusory allegation that there have been ongoing releases and threats of releases of hazardous wastes throughout all defendants' ownership of the property, failing to explain what they may be, or when they may have occurred. The State also argues that, in any event, Fiore may have liability even without such a showing.

There is no dispute that, at the present time, the property is contaminated with hazardous waste. As will be discussed in more detail below, the parties have not organized the record sufficiently for purposes of Rule 56 to allow the court to reliably determine what other material facts are genuinely undisputed.

Standard

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, *referred to in the statements required by Rule 56(c)(2)*, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3) (emphasis added). Rule 56(c)(3) puts "attorneys on notice that they must include in their Rule 56(c)(2) statements all of the facts that they have relied on in support of or in opposition to summary judgment, and that facts that are omitted from their statements will not be considered by the court in ruling on the motion." Reporter's Notes—2003 Amendment, V.R.C.P. 56. "Where . . . the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by indicating an absence of evidence in the record to support the nonmoving party's case. The nonmoving party then has the burden of persuading the court there is a triable issue."

Mello v. Cohen, 168 Vt. 639, 639–40 (1998).

I. Fiore's Summary Judgment Motion

Fiore argues that he is entitled to summary judgment because the State lacks evidence of any release or threat of release occurring while he has owned the property. The State responds that it is not required to make any such showing because, under 10 V.S.A. § 6615(a)(1), Fiore can have liability regardless of the timing of any release or threat of release.

Section 6615(a) establishes four classes of parties that can have liability under the Waste Management Act for abating releases or threatened releases of hazardous waste, and for costs of investigation, removal, and remediation. With regard to each class, "it is not necessary for the state to plead or prove negligence in any form or manner . . . . The state need only plead and prove the fact of the release or threatened release and that the person in question was as specified in subsection (a) . . . ." 10 V.S.A. § 6615(c). The four classes include: (1) current owners or operators of a facility; (2) persons who owned or operated the facility "at the time of" the release or threatened release; (3) persons who "arranged" for disposal or treatment; and (4) transporters. *See* id. § 6615(a). The distinction between subsections (a)(1) and (a)(2), both of which apply to owners and operators, is that (a)(1) applies only to current owners and operators, while (a)(2) applies only to previous owners or operators whose ownership or operation existed at the time of the release or threat of release.

There is no dispute that Fiore is the current owner, and that the site currently is contaminated. On these facts, Fiore may be an owner or operator under 10 V.S.A. § 6615(a)(1) without any additional proof by the State that any release or threat of release occurred while Fiore has owned the property.

In a memorandum that Fiore characterizes as both a reply to the State's opposition to his

motion and his opposition to the State's motion, Fiore for the first time asserts that he is entitled to summary judgment on three statutory defenses: 10 V.S.A. § 6615(c) (proportional liability), § 6615(d)(1)(C) (third party defense), § 6615(e) (innocent landowner). While the State has responded to these new claims as though they were properly raised, they were not. Specifically, Fiore did not submit a statement of undisputed facts in support of these new claims.

While the court realizes that the parties have spent a great deal of time on these motions and desire resolution, the failure to follow the procedural requirements of Rule 56 creates a barrier to that resolution. Without such a statement of facts, to which the State would have to formally respond, the court has no clear factual record on which to rule. The point of the requirements of Rule 56 is to make such a clear record. Attorneys are "on notice that they must include in their Rule 56(c)(2) statements all of the facts that they have relied on in support of or in opposition to summary judgment, *and that facts that are omitted from their statements will not be considered by the court in ruling on the motion*." Reporter's Notes—2003 Amendment, V.R.C.P. 56 (emphasis added). While the court is at times willing to allow counsel some leeway when procedural requirements amount to form over substance, this is not one of those cases. The issues are too complicated, both factually and legally, to be sorted out with less than a clearly delineated factual record. *See* 10B Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2732, at 104 (1998) (discussing the need for "cautious handling" of summary judgment motions in complicated cases). Fiore's summary judgment motion is therefore denied.

II. Banknorth's Motion for Summary Judgment

A. Waste Management Act Claim

Like Fiore, Banknorth argues that it is entitled to summary judgment because the State has no evidence showing any release or threatened release of hazardous waste during its

ownership. Banknorth implies that because it did nothing to generate waste or dispose of it on site, it cannot have liability under 10 V.S.A. § 6615(a)(2). The State again argues that the timing of the release or threat of release is irrelevant to potential liability. The State also makes an evidentiary showing that there is a triable issue about whether a release or threat of release occurred or was ongoing during Banknorth's ownership.

