

Young Lim v Sterling-Coastal Oil

2008 NY Slip Op 33280(U)

November 25, 2008

Supreme Court, Nassau County

Docket Number: 016097/00

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

YOUNG LIM and SUNNIE LIM.

TRIAL/IAS, PART 31
NASSAU COUNTY

Plaintiffs.

- against -

Sequence No.: 004, 005 & 006
Index No.: 016097/00

**STERLING-COASTAL OIL, STERLING
PETROLEUM, INC., COASTAL OIL NEW
YORK, INC., MILRO ENVIRONMENTAL,
MILRO SERVICES, INC., MILRO ASSOCIATES,
INC., GOTHAM PETROLEUM TRANSPORT,
DREW STOCKER, and JOHN DOE, the driver-
operator of the oil delivery truck of STERLING
COASTAL OIL, who delivered oil to YOUNG
LIM and SUNNIE LIM on March 17, 1999.**

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motions and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants Sterling Petroleum, Inc.'s, Gotham Petroleum Transport's and Drew Stocker's (hereinafter collectively, "Sterling") motion and defendants Milro Environmental's, Milro Services, Inc.'s and Milro Associates, Inc.'s (hereinafter collectively "Milro") cross-motion which both seek summary judgment dismissing the complaint herein as asserted against these defendants are denied.

Plaintiffs herein seek a judgment that defendants are liable for the cleanup of their property which was the result of an oil spill and for damages pursuant to Navigation Law §181 on the grounds that Sterling, who were responsible for delivery of oil to the property and Milro who removed the oil tanks from plaintiffs' property caused the spill. The defendants set forth

above all move for summary judgment as asserted against them on the ground that there is no issue of fact that plaintiffs were at least partially responsible for any leaks on the property and are therefore precluded from maintaining this action pursuant to Navigation Law §181(5).

In moving for summary judgment defendants must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form.

Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing a motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. *Id.*

At the outset the Sterling defendants initially moved for summary judgment dismissing the complaint in motion sequence 4 herein but thereafter served an amended notice of motion for summary judgment under sequence 6 which was only different from the original motion in that defendant Drew Stocker moved for summary judgment along with Sterling Petroleum, Inc and Gotham Petroleum Transport. The plaintiffs having opposed the motion for summary judgment on the merits, the court denies the motion under sequence 4 as moot and shall consider the amended motion for summary judgment on behalf of Sterling.

In support of the motions defendants rely upon the deposition testimony of plaintiff Sunnie Lim in which she testified that the oil for plaintiffs' boiler and hot water heater is stored in a 1,000 gallon underground oil tank located on plaintiffs' property and had same filled with oil more than twice per year. On August 18, 1999 plaintiffs' tank was excavated by Milro as part of an oil abatement on plaintiffs' property. (See, deposition transcript of Sunnie Lim, p. 21; Plaintiffs' complaint and bill of particulars). Defendants also point to the deposition transcript of Bruce Donovan who was employed as an oil spill investigator in the New York State Department of Conservation at the time of the excavation. Mr. Donovan found that upon inspection of the tank there were more than five holes and major corrosion of the tank. Those holes that were found in the tank could have caused more than 500 gallons over a two day period to be discharged from the tank. (See, deposition transcript of Bruce Donovan, pp. 62, 91).

Defendants now move for summary judgment dismissing the complaint upon the grounds that plaintiffs may not maintain an action pursuant to Navigation Law §181(1) because in order to do so plaintiffs must not be at all responsible for the discharge.

Navigation Law §181(1) provides:

"Any 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 no matter by whom sustained, as defined in this section."

Navigation Law §181(5) provides:

"Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based upon the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum..."

Pursuant to Navigation Law §172(3) "claim" is defined as any claim by, inter alia, an injured person "who is not responsible for the discharge, seeking compensation for cleanup and removal costs incurred or damages sustained as a result of the petroleum discharge." A discharge is defined as an "action or omission resulting in the release, spilling, leaking, pumping pouring emitting, emptying or dumping of petroleum." Navigation Law §172(8).

