STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STATE OF NEW YORK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. L-48-99
RJI NO. 01-00-063669

VANTAGE PETROLEUM CORP.; STANLEY NABREZNY; FLETCHER G. CHALMERS; RIVERHEAD OSBORNE REALTY LLC; and ARGADASH, INC.,

Defendants.

STANLEY NABREZNY; FLETCHER G. CHALMERS; and ARGADASH, INC.,

Third Party Plaintiffs,

-against-

SUN REFINING AND MARKETING COMPANY now known as SUNOCO, INC.; ALLIED VAN LINES, INC.; AGWAY ENERGY PRODUCTS, LLC; AGWAY, INC. successor by merger to SUFFOLK AGWAY COOPERATIVE, INC., PULASKI AGWAY COOPERATIVE, INC., LONG ISLAND AGWAY EGG AND PRODUCE COOPERATIVE, INC. and LONG ISLAND CAULIFLOWER DISTRIBUTORS, INC.; AGWAY ENERGY SERVICES, INC. successor in interest to AGWAY PETROLEUM CORPORATION; AGWAY LONG ISLAND CROP SERVICES; TOWN OF RIVERHEAD; RIVERHEAD HIGHWAY DEPARTMENT; GARSTEN MOTORS, INC.; DUNKIRK TRUCKING SERVICE, INC.; CULLIGAN WATER COMPANY OF NEW YORK, INC.; CULLIGAN WATER COMPANY OF NEW YORK; ROBERT KRUDOP; MICHAEL ESPOSITO; HERB OBSER MOTORS, INC.; RIVERHEAD MOTORS, INC.; A#1ENGINE REBUILDERS, INC.; and COLOSSAL AUTO BODY, INC.,

Third Party Defendants.

Supreme Court Albany County All Purpose Term, August 29, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Drew Lochte, Esq.
Assistant Attorney General
Attorney for Plaintiff
New York State Department of Law
The Capitol
Albany, NY 12224

Peter Tamigi, Esq.
Burns, Russo, Tamigi & Reardon
Attorneys for Third-Party Defendant Sunoco, Inc., (R&M), formerly known as Sun Refining and Marketing Company i/s/h/a Sun Refining and Marketing Company, n/k/a Sunoco, Inc.
John T. Pieret, Esq., of Counsel
390 Old Country Road
Garden City, NY 11530

Robert R. Tyson, Esq.
Bond Schoeneck & King, LLP
Attorneys for Third-Party Defendants Agway Energy Products, LLC; Agway, Inc. S/h/a Successor-by-Merger to Suffolk Agway Cooperative, Inc., Pulaski Agway Cooperative, Inc., Long Island Agway Egg and Produce Cooperative, Inc. and Long Island Cauliflower Distributors, Inc.; Agway Energy Services, Inc., Successor-in-Interest to Agway Petroleum Corporation; Agway Long Island Crop Services
One Lincoln Center, 17th Floor
Syracuse, NY 13202-1355

Thomas C. Sledjeski, Esq.
Sledjeski & Tierney, PLLC
Attorneys for Third-Party Defendants Town of Riverhead and Riverhead Town Highway Department
18 First Street, P.O. Box 479
Riverhead, NY 11901

Farrell Fritz, P.C.
Attorneys for Defendants/Third-Party Plaintiffs Stanley Nabrezny, Fletcher G. Chalmers, and Argadash, Inc.
Charlotte A. Biblow, Esq., of Counsel
1320 RexCorp Plaza
Uniondale, NY 11556

TERESI, J.:

In June 1995 methyl-tertiary butyl ether ("MTBE") was discovered in one of the Town of Riverhead's municipal water supply wells and was reported to the New York State Department of Environmental Conservation (hereinafter "DEC"). The DEC hired an outside environmental consulting firm, Environmental, Assessment & Remediation (hereinafter "EAR"), to examine the MTBE contamination and determine its source. By February 1996 EAR had completed its study of the MTBE contamination. EAR concluded that the contamination originated at two gasoline filling stations, one of which was owned by Vantage Petroleum Corp. (later sold to Riverhead Osborne Realty, LLC) and the other owned by Stanley Nabrezny and Fletcher G. Chalmers (later sold to Argadash, Inc.) (hereinafter the "S&K station"). Plaintiff remediated the contamination, and by February 1999 had expended over 1.2 million dollars on its investigation and cleanup.