Banknorth may have liability under 10 V.S.A. § 6615(a)(2) if it is a "person who at the time of release or threatened release of any hazardous material owned or operated any facility at which such hazardous materials were disposed of." The State argues that the term "release" includes any past release such that if there ever was a release, all subsequent owners necessarily will be subject to section 6615(a)(2). That is, according to the State, release includes the mere fact of contamination coinciding with ownership no matter how or when the contamination originally arose, effectively mooting "at the time of" in section 6615(a)(2).

The parties have extensively briefed the issue of whether existing contamination alone (e.g., passive migration of pre-existing pollutants) triggers liability under a federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675. For analyses of this issue, s*ee generally* Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001); United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000); ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 359 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706, 722 (3d Cir. 1996); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992). Each of these courts arrived at a different conclusion. The Carson Harbor court described this difference of opinion as a "nuanced range of views, depending in large part on the factual circumstances of the case" rather than "the dichotomy of a classic circuit split." Carson Harbor Village, 270 F.3d at 875.

The court has reviewed the above cases and related authorities, and concludes that they are not dispositive of this issue under Vermont's Waste Management Act in the circumstances presented here. Liability under CERCLA is triggered by "disposal," not "release." *Contrast* 42 U.S.C. § 9607(a)(2) *with* 10 V.S.A. § 6615(a)(2). *See also*, Carson Harbor, 270 F.3d at 874-880 (discussing "disposal" at length). Additionally, the CERCLA definition of "release" differs materially from the Waste Management Act definition. *Contrast* 42 U.S.C. § 9601(22) (including as a release "leaching" and "abandonment . . . of containers") *with* 10 V.S.A. § 6602 (silent regarding "leaching" and abandonment). While the Waste Management Act "parallels CERCLA in many relevant respects," they are not identical. Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124, ¶ 28, 177 Vt. 421.

The court disagrees with the State's expansive interpretation of section 6615(a)(2). "Release" is defined by statute. It means "any intentional or unintentional action or omission resulting in the spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing of hazardous materials into the surface or groundwaters, or onto the lands in the state, or into waters outside the jurisdiction of the state when damage may result to the public health, lands, waters or natural resources within the jurisdiction of the state." 10 V.S.A. § 6602(17). The words spilling, leaking, pumping, etc., all describe specific ways in which hazardous material may contaminate land, water, or natural resources. The release is, for example, the leaking; it is not the mere fact of existing contamination caused by the leak.

This reading of "release" is consistent with the statutory definition, and harmonious with the distinction between section 6615(a)(1) current owners and section 6615(a)(2) former owners. The expression "at the time of release" in section 6615(a)(2) plainly evinces an intent to hold previous owners liable if the release coincided with the period of ownership. If "at the time of

release" really meant "any time after the initial contamination," as the State would have it, then section 6615(a)(1) would be entirely meaningless because all section 6615(a)(1) owners necessarily would be section 6615(a)(2) owners. *Accord*, Carson Harbor, 270 F.3d at 881 (if "disposal" includes "passive migration," then "every landowner after the first disposal would be liable, and there would be no reason to divide owners and operators into categories of former and current."); CMDC Realty, 96 F.3d at 715 (CERCLA's creation of various categories of liable parties "would be a rather complicated way of making liable all people who owned or operated a facility after the introduction of waste into the facility.").

Moreover, if the legislature had intended to make liable all owners after the initial contamination, it could have said so easily by reference to "contamination" rather than "release." The undefined term "contamination" (and variants such as "contaminant" and "contaminated") -- as opposed to the specially defined "release," meaning the process by which contamination arises -- is used repeatedly in the Waste Management Act. *See, e.g.*, 10 V.S.A. §§ 6603j(a), 6604a(a), 6604a(b), 6605a(a)(3)(B), 6605a(c), 6605a(d), 6605e(b)(4), 6615(d)(2)(E), 6615(d)(3)(B), 6615a(a), 6615a(b), 6615a(g)(1)(A), 6615a(g)(1)(B), 6615a(g)(1)(E), 6615a(h)(6), 6615a(j)(2)(D), 6615a(l), 6615b(1), 6615b(4), 6620a(f). It is conspicuously absent from the language of section 6615(a)(2). It is also absent from the definition of "release." 10 V.S.A. § 6602(17). Interpreting "release" to mean "contamination" would ignore the language of the statutory definition as well as the legislature's decision to use "release" in some sections and "contamination" in others.

The court shares the sentiment of the Carson Harbor court when it said the following:

> Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA. It is not our task, however, to clean up the baffling language Congress gave us by deleting . . . words . . . Transported to Washington D.C. [when the statute was written], armed with a red pen and a copy of Strunk and

> White's *Elements of Style*, we might offer a few clarifying suggestions. But in this time and place, we can only conclude that Congress meant what it said . . .

Carson Harbor Village, 270 F.3d at 883. The Vermont statute, like CERCLA, is also strikingly circular and confusing. However, the court cannot ignore the "at the time of release" provision plainly stated in 10 V.S.A. § 6615(a)(2).