If it is demonstrated that the property owner caused or contributed to the spill, he or she is precluded from maintaining an action for indemnification or damages pursuant to Navigation Law §181. See, White v. Long, 85 N.Y.2d 564 (1995); Calabro v. Sun Oil Co., 276 A.D.2d 858 (3rd Dep't 2000). Where defendants demonstrate that plaintiffs' tank had holes in it and the plaintiffs filled the tank during the period of the time they came into possession of the subject property and the discovery of the leaking condition, defendants have met their prima facie burden of demonstrating entitlement to summary judgment. See, Hjerpe v. Globerman, 280 A.D.2d 646 (2nd Dep't 2001). Defendants having met their prima facie burden of demonstrating entitlement to summary judgment, the burden shifts to plaintiffs to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition plaintiffs annex the affidavit of Victor M. Serby, P.E., a licensed professional engineer who avers:

- 1) a review of a photograph taken by Young Lim at the time Milro was removing the tank revealed the teeth of a backhoe puncturing the plaintiffs' tank;
- 2) the photograph of the tank annexed to the DEC tank removal report which was taken offsite reveals a different tank from the one he observed in the picture taken on plaintiffs' property;
- 3) in his opinion the photograph annexed to the DEC report does not accurately depict the condition of the tank that leaked oil onto plaintiffs' property;
- 4) having reviewed Mrs. Lim's deposition transcript he noticed that the property is thirty years old and states with a reasonable degree of engineering certainty that it is impossible for a tank to corrode to the extent portrayed in the DEC report and the photo annexed to the report.;
- 5) he concludes that the removed tank was switched with a more deteriorated tank;
- 6) there is no indication that there was any leaking prior to the tank being overfilled based upon his inspection at the bottom of the excavation which revealed that the level of oil saturation diminished with increasing depth, indicating that the oil contamination was from a sudden release of oil as opposed to a slower leak over a period of time; and
- 7) he concludes that the pressure from overfilling the tank caused a rupture that was compounded by Milo's failure to pump the tank dry, puncturing the tank when removing it and letting the contents of the tank drain into the ground.

Plaintiffs also point to Mr. Donovan's testimony in which he testified that he observed the tank the day after it was removed from plaintiffs' property and testified that "I cannot tell you that the holes that I observed were caused or not caused by the removal of the tank from the soil" and further "sometimes the corrosion forms like a scab over the surface of the tank, and when it's removed that scab comes off and it exposes a hole that may or may not have been leaking previously." (See, Donovan deposition transcript, pp. 69-70, 95).

Plaintiffs assert that issues of fact exist as to whether there was a leak prior to Sterling's delivery and spill of oil and Milro's removal of the tank. Based upon that portion of Mr. Serby's affidavit in which he opines that the decreasing amounts of saturation in the ground indicate a sudden spillage, the court concludes that plaintiffs have raised a triable issue of fact as to whether they were at all a cause of the leak or spill. As set forth above, Mr. Serby concluded that the spillage was sudden and not a gradual leak over time as indicated by the diminished saturation with increased depth.


Where, as here, plaintiffs' offer expert witness evidence which, if credited by the jury, is sufficient to rebut defendants' position that plaintiffs were a cause of the spill, the court will find that plaintiffs have raised a triable issue of fact and deny defendants' motion for summary judgment. See, e.g., Speller v. Sears, Roebuck and Co., 100 N.Y.2d 38 (2003). The court rejects defendants' position set forth in reply that this portion of the Serby affidavit fails to set forth an issue of fact because 1) he fails to support his conclusion with "his method of analysis, lab tests of the soil at various depths or any professional publications that support such a theory"; and 2) his own report does not support his conclusion in that he acknowledges in his report that test borings demonstrate that contamination had reached to a depth of eighty feet but remediation goes to a depth of thirty feet, making defendants posit "what accounts for the additional fifty feet other than a leak".

The court will disregard an expert's affidavit submitted in opposition to a summary judgment motion where the expert fails, inter alia, to recite the manner by which he came to his conclusion. See, Ioffe v. Hampshire, 21 A.D.3d 930 (2nd Dep't 2003). Having reviewed Mr. Serby's affidavit the court concludes that he has set forth the manner by which he came to his conclusion, by noting decreasing levels of saturation. Further, the fact that remediation goes to thirty feet but saturation is noted to eighty feet does not mean that the saturation levels do not diminish going down to that depth.

Accordingly, based upon the foregoing the court denies the motions for summary judgment.

So Ordered.

Dated: November 25, 2008


A.J.S.C.

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**