

Bruckner Realty, LLC v County Oil Co., Inc.
2007 NY Slip Op 33428(U)
October 16, 2007
Supreme Court, Nassau County
Docket Number: 0439-05/
Judge: James P. McCormack
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/TAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

BRUCKNER REALTY, LLC,

Plaintiff(s),

Index No. 000439/05

-against-

Motion Seq. No.: 007 & 008

Motion Submitted: 9/4/07

COUNTY OIL COMPANY, INC., ANCHOR TRANSIT
CORP., MYSTIC TANK LINES CORP., A. B. C. TANK
REPAIR & LINING, INC. AMERICAN HOME
ASSURANCE COMPANY, A COMPANY OF
AMERICAN INTERNATIONAL GROUP, INC., AND
ZURICH NORTH AMERICA, INC.,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The motion by defendant County Oil Company, Inc. ("County") and the cross motion by defendant ABC Tank Repair & Lining, Inc. ("ABC"), both seeking summary judgment, are granted for the reasons set forth herein.

The plaintiff, Bruckner Realty LLC, commenced this action to be reimbursed for oil contamination in the Long Island Sound.

Plaintiff owns an apartment building located at 3555 Bruckner Boulevard, Bronx,

N.Y. (the "premises"). The plaintiff uses heating oil for heat and hot water. County is an oil broker located in Queens, N.Y. Plaintiff sought an oil delivery in September, 2004. Plaintiff called County. County arranged for an oil delivery to the premises on September 23, 2004. Shortly after the delivery of 6,500 gallons of oil, superintendent of the premises, Alejandro Nunez, noticed the gauges on the premises' heating system were running high indicating a blockage in the fuel line. Nunez thought a steam cleaning was needed (see Exhibit G, pg. 161-162 annexed to its motion affidavit). County was called and notified of the problem. County stated it would take care of it. County called ABC and asked ABC to clean out the fuel lines by steam cleaning the lines. ABC performed the cleaning and left the premises on September 28, 2004. A day after the steam cleaning, Nunez noticed oil was leaking from the lines of the heating system at the premises. The leaking oil was pumped out of the premises, into the New York City sewer system and into the Long Island Sound.

In its complaint, plaintiff states County "took it upon itself to take corrective action" without being specific as to how this would result in a contract." From the record County sought to act on plaintiff's complaint of allegedly "bad" oil through steam cleaning, i.e., removing sludge from the plaintiff's oil lines that were allegedly causing increased pressure in the oil lines of plaintiff's apartment complex heating system.

Plaintiff contends the negligent application of steam by ABC caused the oil pipes to burst and discharge approximately 1,500 gallons of heating oil into the Sound.

Plaintiff originally had accused County of delivering "bad" oil. Plaintiff has stipulated that the oil delivered by County (by Anchor Transit) was not defective (see Exhibit E annexed to the affidavit of William S. Nolan). Plaintiff alleges County set in motion the events that caused the leak. County contends it is only a broker and ABC was sent by County to placate plaintiff, a customer (plaintiff alleges it had ordered over a half million gallons of oil from County) based on plaintiff's "bad" oil allegation. County has offered the expert affidavit of Uriel M. Oko, a pipe engineer who is an expert in pipe failure from corrosion, especially oil pipes. Mr. Oko concluded the dampness in the boiler room floor corroded the oil pipe lines and the perforations or holes in the pipe existed long before the steam cleaning by ABC. Mr. Oko found the oil sludge was blocking the oil from leaking out all the holes in the line. Once the steam cleaning removed the sludge, the oil could leak out of the perforated pipes. Mr. Oko found the application of steam cleaning to the pipes did not cause them to burst. The corroded pipe that leaked oil on September 29, 2004, was part of the oil return line of the old out-of-use boiler. This old return line was connected to the return line of the in-use boiler by a make-shift "T" connection located behind the boiler and underneath the access stairs. This "T" connection has absolutely no function in the in-use boiler system at the Bruckner building and could not be observed from the front of the boiler or from the oil filter, where the steam cleaning was applied.

The undisputed facts clearly evidence that the section of pipe that leaked was determined to be heavily corroded and perforated in various places prior to the

application of steam on September 28, 2004 (see Oko affidavit).

