

**Sunrise Harbor Realty, LLC v 35th Sunrise Corp.**

2009 NY Slip Op 31986(U)

August 26, 2009

Supreme Court, Suffolk County

Docket Number: 23496-01

Judge: Gary J. Weber

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

*P R E S E N T:*

Hon. Gary J. Weber  
Acting Justice of the Supreme Court

MOTION DATE  
Motion Seq. #

M E M O R A N D U M   D E C I S I O N

SUNRISE HARBOR REALTY, LLC,

Plaintiffs,

-against-

35<sup>th</sup> SUNRISE CORP., 1201 SUNRISE HIGHWAY  
CORP., and AMERADA HESS CORPORATION,

Defendants.

SAHN & WARD, PLLC  
BY: JON A. WARD, ESQ.  
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OSHMANN & MIRISOLA, LLC  
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& Amerada Hess Corporation  
90 Williams Street, 6<sup>th</sup> Floor  
New York, New York 10038

35<sup>th</sup> SUNRISE CORP. and AMERADA HESS  
CORPORATION,

Third-Party Plaintiffs,

-against-

EAST BAY REALTY, LLC,

Third-Party Defendant.

BRUCE KENNEDY, P.C.  
Attorneys for Defendant 1201 Sunrise  
Highway Corp.  
31 Green Avenue  
Amityville, New York 11701

Procedural Background

This was a non-jury trial held before the undersigned on May 22, 2008; May 27, 2008; June 5, 2008; June 10, 2008; June 30, 2008; July 22, 2008; July 24, 2008; July 29, 2008; August 14, 2008; October 7, 2008; November 6, 2008; December 1, 2008; December 19, 2008 and December 22, 2008.

At the close of Plaintiff's case on July 29, 2008 the Court dismissed all claims as against the defendant 1201 Sunrise Highway Corporation because this defendant never had title to or control of the subject Gasoline Station property, its sole connection to the property being that of a mortgage holder, which assigned a successful bid at a subsequent foreclosure sale of the property to a third party.

The defendant, Amerada Hess Corporation, was a supplier of gasoline to the subject defendant Gasoline Station owned by 35<sup>th</sup> Sunrise Highway Corp. for a period of time, but no proof was ever adduced on the trial of this action that the Amerada Hess Corporation was negligent or was a "discharger" as that term is defined in the Navigation Law

Plaintiff in its Post Trial Memorandum filed with this Court on April 17, 2009, consents in the preliminary statement of that pleading to a dismissal of all claims as against the Amerada Hess Corporation.

This leaves for the decision of the Court the ten causes of action alleged by the plaintiff, Sunrise Harbor LLC (hereinafter "Sunrise Harbor") as against 35<sup>th</sup> Sunrise Corp. (hereinafter 35<sup>th</sup> Corp.) and the Third Party claim by 35<sup>th</sup> Corp. and Amerada Hess Corporation against East Bay Realty LLC (hereinafter "East Bay").

#### Decision

#### A THE THIRD PARTY ACTION AGAINST EAST BAY

Counsel for 35<sup>th</sup> Corp. and Amerada Hess Corporation cunningly argues that since East Bay was in the chain of title to Sunrise Harbor, East Bay is liable for damages resulting from any contaminants which may have been on the subject property when it was conveyed to plaintiff, Sunrise Harbor.

The problem with this argument is that all of the principals involved in these two business entities (Sunrise Harbor and East Bay) are the same and the conveyance from one to the other was merely a matter of form.

In any event, the claims of 35<sup>th</sup> Corp. relative to pollution that may have been caused by Sunrise Harbor will be addressed later in this decision and are, as a practical matter, the same as 35<sup>th</sup> Corp. seeks to assert as against East Bay.

The Third Party action should be dismissed.

#### B LIABILITY OF 35<sup>TH</sup> CORP. TO SUNRISE HARBOR PURSUANT TO THE NAVIGATION LAW

35<sup>th</sup> Corp. is the owner of a Gas Station, which is located on the south side of Sunrise Highway at the southwest corner of the intersection of Sunrise Highway and 35<sup>th</sup> Street in Copiague, New York. The Gas Station has a street address of 1201 Sunrise Highway, Copiague, New York. The Gas Station is improved with, among other things, three (3) 10,000 gallon gasoline underground storage tanks. These tanks are located in the southwest quadrant of the property.

