SHORT FORM ORDER

INDEX No. 05-15335
CAL. No. 07-01463-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/30/07 (#007)
MOTION DATE 10/23/07 (#008 & #009)
MOTION DATE 11/29/07 (#010)
ADJ. DATE 11/29/07
Mot. Seq. #007 - MD
Mot. Seq. #008 - MotD
Mot. Seq. #009 - MotD
Mot. Seq. #010 - MD

GRANT HENDRICKS and ROSEMARY HENDRICKS,

Plaintiffs,

- against -

JOSEPH A. McNULTY CO., INC. d/b/a HENDRICKSON FUELS, AMBROSE ENVIRONMENTAL MANAGEMENT, INC., TRADE-WINDS ENVIRONMENTAL RESTORATION, INC. and LANCER INSURANCE COMPANY, INC.,

Defendants.

TRADE-WINDS ENVIRONMENTAL RESTORATION, INC.,

Third-Party Plaintiff,

- against -

HILARY H. HOLLBORN & SONS, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 120 read on this motion to preclude; motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-37; 38-39; 40-54; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 55-57; 78-90; 91-106; 107; Replying Affidavits and supporting papers 108-112; 113-116; 117-119; 120; Other Trade-Winds' memorandum of law (#007); Trade-Winds' memorandum of law (#008); plaintiffs' memorandum of law (#007); plaintiffs' memorandum of law (#008); Hollborn's memorandum of law (#010); Trade-Winds' memorandum of law (#010); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant/third-party plaintiff Trade-Winds Environmental Restoration, Inc. (Mot. Seq. #007) for an order pursuant to CPLR 3126 (2) precluding plaintiffs from introducing any evidence at trial of real and personal property damages allegedly caused by asbestos contamination as a sanction for spoliation of evidence; the motion by defendant/third-party plaintiff Trade-Winds Environmental Restoration, Inc. (Mot. Seq. #008) for an order (i) pursuant to CPLR 3212 granting summary judgment dismissing the first and second causes of action in plaintiffs' complaint against it and dismissing any cross claims against it under the Navigation Law, (ii) in the alternative, pursuant to Navigation Law § 178-a, declaring it immune from liability under the Navigation Law and granting summary judgment dismissing the first and second causes of action in plaintiffs' complaint against it, and (iii) pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' punitive damages claim against it; the motion (incorrectly denominated as a cross motion) by defendants Joseph A. McNulty Co., Inc. d/b/a Hendrickson Fuels, Ambrose Environmental Management, Inc., and Lancer Insurance Company, Inc. (Mot. Seq. #009) for an order pursuant to CPLR 3212 granting summary judgment dismissing the first and second causes of action in plaintiffs' complaint against it pursuant to Navigation Law § 181; and the motion by third-party defendant Hillary H. Hollborn & Sons, Inc. (Mot. Seq. #010) for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims and cross claims against it, are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant/third-party plaintiff Trade-Winds Environmental Restoration, Inc. (Mot. Seq. #007) is denied, without prejudice to renewal at trial; and it is further

ORDERED that the motion by defendant/third-party plaintiff Trade-Winds Environmental Restoration, Inc. (Mot. Seq. #008) is granted to the extent of granting summary judgment dismissing as against it plaintiffs' first and second causes of action, the cross claim of defendants Joseph A. McNulty Co., Inc. d/b/a Hendrickson Fuels, Ambrose Environmental Management, Inc., and Lancer Insurance Company, Inc. to the extent it seeks contribution under the Navigation Law, and plaintiffs' claim for punitive damages, and is otherwise denied; and it is further

ORDERED that the motion by defendants Joseph A. McNulty Co., Inc. d/b/a Hendrickson Fuels, Ambrose Environmental Management, Inc., and Lancer Insurance Company, Inc. (Mot. Seq. #009) is granted to the extent of granting summary judgment dismissing as against them plaintiffs' second cause of action, and is otherwise denied; and it is further

ORDERED that the motion by third-party defendant Hillary H. Hollborn & Sons, Inc. (Mot. Seq. #010) is denied.

This is an action, *inter alia*, to recover damages to real and personal property arising from an oil spill which took place on March 8, 2005 when defendant Joseph A. McNulty Co., Inc. d/b/a Hendrickson Fuels ("Hendrickson") mistakenly made a delivery of fuel oil to an inactive underground storage tank at the plaintiffs' residence, causing a discharge of petroleum into the soil, subsoil, and groundwater at the premises, and from asbestos contamination which allegedly resulted from the subsequent efforts of defendant/third-party plaintiff Trade-Winds Environmental Restoration, Inc. ("Trade-Winds") to remedy the condition. Defendant Lancer Insurance Company, Inc. ("Lancer") is Hendrickson's environmental contamination and general liability insurance carrier. Defendant Ambrose Environmental Management, Inc. ("Ambrose") is a claims management company which was retained by Lancer to coordinate the remediation of the premises and which, in turn, hired Trade-Winds to perform the actual remediation. It appears that third-party defendant Hillary H. Hollborn & Sons, Inc. ("Hollborn"), a company which performs plumbing, heating, and electrical work, removed and replaced the plaintiffs' boiler in January 2005, several weeks prior to the spill.