ABC states it performed a simple cleaning of plaintiff's heating unit. A diagram of the unit is set forth as Exhibit 1 annexed to the affidavit of Donald M. Rutherford. The leak occurred in the rear out-of-the-way area in an out-of-service boiler. ABC states its technician was not involved in the inspection and/or maintenance of plaintiff's heating system. ABC's task was to merely successfully steam clean the line and leave. The report of Mr. Oko reveals no negligence in ABC's steam cleaning.

As noted, the plaintiff has offered the expert report of Donald H. Rutherford. Mr. Rutherford's report deals with the flow of the leaking oil.

Plaintiff's expert report found that 100% of the oil discharge from plaintiff's building occurred prior to the discovery of the discharge making any negligent conduct after discovery irrelevant. The Court must concur with ABC's assessment of plaintiff's expert conclusion that it is based on pure speculation with no data to back it up. The record herein clearly reflects that the discharge of oil continued well after plaintiff's initial discovery. Also, perhaps, plaintiff's inspection policy was negligent.

An owner of contaminated property who has control over the activities occurring on the property and reason to believe that petroleum products are stored therein may be liable as a discharger (*State of New York v Green*, 96 NY2d 403). Clearly, plaintiff was found to be a "discharger."

Plaintiff's causes of action as to County and ABC under the Navigation Law are unavailing.

A discharger under Navigation Law § 188(5) must be able to halt the discharge, effect a clean up or prevent the discharge initially (*State v Speonk Fuel, Inc.*, 3 NY3d 720).

The discharge did not result from damaged or flawed storage equipment wherein County or ABC were responsible for the repair and maintenance of the damaged or flawed equipment (*Domermuth Petroleum Equipment and Maintenance Corp. v Herzog & Hopkins, Inc.*, 111 AD2d 957).

If a discharge from an underground storage tank occurs as a means of storage rather than the manner of delivery and the supplier has no involvement in the storage of the product, the supplier is not in a position to halt or prevent a spill or clean up resulting from the spill and the supplier will not be held liable as a discharger (*State v Joseph*, 29 AD3d 1233, *lv to app den.* 7 NY3d 711). Neither County nor ABC are “dischargers” under the Navigation Law based on the record herein.

County notes that Navigation Law only allows a faultless landowner to sue other parties for the clean up costs that can be associated with a petroleum discharge (*State v Green, supra; Hjerpe v Globerman*, 280 AD2d 646). Here, the record reflects plaintiff conceded its guilt to eight different violations that contributed to the spill. As noted by County, plaintiff’s sump pump fed the leaking oil into the New York City Sewer System. County notes the sump pump should not have been connected to the sewer system and the plaintiff’s superintendent was never instructed on how to operate, maintain or monitor the sump pump (see Exhibit G, pg. 151 annexed to the affirmation of C. William Nolan), and the superintendent never turned the pump off during the

spill (Exhibit G, p. 152-153).

The record is clear the plaintiff did not properly or rapidly respond to the spill. The superintendent had no spill prevention equipment and could not halt the flow of oil (see Exhibit G, pgs. 131-134, 138-139, 149-151 annexed to the Nolan affidavit).

A Navigation Law claim may only be asserted by an injured person who is not responsible for the discharge (*Fuchs & Bergh, Inc. v Lance Enterprises, Inc.*, 22 AD3d 715). Clearly, plaintiff is responsible for the discharge. It cannot avail itself of the Navigation Law.

One who hires an independent contractor cannot be held for the independent contractor's negligent acts (*Chainani v Bd. of Ed. of the City of New York*, 87 NY2d 370). The record clearly reflects that County merely arranged for ABC to perform the steam cleaning without exercising any authority or control over the manner and technique of ABC's job performance. ABC was an independent contractor (see *E.B.A. Wholesale Corp. v S.B. Mechanical Corp.*, 127 AD2d 737). The deposition of Fitzwalter Goddard clearly shows ABC was an independent contractor (see Exhibit K, pgs. 29, 191, 193 annexed to the Nolan affidavit) and not an agent of County (see *L. Smirlock Realty Corp. v Title Guaranty Co.*, 70 AD2d 455).

Also, as noted by County, plaintiff's attempt to circumvent the independent contractor consent by alleging ABC's task was inherently dangerous is unavailing since courts have held that the cleaning of fuel tanks is not an inherently dangerous activity (*Tropea v Shell Oil Co.*, 307 F.2d 757) and that activities that involve the risk of a

petroleum discharge are not inherently dangerous (*English v Merroads Realty Corp.*, 288 NY 93).