Plaintiff commenced this action against the owners of both stations to recoup its investigation and cleanup costs. Stanley Nabrezny, Fletcher G. Chalmers and Argadash, Inc. (hereinafter the "S&K defendants"), in turn, commenced a third party action against numerous corporate and individual defendants. Third Party Defendants Sun Refining and Marketing Company now known as SUNOCO, Inc. (hereinafter "SUNOCO"), Agway Energy Products,

Agway, Inc. successor by merger to Suffolk Agway Cooperative, Inc. - Pulaski Agway Cooperative, Inc. - Long Island Agway Egg and Produce Cooperative, Inc. - and Long Island Cauliflower distributors, Inc., Agway Energy Services, Inc. successor in interest to AGWAY Petroleum Corporation, Agway Long Island Crop Services (hereinafter collectively referred to as "Agway"), along with the Town of Riverhead and the Town of Riverhead Highway Department (hereinafter collectively referred to as "Riverhead") each bring motions for summary judgment. Discovery is complete and the S&K defendants oppose each of the motions, which will be addresses separately.

SUMMARY JUDGMENT STANDARD

"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 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). "[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden." (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). Moreover, a movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc.,

223 AD2d 913, 914 [3d Dept.1996]).

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).

THE RIVERHEAD MOTION FOR SUMMARY JUDGMENT

Riverhead failed to properly support its motion for summary judgment, which is denied.

Riverhead moves for summary judgment, by its attorney's affirmation, claiming that the record contains insufficient proof that Riverhead contributed to the MTBE contamination herein. No affidavits or deposition testimony, based upon personal knowledge, support such claim. Nor does Riverhead support its motion by even alleging that no MTBE was discharged at its garage (the location the S&K defendants allege Riverhead discharged petroleum).

A motion for summary judgment must be supported by a "person having knowledge of the facts" and otherwise "admissible proof". (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra). Here Riverhead's attorney's affirmation alone does not suffice. (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]). Riverhead's verified answer, sworn to by the Town Clerk, fails to allege specific knowledge of the facts occurring at the town garage. No additional proof is submitted to cure such defect. Riverhead's motion improperly points to gaps in the S&K defendants' proof without proving how it is not a cause of the MTBE contamination.

(Antonucci, supra).

Accordingly, Riverhead has not met its initial burden in establishing its entitlement to summary judgment as a matter of law, and its motion is denied.

THE SUNOCO MOTION FOR SUMMARY JUDGMENT

Because Sunoco failed to establish its entitlement to judgment as a matter of law on the S&K defendants' indemnification, contribution and contractual indemnification claims, that portion of its motion is denied. However, Sunoco did establish its entitlement to judgment as a matter of law on the S&K defendants' direct Navigation Law §181(5) claim, which showing was not rebutted, and that portion of Sunoco's motion is granted.

Sunoco exclusively supplied gasoline to the S&K station, regardless of owner, from 1963 until 1995. However, Sunoco did not begin to mix MTBE with the petroleum it sold until the Summer of 1984.

Prior to April 1984, Sunoco owned all five underground storage tanks ("USTs") located at the S&K station. The parties also agree that in April 1984, Sunoco sold four of the USTs it owned at the S&K station to one of the station's then owners, Defendant Nabrezny, as reflected in a bill of sale for such transaction. Nabrezny has "no idea" why the fifth UST was not included in the bill of sale, but claims that because it was not included in the bill of sale Sunoco still owned it. Sunoco claims that the parties agreed upon the sale of all of the USTs, including the fifth UST, and the bill of sale's failure to include the fifth UST was a mere scrivener's error. The parties do agree that the above ownership relationship continued until 1989 when all five USTs were removed.

"Tightness tests" of the USTs were conducted in both 1983, prior to the above sale, and upon completion of the above removal in 1989. Each of the USTs in each of the tests was found to be "tight", i.e. the USTs did not leak, despite a finding of some corrosion.

However, when the USTs were removed in 1989, the S&K Station owners discovered that the USTs, and the soil surrounding them, were stained by gasoline contamination. The DEC was notified and oversaw the remediation. Because the USTs tested "tight", the source of the contamination was thought to be either deteriorated fill pipes or overfilling of the USTs. Mr. Nabrezny testified at his deposition that he observed the fill area every day both before and after the 1989 cleanup. He testified that, although he did see "dampness" around the fill area on occasion, such dampness was not significant and constituted a spill of less than two gallons. To remediate the contamination, soil was removed and testing wells were installed with testing to last for one year.