According to the plaintiffs, there are two underground oil tanks on their property–one, an active tank located in the side yard, and the other, an inactive tank which had not been used for approximately 20 years, located partially under the house and partially under a back patio. For many years prior to March 8, 2005, Hendrickson had been making fuel oil deliveries to the active tank without incident; indeed, the location of the active tank was indicated on the driver's ticket for the March 8 delivery. When the plaintiffs discovered oil in the basement on March 9, they immediately contacted Hendrickson, and employees of Trade-Winds arrived that evening to begin remediation. As part of its remediation efforts, Trade-Winds installed an air scrubbing unit to remove petroleum odors from the basement. The plaintiffs allege that Trade-Winds improperly installed the unit by allowing the exhaust to blow directly into the basement instead of venting it outside the house. The plaintiffs further claim that operation of this "powerful" unit disturbed the exposed asbestos pipe insulation in the basement and circulated asbestos fibers throughout the house, causing asbestos contamination and forcing the plaintiffs to vacate the residence for over a year. Trade-Winds counters that any asbestos contamination was a result of Hollborn's negligent dismantling and removal of an asbestos-encased boiler predating the oil spill. Trade-Winds also contends that Hollborn, in the course of removing the boiler, negligently cut feed line pipes connected to the inactive tank without plugging or sealing them, thereby contributing to the spill.

The plaintiffs assert four separate causes of action in their complaint. As their first cause of action, the plaintiffs allege that Hendrickson, Ambrose, and Trade-Winds are strictly liable as dischargers of petroleum under Navigation Law § 181 for all direct and indirect damages resulting from the discharge, and that the plaintiffs are further entitled to bring a direct claim against Lancer under Navigation Law § 190 for all such damages; the second, that the plaintiffs are entitled to contribution from each of the defendants under Navigation Law § 176 (8); the third, that Hendrickson was negligent in delivering fuel oil to the inactive tank instead of to the active tank; and the fourth, that the defendants were negligent in installing the air scrubbing unit without properly venting it to the outside. The plaintiffs also seek punitive damages against each of the defendants.

Trade-Winds now moves for an order precluding the plaintiffs from introducing evidence of real

and personal property damages sustained as a result of the alleged asbestos contamination, claiming that the plaintiffs removed and disposed of all potential asbestos materials in the basement without providing prior notice to Trade-Winds that such remediation was to take place and before affording Trade-Winds an opportunity to inspect the property. According to Trade-Winds, it served a notice to preserve and inspect the property on September 28, 2005, within 20 days after serving its answer to the complaint; however, the plaintiffs had already commenced their asbestos remediation on September 26 and did not permit Trade-Winds to inspect the property until October 7, by which time critical evidence had been altered and destroyed and Trade-Winds' expert could no longer determine whether the asbestos fibers identified in the upper living quarters of the house were traceable to the reported asbestos materials in the basement or to other sources.

A party seeking the imposition of spoliation sanctions for the intentional or negligent destruction of crucial evidence must demonstrate that the loss of such evidence deprived it of the ability to establish a claim or defense (*e.g.*, ***Kirschen v Marino***, 16 AD3d 555, 792 NYS2d 171 [2005]). Here, based on the record provided, it is not clear how the plaintiffs intend to prove that the asbestos contamination was caused by Trade-Winds' remediation efforts and, hence, whether the removal and disposal of the relevant physical evidence will leave Trade-Winds without means to confront the plaintiffs' claim. Accordingly, the Court is constrained at this juncture to deny the request for spoliation sanctions, without prejudice to renewal at trial.

Trade-Winds also moves for partial summary judgment dismissing the plaintiffs' first and second causes of action and any cross claims asserted under the Navigation Law on the ground, *inter alia*, that it did not violate the Navigation Law because it is not a "discharger" under the statute, and further dismissing the plaintiffs' claim for punitive damages on the ground that its conduct did not evince the high level of moral turpitude required for imposing such damages.

Navigation Law § 181 (1) provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages." Navigation Law § 181 (5) further provides that "[a]ny claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum." "Discharge" is defined as any "action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state" (Navigation Law § 172 [8]), including all "bodies of surface or groundwater" (Navigation Law § 172 [18]). Additionally, pursuant to Navigation Law § 176 (8), "every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party."