The court must concur with County and ABC that plaintiff's claim for indemnification and contribution are not viable as to them. As noted there was no contract for County or ABC to maintain plaintiff's heating system and the record clearly shows plaintiff participated to the spill, and plaintiff cannot benefit from the indemnification doctrine (*Colyer v K Mart Corp.*, 273 AD2d 809; *Henderson v Waldbaums*, 149 AD2d 46) nor has plaintiff shown that it had any relationship that would make County or ABC vicariously liable for the clean up costs associated with the spill nor has plaintiff shown that County's or ABC's negligence caused the spill.

Nor has plaintiff shown a viable cause of action for a contribution claim as to County or ABC (*see Nassau Roofing & Sheet Metal Co., Inc. v Facilities Div. Corp.*, 71 NY2d 599), since neither had a duty to guard against the spill.

County and ABC had no way to discover a single steam cleaning would cause an oil spill miles from the building in Long Island Sound (*see Palsgraf v Long Island Railroad Co.*, 248 NY 339). The spill was not foreseeable by County or ABC (*Pinero v Rite Aid of New York*, 294 AD2d 251; *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711).

Here, County and ABC had no duty to inspect or monitor plaintiff's heating system. There was no duty owed by County or ABC to plaintiff wherein the breach of that duty was the proximate cause of the injury to the plaintiff (*Alvino v Lin*, 300 AD2d 421).

The primary obligation to keep the heating system in good repair should have been borne by plaintiff, its staff and those plaintiff had selected to perform regular maintenance and inspection of the system (*see Allen v Thompson Overhead Door Co.*, 3 AD3d 462).

The allegation that County would take care of the problem (high reading on plaintiff's gauges) does not provide contractual terms to both County and ABC to maintain/inspect plaintiff's heating system (*see Freedman v Pearlson*, 271 AD2d 301).

The owner that can control the use of the property and the activities which occur there has the amount of control required for liability (*State of New York v Dennin*, 17 AD3d 744, *lv dismiss.* 5 NY3d 824). The owner with the control here was the plaintiff.

While the oil "goop" or sludge served a purpose to plug the holes of an oil line, eventually the sludge would cause the heating unit to register excessive (dangerously) high pressure. Such sludge would have to be removed and expose any "plugged" corroded lines. It was plaintiff's task to make sure its oil lines were in good working order, not County's or ABC's.

Plaintiff clearly neglected its heating system and plaintiff did not act on information from G. Bauer, the entity responsible for the maintenance of the building and the inspection of the heating system, nor plaintiff's own building superintendent that the old rusted oil pipes and equipment had to be removed or replaced.

Finally, plaintiff's claim for promissory estoppel will not be considered since it is first asserted in response to County's summary judgment motion (*Rengifo v City of New*

York, 7 AD3d 773).

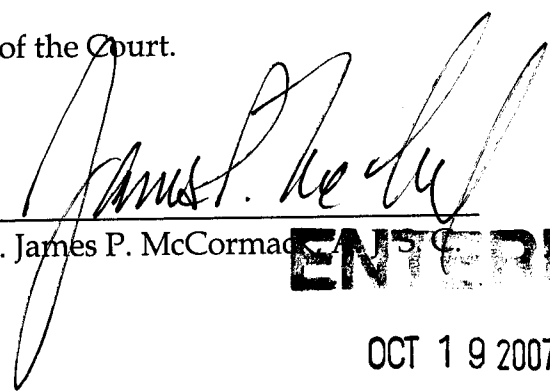
In conclusion, County and ABC had a limited contractual undertaking, they did not have a comprehensive and exclusive property maintenance obligation that would have displaced plaintiff's duty to maintain its property and its heating system safely (*Castro v Maple Run Condominium Ass'n.*, 41 AD3d 412).

Plaintiff put the whole matter in motion by its poor maintenance of its heating unit by allowing sludge to build up and by allowing its piping to corrode.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062). County and ABC have met their respective burdens for summary relief.

This constitutes the Decision and Order of the Court.

Dated: October 16, 2007
Mineola, N.Y.



Hon. James P. McCormack

ENTERED

OCT 19 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**