The court thus concludes that for the State to establish that Banknorth may have liability under 10 V.S.A. § 6615(a)(2), the State must prove that the release or threat of release (such as the spilling, or threat of spilling) actually occurred while Banknorth owned the site. Because the State will have the burden of persuasion at trial on the presence of the release or threat of release, Banknorth is permitted to discharge its burden of production on the motion for summary judgment by indicating an absence of evidence in the record to support the State's case. *See* Poplaski v. Lamphere, 152 Vt. 251, 254–55 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). By indicating an absence of evidence in support of a "release or threat of release" during its ownership, Banknorth properly has shifted onto the State "the burden of persuading the court there is a triable issue" with regard to release. Mello v. Cohen, 168 Vt. 639, 639–40 (1998).

Banknorth, however, has indicated an absence of evidence only in a very general way. The existence of a "release" is both a question of law and fact. Though it is well aware of the complicated facts involved in this case, Banknorth has made no meaningful indication of the underlying facts it contends are not present. In analyzing whether the State has demonstrated that there is a triable issue with regard to "release," the court therefore bears in mind that this matter has been raised only in the most general sense.

The State has satisfied its burden of establishing a triable issue by pointing to specific record evidence in support of a release or threat of release at the time of Banknorth's ownership.

That is, the State has cited to substantial evidence in support of a release or threat of release during the period of Banknorth's ownership. Generally, the record includes evidence supporting the State's contentions that underground storage tanks containing hazardous waste may have been abandoned and not maintained during Banknorth's ownership, and that the tanks may have been leaking at that time as well. The record also includes evidence that vapors of hazardous waste were being emitted into the air, either from the storage tanks or the ground. There also is evidence that hazardous waste was prone to collecting in the sump, and that Banknorth cleaned out the sump. *See* State of Vermont's Response to Defendant Banknorth's Statement of Undisputed Material Facts (filed Oct. 5, 2005).

While the court does not now decide that the State's evidence conclusively proves a release or threat of release during Banknorth's ownership, this evidence is sufficient in the posture of the motion under consideration to establish a triable issue in that regard. Banknorth's summary judgment motion therefore is denied on that issue.

B. Public Nuisance

Again invoking the Celotex summary judgment standard, Banknorth also argues that the State has no evidence supporting its public nuisance claim against Banknorth. Specifically, Banknorth argues that because there was no release or threat of release while it owned the property, there could not have been a release or threat of release sufficient to trigger liability for a public nuisance. The State has failed to respond to, or even acknowledge, this argument.

As the Vermont Supreme Court has stated, "the concept of public nuisance is vague and amorphous." Napro Development Corp. v. Town of Berlin, 135 Vt. 353, 356 (1977). The Restatement on Torts makes clear that not all instances of pollution necessarily will give rise to a public nuisance claim. Restatement (Second) of Torts § 821B cmt. g. Therefore, the court

cannot conclude that the State's successful showing of a triable issue with regard to "release," for purposes of the Waste Management Act claim, necessarily satisfies its parallel burden with regard to the nuisance claim.

The State can "survive" Banknorth's motion on public nuisance only by coming forward with "specific facts" that demonstrate a triable issue. State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995) (citing Celotex, 477 U.S. at 324). The State has not responded to Banknorth's motion regarding public nuisance at all, much less by designating any specific facts in opposition to it. Banknorth's motion is therefore granted on this issue.

III. The State's Summary Judgment Motion

The State has filed its own summary judgment motion, in which it seeks judgment solely on whether all defendants other than Jason's Dry Cleaning, Inc. may have liability under 10 V.S.A. § 6615(a).[3]

A. Defendants David Benvenuti and Howe Cleaners, Inc.

The State seeks a determination that Benvenuti and Howe Cleaners have liability as previous owners and operators of the site. 10 V.S.A. § 6615(a)(2). Neither defendant responded to the State's motion. However, while the facts in the State's statement of material facts are "deemed" to be admitted because these defendants did not oppose them, the State included no facts in that statement regarding these defendants. V.R.C.P. 56(c)(2). Even where a party fails to oppose a summary judgment motion altogether, the court may only grant the motion "if appropriate." V.R.C.P. 56(e). The court may not grant the motion merely because the opposing party filed no opposition. Here, the State's Rule 56 statement includes no facts that would support the liability of Benvenuti and Howe Cleaners under 10 V.S.A. § 6615(a)(2), an issue on

[3] Jason's Dry Cleaning, Inc. has never made an appearance in this case. Nothing in the record suggests that it was ever served. It remains a named defendant.

which the State has the burden of persuasion at trial. Summary judgment on this issue, therefore, is not appropriate. The State's motion is denied with regard to Benvenuti and Howe Cleaners.