Sunrise Harbor owns the Sunrise Harbor Property, which is located at 1205-1209 Sunrise Highway, Copiague, New York. The Sunrise Harbor Property is improved with a commercial building that is divided into three separate spaces which are leased out to tenants.

The Sunrise Harbor Property is located immediately adjacent to and south of the Gas Station.

There is no dispute between the parties as to the fact that sometime around September of 2005 the gasoline tanks that were located on the property which was later purchased by 35<sup>th</sup> Corp. failed a tank pressure test and this failure was reported by the tester, as is required by law, to the New York State Department of Environmental Conservation (hereinafter N.Y.S.D.E.C.).

The N.Y.S.D.E.C. then assigned spill number 95-07263 to the site. It should be noted that expert witnesses who testified in this action indicated that a spill number is assigned upon the reported failure of a pressure test, but this does not necessarily mean that a spill has actually taken place in the sense that any petroleum product has escaped and actually been discharged into the environment.

In any event, the Gas Station reopened in June, 1996, after title has closed in 35<sup>th</sup> Corp., under the auspices of Tariq Mahmud (hereinafter "Mahmud"), the principal of 35<sup>th</sup> Corp..

Neither Mahmud nor any other party acting on behalf of 35<sup>th</sup> Corp. took any action relative to the open spill number, which was a matter of public record, before taking title to the property. Indeed, the trial record would indicate that Mahmud and 35<sup>th</sup> Corp. were either unaware of or unconcerned, or both, about any potential open spill number relative to the site.

However, around the time of the re-opening of the Gas Station by Mahmud in June of 2006, he was able to effectuate repairs to certain vent lines to the gasoline tanks and the tanks then passed a pressure test.

These apparently successful repairs were not, however, reported to the N.Y.S.D.E.C. or the Suffolk County Department of Health.

James Ross (hereinafter Ross), later to become a principal of Sunrise Harbor, became interested in purchasing the Gasoline Station and adding it to his (East Bay) property in the Spring of 2001.

On March 9, 2001, C.A. Rich, a consulting company which specializes in rendering opinions relating to gasoline contamination, performed a subsurface investigation of the Sunrise Harbor property at the behest of Ross and his partners.

In a report dated May 15, 2001, C.A. Rich advised that the soil and groundwater under the Sunrise Harbor property to the south of the boundary line with the Gas Station and immediately to the south of the underground storage tanks at the Gas Station were contaminated by "BTEX" and "MTBE", which are gasoline related pollutants, at levels exceeding N.Y.S.D.E.C. guidelines and standards. (See Plaintiff's Exhibit 66).

The record is also clear that the groundwater flow in the vicinity of both subject properties is to the south, which would carry the BTEX and MTBE pollutants to the south in the flow.

There is much other testimony in the record in support of these findings by C.A. Rich.

35<sup>th</sup> Corp. argues in response that the contamination in question may be from sources other than its Gas Station.

In support of these contentions, the defendant, 35<sup>th</sup> Corp. called its expert witness, Mustafa El-Sehamy (hereinafter "El-Sehamy") to the stand.

El-Sehamy, with the aid of experienced counsel, pointed to a number of other possible culprits who may have or did factor into any pollution existing on the Sunrise Harbor property. These offenders and potential offenders included the following:

1. An Exxon Station to the north of both the Gas Station and the Sunrise Harbor property.
2. Waste products disposed of into cesspools by a tenant<sup>1</sup> on the Sunrise Harbor property.
3. A heating oil spill of about 15 gallons occasioned by a tenant on the Sunrise Harbor property.
4. Used motor oil that was drained or dumped by tenants on the Sunrise Harbor property.

The record does not support a finding that the Exxon Station was a contributor to the pollution caused by the BTEX and MTBE found on the Sunrise Harbor property, since it would appear that the N.Y.S.D.E.C. reports pertaining to that site did not show these materials in the ground at that site in amounts above state standards.