Sunoco first moves for summary judgment dismissing the S&K defendants' cause of action brought directly under Navigation Law §181(5) against them. Sunoco's liability, if any, necessarily depends upon the S&K station being the source of the MTBE contamination. As it is the only physical location Sunoco is alleged to have been involved with petroleum products. Because the S&K defendants own and control the S&K station, if Sunoco is found to have discharged petroleum at the S&K station such finding also results in the S&K defendants being deemed a "discharger" under the Navigation Law and precluded from bringing a direct Navigation Law §181(5) claim against Sunoco. (State of New York v. Green, 96 NY2d 403 [2001], White v. Long, 85 NY2d 564 [1995], State of New York v. B&P Auto Serv. Ctr., Inc., 29 AD3d 1045 [3d Dept 2006], State of New York v. King Serv., 167 AD2d 777 [3d Dept.

1990], Navigation Law §§ 181[1 and 5] and 172[3 and 8]). As such, there is no scenario that the S&K defendants' can bring a direct Navigation Law §181(5) cause of action against Sunoco. Accordingly, this portion of Sunoco's motion is granted.

While the S&K defendants are precluded from bringing a direct Navigation Law §181(5) claim, they are not without redress. "Navigation Law §181[5] allows a faultless landowner to seek contribution from the actual discharger, even though the landowner itself is liable as a discharger under section 181(1)" (Green, supra at 408). Where a landowner has "not caused or contributed to (and thus are not "responsible for") the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage." (White, supra at 569). Here, the S&K defendants' claims against Sunoco in "indemnification and contribution [are] predicated upon [Sunoco's] liability as a discharger." (King Serv., supra at 779).

Sunoco seeks summary judgment of the S&K defendants third party complaint against them by claiming that the record evidence fails to prove that they discharged the MTBE that contaminated the Town of Riverhead's well. Sunoco affirmatively proved that they did not discharge MTBE prior to May 1984. For the period after May 1984, however, Sunoco does not proffer any affirmative testimony or documentation to prove their non-discharge. Rather, they "pointing to gaps in... proof" (Antonucci, supra) and claim that the record lacks evidence showing that they contributed to the MTBE contamination.

Sunoco's lack of affirmative proof demonstrating, as a matter of law, that they did not cause the MTBE contamination, requires denial of their motion. (Alvarez, supra). Sunoco relies on Mr. Nabrezny's deposition testimony for the proposition that any overfill they caused did not contribute to the MTBE contamination. While Mr. Nabrezny's testimony clearly establishes that

any overfill caused by Sunoco was small, such testimony does not establish that a single overfill, or the sum of small overfills, did not cause the contamination herein. The record is silent as to the actual amount of each single overfill, the aggregate overfill, or the overfill's effect over time. Likewise, Mr. Chalmer's disorganized "reconciliation" of gallonage testimony fails to prove, as a matter of law, that Sunoco did not discharge the MTBE herein. (Schlanger v. Doe, __ AD3d __ [3d Dept. 2008], see also Turnbull v. MTA New York City Transit, 28 AD3d 647 [2d Dept. 2006][stating that on a summary judgment motion, for a navigation law claim, the movant has the "initial burden of demonstrating that the plaintiffs did not sustain damages"]). Sunoco's "pointing to gaps in... proof" is insufficient. (Antonucci, supra). Because Sunoco failed to demonstrate as a matter of law that they did not cause the MTBE contamination, they failed to meet their primary burden on this portion of their motion, which is denied.

Sunoco also theorizes that if their overfills caused the MTBE contamination, which the S&K defendants admittedly observed and failed to report, then the S&K defendants could not be "faultless landowners" because of their failure to report a discharge. As set forth above, a "discharger" must also be "faultless" to bring a contribution or indemnification action for their damages under the Navigation Law. (White, supra). Sunoco's argument assumes that the S&K defendants' failure to report its observations causes it to be at "fault" for the discharge. The assumption, however, was not proven. The S&K defendants do have an obligation to report any spill, leak or discharge of petroleum. 6 NYCRR §613.8 However, not all losses of petroleum must be reported. 6 NYCRR §613.4(d) [no reporting requirement unless there is a loss of 7.5 gallons per 1,000 gallons delivered or more]. Such exception to the mandatory reporting of a discharge implicitly recognizes that minimal discharges need not be reported. Sunoco's proof

demonstrated that the S&K defendants did not report discrete events of minimal discharges. The small individualized events do not prove, as a matter of law, that the S&K defendants were at "fault". This is so especially in light of the exceptions specifically set forth in the code requiring disclosure. Accordingly, Sunoco's motion for summary judgment of the S&K defendants' indemnification and contribution claims is denied.