B. Defendant John Fiore

With regard to Fiore, the State seeks a determination that he may have liability as "the owner or operator of a facility." 10 V.S.A. § 6615(a)(1). There is no dispute that Fiore is the current owner of the site, and that the site is contaminated. The court already has ruled that the State does not need to prove that any release or threat of release occurred during Fiore's ownership of the property. Fiore, however, argues that the site is not a "facility," and therefore he cannot be the owner of a facility for purposes of section 6615(a)(1).

"Facility" means "all contiguous land, structures, other appurtenances, and improvements on the land, *used for* treating, storing, or disposing of waste. A facility may consist of several treatment, storage, or disposal operational units." 10 V.S.A. § 6602(10) (emphasis added). Fiore interprets the words "used for" to indicate the legislative intent to restrict facilities to those places in which a current owner intentionally engages in the treatment, storage, or disposal of waste. This interpretation conflicts with the language of the statutory definition, as well as the use of the term in 10 V.S.A. § 6615(a)(1). "Facility" is defined expansively in terms of how a place has been used, not who used it or what that owner's intentions might be. The Court concludes that the site is a facility for purposes of 10 V.S.A. § 6615(a)(1).

As he did in reply to the State's opposition to his own summary judgment motion, Fiore also argues that he is entitled to three defenses: section 6615(c) (proportional liability); section 6615(d)(1)(C) (third party defense); and section 6615(e) (innocent landowner). *See* supra Part I at 4–5. The court declines to address any of these arguments in the context of the State's motion because they all are outside its scope. The State seeks summary judgment only on whether the

defendants are properly classified as owners or operators under 10 V.S.A. § 6615(a). While the eventual determination of liability is subject to the affirmative defenses in subsections (d) and (e), and the apportionment of liability among joint and severally liable defendants is subject to subsection (c), none of these provisions can alter a conclusion about the threshold question of whether Fiore is a section 6615(a)(1) owner. That is the only issue presented by the State's summary judgment motion. The defenses are outside the limited scope of the State's motion.[4]

The State's motion is granted with regard to Fiore. Fiore will, however, be entitled to present his affirmative defenses at trial.

C. Banknorth

As noted above, Banknorth may have liability if it is a person "who at the time of release or threatened release of any hazardous material owned or operated any facility at which such hazardous materials were disposed of." 10 V.S.A. § 6615(a)(2). The court has already determined that the State is required to prove that the release or threat of release actually occurred while Banknorth owned the property. The remaining controversy between the parties is the timing of any releases or threats of releases.

As the moving party, and the party with the burden of persuasion at trial, the State is obligated to support its motion with a statement of material facts showing that it is entitled to summary judgment. As mentioned above, pursuant to Rule 56(c)(3), the State's statement of material facts must include all of the facts relied on in support of summary judgment. "[F]acts that are omitted from the[se] statements will not be considered by the court in ruling on the motion." Reporter's Notes—2003 Amendment, V.R.C.P. 56.

[4] Moreover, as noted previously, none of these claims were properly raised in Fiore's summary judgment motion. Fiore has not advanced them on a factual record organized to comply, even minimally, with Rule 56 standards. With the parties apparently disagreeing on nearly every point of fact and law, the court declines to consider these defenses outside the confines of a properly supported motion.

Regarding the timing of any releases or threats of release, the State, in its statement of material facts, says only this: “Releases and threatened releases of hazardous materials existed at all times defendants owned or operated the facility and continue to exist.” State’s Statement of Undisputed Facts in Support of Its Motion for Summary Judgment ¶ 2 (filed July 29, 2005).

This “fact” is patently insufficient under Rule 56 standards. The release or threat of release, including its timing, is an ultimate fact necessarily composed of numerous other facts, including exactly what activities are alleged to be the release, and when they occurred in relation to Banknorth’s ownership. The State fails to articulate any specific evidence of “spilling, leaking, pumping, pouring, emitting, emptying, dumping, or disposing” necessary to a release or threat of release, or any evidence as to the timing thereof. The State merely cites to a long list of exhibits without separately listing or explaining what facts they arguably prove. Moreover, many of the exhibits contain highly technical scientific information likely requiring expert interpretation. The court finds this insufficient for Rule 56 purposes.

The State’s motion is denied with regard to Banknorth.

<u>Order</u>

For the foregoing reasons, the court rules as follows:

1) Fiore’s motion for summary judgment is denied;

2) Banknorth’s motion for summary judgment is denied on the section 6615(a)(2) claim, and granted on the nuisance claim; and

3) the State’s motion for partial summary judgment is denied with regard to David Benvenuti and Howe Cleaners, Inc.; granted with regard to John Fiore; and denied with regard to Banknorth.

Dated at Montpelier, Vermont this 10th day of March 2006.

Helen M. Toor
Superior Court Judge