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This former tenant came to Court to testify only after serious steps had been taken by counsel to hold him in contempt of court.

Moreover, the Exxon Station is located west and north of the Sunrise Harbor property, and an expert witness, whose testimony the Court believes credible, James A. Perazzo, testified that the flow of any contaminants from the Exxon Station would not have migrated to the Sunrise Harbor property, given the relative locations of the two parcels and the direction of groundwater flow in the area.

As to the remaining items cited by the defense (Items 2 - 4 above), while each was capable of causing its own kind of pollution, none would be associated with the gasoline spawned contaminants, MTBE & BTEX.

Further, it does not appear that any contaminants which may have been released by these tenants ever rose to levels where additional remediation would be necessary. *See also Drouin v. Ridge Lumber Inc. 209 A.D.2nd 959, 619 N.Y.S. 2d 433.*

In short, 35<sup>th</sup> Corp. is liable to Sunrise Harbor because the evidence on this record is overwhelming to the effect that the subject contaminants BTEX and MTBE passed due to spillage or seeping in and about the gasoline storage tanks from the 35<sup>th</sup> Corp. property to the Sunrise Harbor property, in violation of Navigation Law Article 12.

#### THE BALANCE OF SUNRISE HARBOR'S CLAIMS AGAINST 35<sup>TH</sup> CORP.

The rest of Plaintiff's claims are pleaded in negligence, trespass, nuisance and similar such theories.

To the extent that any of these causes of action require proof of deliberate bad conduct or negligence, plaintiff has failed to meet its burden.

In any event, these causes of action should be dismissed as moot in light of the findings earlier herein made by the Court relative to the defendant 35<sup>th</sup> Corp.'s liability to the plaintiff pursuant to the Navigation Law, Article 12, which does not require the same quantum of proofs necessary to sustain these other causes of action.

#### DAMAGES

##### A THE CLEAN UP PROPOSALS AND STIGMA

The credible expert testimony on the trial of this action places the clean up cost of the Sunrise Harbor property at \$721,800.00.

The Court specifically does not find that it is necessary to award any "stigma" damages in light of the fact that the Sunrise Harbor premises apparently were and are operating to this day, as they were in the past. Once the property is successfully remediated it is hard to see how the premises will be any worse off than any other commercial property located in the neighborhood.

Counsel for Sunrise Harbor appears to concede as much as to this point in his Post Trial Memorandum dated April 16, 2009, at page 47.

#### INTEREST ON THE AWARD FOR CLEAN UP COSTS

Plaintiff has not yet paid any money for clean up costs and the figure of \$721,800.00 above referenced factors in the need to pay ongoing expenses as the clean up process moves forward.

With these factors in mind, the Court will award interest to the plaintiff on the clean up costs of \$721,800.00 from the date of entry of the judgment herein but not before.

ENVIRONMENTAL CONSULTING FEES INCURRED  
BY SUNRISE HARBOR PURSUANT TO THE  
NAVIGATION LAW

Defendant 35<sup>th</sup> Corp. is liable to plaintiff Sunrise Harbor pursuant to Navigation Law Article 12 for environmental consulting fees and witness fees.

The Court finds these fees to be in the sum of \$117,733.99. See Plaintiffs Exhibits 87, 88, 89, 91 92 and 94.

INTEREST ON THE ENVIRONMENTAL  
CONSULTING FEES

Plaintiff should receive interest on the environmental consulting fees on a single, reasonable intermediate date between May 3, 2004 (when the first report was received from C.A. Rich) and the date that the judgment herein is noticed for entry. Counsel should specify this date in the judgment. For the sake of example, if the entry of judgment was noticed for May 3, 2005, the intermediate date would be November 3, 2004. See *C.P.L.R. 5001(b)*.

LEGAL FEES INCURRED  
BY SUNRISE HARBOR

Plaintiff Sunrise Harbor is entitled to attorney's fees as against the defendant 35<sup>th</sup> Corp., See *Stamella v. Burke Heat, 14 A.D.3rd 694, 789 N.Y.S. 2d 227, (Appellate Division, 2<sup>nd</sup> Dept. 2004)*.