Sunoco also seeks summary judgment on the S&K defendants' claim for contractual indemnification. Sunoco argues that the S&K defendants' contractual indemnity claim requires, as a necessary element, a finding that the "sole cause" of the MTBE contamination was Sunoco. Sunoco's motion, however, fails to demonstrate, as a matter of law, that they are not the "sole cause" of the MTBE contamination herein because it did not prove, as a matter of law, that another party is responsible. Accordingly, for the reasons set forth above, Sunoco failed to meet its initial burden on this portion of its summary judgment motion, which is denied.

THE AGWAY MOTION FOR SUMMARY JUDGMENT

Agway failed to establish its entitlement to judgment as a matter of law on the S&K defendants' direct Navigation Law §181(5) claim and that portion of its motion is denied. However, Agway did establish its entitlement to judgment as a matter of law on the S&K defendants' indemnification and contribution claims, and that portion of Agway's motion is granted.

Agway moves for summary judgment to dismiss the S&K defendants' third party complaint against it, in its entirety, by demonstrating that the MTBE contamination herein was not discharged at the Agway site. Agway's expert, relying on Agway's own testing and

plaintiff's data, concludes that the MTBE contamination was generated at the S&K defendants' site. Agway also relies upon plaintiff's proof which determined that the MTBE contamination originated at the S&K site and was not generated by a documented discharge at the Agway facility. On this motion, Agway met its initial burden of proof to affirmatively demonstrate its entitlement to judgment as a matter of law. State of New York v. Moon, 228 AD2d 826 [3d Dept. 1996]).

In opposition, the S&K defendants submitted their own expert's report, which demonstrated how the Plaintiff's and Agway's experts' opinions were incorrect and how the source of the MTBE was the Agway facility. Although Agway's expert pointed to the tenuous scientific basis for the S&K defendants' expert's opinion, the proof submitted by S&K defendants' did create an issue of fact about the source of the MTBE contamination. Agway's proof and their "justified attacks on the quality of [the S&K defendants'] submissions merely raise credibility issues outside the scope of a motion for summary judgment." (Moon, supra at 828). Accordingly, that portion of Agway's motion for summary judgment is denied.

Agway also moves for summary judgment of the S&K defendants' direct Navigation Law §181(5) claim against them, which is denied. Agway reasons that the only damage the S&K defendants' can sustain will occur if the Plaintiff prevails in the primary action and proves that they "discharged" petroleum. Therefore, because a "discharger" of petroleum is ineligible to bring a direct Navigation Law claim, Agway argues that the S&K defendants claim must fail. (Green, supra, Long, supra, King Serv., supra, Navigation Law §§ 181[1 and 5] and 172[3 and 8]). Agway's premise, however, is fundamentally flawed because the S&K defendants' damages are not circumscribed by the plaintiff's claim against them. Rather, the S&K defendants'

damages can encompass "indirect damages" including attorney's fees. (Strand v. Neglia, 232 AD2d 907 [3d Dept. 1996]). Accordingly, Agway's motion for summary judgment on this ground is denied.

Agway also moves for summary judgment of the S&K defendants' indemnity cause of action, which is granted. "Indemnity... involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss." (County of Westchester v. Becket Assoc., 102 A.D.2d 34 [2d Dept. 1984]). "One is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another." (Finch, Pruyn & Co. v Wilson Control Servs., 239 A.D.2d 814 [3d Dept. 1997], see also State of N.Y. Facilities Development Corp. v. Kallman & McKinnell, 121 AD2d 805 [3d Dept. 1986]). Here, the S&K defendants are not being sued by plaintiff on a theory of "vicarious liability". Rather, plaintiff's action against the S&K defendants is premised upon a claim of their direct petroleum discharge. The legal theory underpinning indemnification simply does not fit with the S&K defendants' claim over against Sunoco. For there is no shifting of liability between these parties that would support an indemnity claim's re-imposing liability on the "wrongdoer". Accordingly, the S&K defendants' indemnification action must be dismissed.