Upon review, the Court finds that Trade-Winds established its prima facie entitlement to summary judgment as to all claims asserted against it under the Navigation Law by demonstrating that it was not responsible for the discharge (*see*, Navigation Law §§ 176 [8], 181 [5]). Pursuant to Navigation Law § 172 (8), statutory liability is predicated on an act or omission that *results* in the releasing, etc., of petroleum, whether by means of storage or by manner of delivery (*see*, ***State of New York v Joseph***, 29

AD3d 1233, 816 NYS2d 214, *lv denied* 7 NY3d 711, 823 NYS2d 770 [2006]). Here, it is apparent that Trade-Winds' involvement in this matter postdated the delivery of the fuel oil and that it was not responsible for the installation or condition of the subject tank (*cf.*, ***Huntington Hosp. v Anron Heating & A.C.***, 250 AD2d 814, 673 NYS2d 456 [1998]; ***Barclays Bank of N.Y. v Tank Specialists***, 236 AD2d 570, 654 NYS2d 673 [1997]). The plaintiffs, in opposition, failed to raise a triable issue of fact. The plaintiffs' attempt to fix statutory liability on the claim that Trade-Winds' conduct resulted in the asbestos contamination of the premises and thus delayed the oil remediation of the property until the asbestos contamination was abated is without support in the law. The plaintiffs' reliance on ***Hilltop Nyack Corp. v TRMI Holdings*** (264 AD2d 503, 694 NYS2d 717 [1999]) and ***Breslau v Palma***, (NYLJ, Jan. 4, 2006, at 27, col 3 [Sup Ct, Nassau County]) is misplaced as well; while statutory liability surely extends to an environmental contractor whose failure to clean up a spill results in the contamination of adjoining property owned by the injured person, that is not the situation here. Trade-Winds, therefore, is entitled to summary judgment dismissing the plaintiffs' first and second causes of action against it as well as its co-defendants' cross claim to the extent it seeks contribution under the Navigation Law. The plaintiffs' claim against Trade-Winds for punitive damages is dismissed as well. "Punitive damages are recoverable in actions where a party engages in willful or wanton conduct evincing a deliberate intention to harm or an utter indifference or conscious disregard for the safety of others" (***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 715, 808 NYS2d 705, 708 [2005]; *accord*, ***Home Ins. Co. v American Home Prods. Corp.***, 75 NY2d 196, 551 NYS2d 481 [1990]). Even assuming, for purposes of this motion, that Trade-Winds was responsible for the asbestos contamination, its conduct cannot be said to rise to the level of wantonness, wilfulness or recklessness necessary to sustain such an award.

Hendrickson, Ambrose, and Lancer likewise move for partial summary judgment dismissing the plaintiffs' first and second causes of action against it, alleging that the plaintiffs, having contributed to the discharge by "illegally" maintaining an inactive tank on their property, are "dischargers" and cannot recover under the statute.

Pursuant to Navigation Law § 172 (3), a "claim" may only be maintained by an injured person "who is not responsible for the discharge" (Navigation Law § 172 [3]). Provided, then, that the injured person did not cause or contribute to the discharge, he or she is not precluded from bringing a claim in strict liability under the Navigation Law (***White v Long***, 85 NY2d 564, 626 NYS2d 989 [1995]; ***Carter v Suburban Heating Oil Partners***, 44 AD3d 1221, 845 NYS2d 482 [2007]; ***Hjerpe v Globerman***, 280 AD2d 646, 721 NYS2d 367 [2001]).

Apart from whether, as the plaintiffs contend, an inactive home heating oil tank such as theirs is exempt from the abandoned tank requirements set forth by Suffolk County law (*see*, Suffolk County Code §§ 706-1208 [A], 706-1210 [D]), the Court finds as a matter of law that the existence of the inactive tank did not cause or contribute to the discharge but merely furnished the condition for the event's occurrence (*cf.*, ***Margolin v Friedman***, 43 NY2d 982, 404 NYS2d 553 [1978]; ***Silver v Sheraton-Smithtown Inn***, 121 AD2d 711, 504 NYS2d 56 [1986]). Accordingly, the plaintiffs may not be held responsible for the discharge and are not barred from recovery under Navigation Law § 181. Since they are not responsible for the discharge, however, their claim for contribution under Navigation

Law § 176 (8) is dismissed as academic.[1]

Finally, Hollborn moves for summary judgment dismissing all claims and cross claims against it on the grounds (i) that it did not cause or contribute to the discharge and, therefore, is not strictly liable under the Navigation Law, (ii) that it cannot be held liable in negligence because Trade-Winds cannot demonstrate that it breached a duty to the plaintiffs or that any act or omission on its part was a proximate cause of the alleged property damage, and (iii) that it did not breach its contract with the plaintiffs.

Hollborn's cross motion is denied as untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see*, CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Although Hollborn claims that its delay was justified because a court-ordered second deposition of plaintiff Rosemary Hendricks had not yet taken place at the time the note of issue was filed on June 18, 2007, it appears that this deposition was taken on June 27, 2007, a mere nine days after the note of issue was filed, and Hollborn has not established how the absence of her testimony prior to that date hindered its ability to timely move for summary judgment.

The Court directs that all remaining claims in this action be severed and continued.

Dated: FEB 04 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

[1] If, on the other hand, the plaintiffs did bear some responsibility for the discharge, this would only bar their recovery under section 181 and would not preclude them from seeking contribution under section 176 (8) from any other responsible party (*see*, ***Dora Homes v Epperson***, 344 F Supp 2d 875 [ED NY 2004]).