Plaintiff seeks and has submitted invoices requesting the sum of \$388,541.06 on this claim. Sunrise Harbor's attorney's assert that the value of the legal services billed is in the sum of \$388,541.06.

Where, as in this case, attorneys are engaged under a contract for a definite purpose and not under a general retainer, he or she is entitled to recover on *quantum meruit* the fair and reasonable value of the services rendered, at least where these fees are to be collected from a defendant pursuant to statute. Having presented the issue to the undersigned for determination, the Court must be guided by the longstanding principles recognized by *Matter of Freeman, 34 NY2d 1 and Matter of Potts, 123 Misc. 346, aff'd 213 AD 59, aff'd 241 NY 593*.

The Court is not necessarily bound by the fact that Plaintiff's attorney has already been paid any specific sum of money for attorney's fees by Plaintiff, since Plaintiff is, effectively, demanding that the Defendant reimburse Plaintiff for any fees that might have been paid or will be paid.

What is determinative is not the amount that Sunrise Harbor may have paid or will pay for legal fees but what is a reasonable legal fee. (See *Nitti v. Credit Bureau of Rochester, 375 N.Y.S.2d 817 (Supreme Court Monroe County 1975, citing with approval Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 242)*)

In determining a reasonable legal fee the Court should consider what a reasonable paying client would pay and also the fact that a reasonable, paying client would wish to spend the minimum to litigate the case effectively. See *VFS Financing Inc. v. Pioneer Aviation LLC 08 C.U. 7655 N.Y.L.J. August 12, 2009*.

Thus, Plaintiff has the burden of establishing both the reasonableness and the value of services rendered (see *Matter of Potts, supra*). Reasonableness is determined on a *quantum meruit* basis using generally recognized criteria, namely the time spent in rendering the legal services, the nature of those services, the difficulties encountered, the worth of the action, the results obtained, the amount involved, and the professional standing of counsel (see *Matter of Freeman, supra; Matter of Potts, supra*). When determining reasonableness of fees, detailed contemporaneous time records are an important vehicle through which counsel validates the time claimed (See *Matter of Kelly, 187 A.D.2d 718*). The time spent by counsel, however, is only one factor to be considered in determining reasonable

compensation (*Matter of Kentana*, 170 Misc 663), often serving as an appropriate starting point (*see Estate of Gillet*, 139 Misc2d 188, 527 N.Y.S.2d 690).

Having due regard for all the elements relevant to the fixing of legal fees (*see Matter of Freeman, supra; Matter of Potts, supra*), and being constrained by the proof submitted in support of the requested fee, as well as the value of the entire case, the court fixes and determines the fair value of counsel's services to be \$175,000.00.

INTEREST ON THE ATTORNEY'S  
FEES AWARDED

Plaintiff should receive interest on the attorneys fees awarded from a single reasonable intermediate date between May 3, 2004 (when the first report was received from C.A. Rich) and the date that the judgment to be entered herein is noticed for entry.

SUMMARY

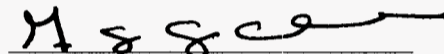
Plaintiff, Sunrise Harbor Realty LLC, is awarded judgment in the sum of \$721,800.00 as against the defendant 35<sup>th</sup> Corp. only, with interest from the date of the entry of judgment herein together with the costs and disbursements of this action, as to its cause of action under the Navigation Law.

Plaintiff is also awarded additional sums of \$117,733.99 representing environmental consulting and expert witness fees, as well as attorney's fees, in the sum of \$175,000.00 with interest on these last two sums to be calculated from the single reasonable intermediate date, to be determined as above specified, all pursuant to the causes of action pleaded under the Navigation Law.

The balance of Plaintiff's claims and causes of action as well as the third party action as against East Bay Realty LLC are dismissed.

Submit Judgment on Notice.

Dated: August 26, 2009

  
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Gary J. Weber, Acting J.S.C.

Non-Final Disposition  
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