Agway also moves for summary judgment on the S&K defendants' contribution cause of action, which is granted. In Dole v. Dow Chem. Co., (30 NY2d 143, [1972]) the Court of Appeals instructed that a third party plaintiff's contribution claim could be considered "only if that party were found negligent; and if that were found, the remedy would depend on the proportion of the blame found against third-party defendant." In accord with Dole, the S&K

defendants' contribution claim against Agway can only be considered if the S&K defendants are found to have contaminated the Town of Riverheads' well water. In that event, the S&K defendants claim that Agway was the source of the contamination will necessarily have failed. This occurs because the S&K defendants claim to be "faultless landowners" and do not assert that Agway was an additional source of their own contamination. Rather, the S&K defendants claim that Agway is an alternative source of the contamination. The S&K defendants "faultless landowner" theory and their alternative source of contamination argument are mutually exclusive. Thus, the S&K defendants do not employ a theory of contribution liability against Agway that allows for a proportionment between two contaminators because the logical outcome of their position allows for only one contaminator. Accordingly, the S&K defendants' fundamental premise that they are "faultless landowners" and there is another contaminator does not support a theory of contribution, and Agway's motion for summary judgment of their contribution claim is granted.

Lastly, Agway seeks summary judgment of the S&K defendants' claims against Agway Energy Services, Inc. and Agway Long Island Crop Services arguing that neither entity had any connection with the Agway facility at issue herein, which is granted. Agway supports its motion by submitting an affidavit of an individual purporting to have knowledge of the Agway defendants' prior and current operations, which states that neither entity conducted any business at the Riverhead facility. Moreover, Agway submits a certified copy of Agway Energy Services, Inc.'s Certificate of Incorporation, setting forth August 7, 1996 as its date of incorporation. The Agway submissions demonstrate its entitlement to summary judgment on this issue, as a matter of law. In opposition, the S&K defendants offer the affidavit of Mr. Nabrezny who states, in

conclusory fashion, that such entities have operated at the Riverhead Agway facility. Mr. Nabrezny sets forth no detail to support such conclusion. The S&K defendants' reliance on the prior deposition testimony of the Agway employee affiant, as quoted out of context, is similarly unavailing. As such, Agway's motion for summary judgment to dismiss the S&K defendants' claims against Agway Energy Services, Inc. and Agway Long Island Crop Services is granted.

All additional arguments set forth by the parties have been considered and determined to be lacking in merit.

All papers, including this Decision and Order, are being returned to the attorney for the Defendants/Third-Party Plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: September 2, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated April 28, 2008 with Attached Affirmation Support of John T. Pieret, Esq. dated April 28, 2008 with attached Exhibits A - Y.
2. Reply Affirmation of John T. Pieret, Esq. dated July 11, 2008 with various attachments.
3. Notice of Motion dated April 30, 2008; Affidavit of John R. Steiner, Esq. dated April 29, 2008 with attached Exhibits A - C.
4. Affidavit of Scott M. Hulseapple dated June 23, 2008 with attached Exhibit A.

5. Affirmation of Thomas R. Smith, Esq. dated April 29, 2008 with attached Exhibits A - F.
6. Affirmation of Robert R. Tyson, Esq. dated April 30, 2008 with attached Exhibits A and B.
7. Affidavit of Dr. Samuel W. Gowan dated April 28, 2008 with attached Exhibits A - D.
8. Reply Affidavit of Dr. Samuel W. Gowan dated June 23, 2008 with Attached Exhibits A - C.
9. Reply Affirmation of Robert R. Tyson dated June 24, 2008 with attached Exhibit A.
10. Notice of Motion for Summary Judgment with Affirmation of Thomas C. Sledjeski, Esq. both dated April 30, 2008 with attached Exhibits A - E.
11. Affirmation of Charlotte A. Biblow, Esq. dated June 12, 2008; Affidavit of Fletcher G. Chalmers dated June 11, 2008; Affidavit of Stanley Nabrezny dated June 11, 2008; Affidavit of Peter Dermody dated June 12, 2008 with Attached Exhibits A - G.
12. Defendant/Third-Party Plaintiffs' Opposition to Third-Party Defendants' Motions for Summary Judgment Volumes I, II, and III with attached Exhibits A - V.
13. Affirmation of Drew A. Lochte, Esq. dated June 23, 2008 with Attached Exhibit A.