

Lampke v Petro, Inc.

2011 NY Slip Op 31014(U)

April 14, 2011

Supreme Court, Suffolk County

Docket Number: 35947/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 35947/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

EDNA LAMPKE and ROBERT LAMPKE,

Plaintiffs,

-against-

PETRO, INC., MATSON HEATING and AIR
CONDITIONING, INC., and RUG
RENOVATING CO., INC.,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 23, 2010
FINAL SUBMISSION DATE: OCTOBER 28, 2010
MTN. SEQ. #: 003
MOTION: MG

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Upon the following papers numbered 1 to 12 read on this motion _____
FOR PARTIAL SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Opposition and supporting papers 6, 7; Affidavit and supporting papers 8, 9; Replying Affirmation and supporting papers 10, 11; Reply Affirmation 12; it is,

ORDERED that this motion by plaintiffs, EDNA LAMPKE and ROBERT LAMPKE (“plaintiffs”), for an Order, pursuant to CPLR 3212 (c), granting partial summary judgment on the issue of liability against defendants, PETRO, INC. (“Petro”) and MATSON HEATING and AIR CONDITIONING, INC. (“Matson”), and setting this matter down for a trial on the issue of damages, is hereby **GRANTED** as provided hereinafter. The Court has received opposition to the instant application from Petro and Matson, as well as an affidavit in response from defendant RUG RENOVATING CO., INC.

This is an action to recover damages as a result of a fuel oil spill at the residential premises of plaintiffs located at 13 Basket Neck Lane, Remsenburg, New York, allegedly caused by Petro and Matson’s negligent installation of a furnace and oil burner in or about April of 2006. Plaintiffs claim that they suffered damage to their personalty in the home, a diminution in value of the home, and adverse health conditions due to the intrusion of the oil. The action was commenced on or about October 20, 2008, by the filing of a summons and complaint. Issue was joined by Petro on November 5, 2008, and by Matson on December 16, 2008.

Plaintiffs now move for partial summary judgment on the issue of liability against Petro and Matson, arguing that these defendants are “dischargers” pursuant to Navigation Law § 172 (8), and are therefore strictly liable for the petroleum spill. Plaintiffs claim that the petroleum discharged onto the concrete basement floor of their residence, as well as into the soil beneath it, resulting in the excavation of the soil from the area below the basement floor. Plaintiffs argue that the Court may take judicial notice of the flow of discharged petroleum via ground surface to ground water, particularly given the “sandy soil of the south shore of Long Island.” Moreover, plaintiffs allege that they did not cause or contribute to the discharge. Thus, plaintiffs seek partial summary judgment on the issue of liability, and a trial as to damages. In support of the foregoing, plaintiffs have submitted, among other things, the pleadings and affidavits of each plaintiff.

In opposition, Petro alleges that issues of fact exist as to whether Petro is responsible as a “discharger” of oil, as Petro merely delivered oil and the spill did not occur due to the means or manner of delivery. Petro contends that the spill was caused by the negligent installation and work performed by Matson, and that questions of fact exist as to whether Petro engaged in any acts or omissions that resulted in the spilling of petroleum. Further, Petro argues that there is no proof herein that the petroleum drained into the groundwater, as the amount of the spill, the depth of the underground seepage, and the depth of the underground water table are yet to be determined.

Matson argues, on the other hand, that no discharge of petroleum occurred at all within the meaning of Navigation Law § 172 (8). Matson alleges that plaintiffs do not claim that defendants released petroleum directly into state waters, and that the petroleum that was released only reached a depth of two feet, while groundwater in that area is not reached until ten feet below grade. Thus, Matson contends that groundwater was not impacted by this release.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent’s Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Section 181 of Article 12 of New York’s Navigation Law provides in pertinent part, “[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, no matter by whom sustained” (Navigation Law § 181 [1]; *Turnbull v MTA N.Y. City Tr.*, 28 AD3d 647 [2006]; *Fuchs & Bergh, Inc. v Lance*

Enters., Inc., 22 AD3d 715 [2005]), so long as the plaintiff has “not caused or contributed to (and thus are not ‘responsible for’) the discharge” (*White v Long*, 85 NY2d 564, 569 [1995], quoting Navigation Law § 172 [3]; see *Carter v Suburban Heating Oil Partners, L.P.*, 44 AD3d 1221 [2007]). Article 12 of the Navigation Law affords injured individuals the right to pursue a private right of action in strict liability directly against a discharger of petroleum (see e.g. *Leone v Leewood Serv. Station*, 212 AD2d 669 [1995]). Navigation Law § 181 (5) 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, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section” (Navigation Law § 181 [5]).

Pursuant to Navigation Law § 172 (8), “discharge” means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state (Navigation Law § 172 [8]).

In the case at bar, the Court finds that plaintiffs have made an initial *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Plaintiffs have established that Petro, as contractor, and Matson, as installer, either directly or indirectly caused the leak; that the petroleum seeped into the soil beneath plaintiffs’ basement floor; and that plaintiffs did not cause or contribute to the discharge (see *Young v Abbott & Mills, Inc.*, 2011 NY Slip Op 2658 [2d Dept]; *Tiffit v Bigelow’s Oil Serv., Inc.*, 70 AD3d 1248 [2010]; cf. *Hjerpe v Globerman*, 280 AD2d 646 [2001]). Navigation Law article 12 must be liberally construed (see Navigation Law § 195), and therefore Petro, who contracted with Matson to install the furnace and oil burner, is subject to liability as a “discharger” under the statute (see *Huntington Hosp. v Anron Heating & Air Conditioning, Inc.*, 250 AD2d 814 [1998]; *Barclay’s Bank v Tank Specialists*, 236 AD2d 570 [1997]; see also *White v Long*, 85 NY2d 564, *supra*; *145 Kisco Ave. Corp. v Dufner Enters.*, 198 AD2d 482 [1993]).

The burden then shifted to the defendants to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action on liability (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). The Court finds that defendants have failed to meet their burden to demonstrate that they were not dischargers or that plaintiffs caused or contributed to the discharge. Both defendants have merely submitted affirmations of counsel in opposition to plaintiffs' motion. Counsel's affirmations, made without personal knowledge, are without any evidentiary value and are insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). In addition, although Matson has submitted a letter from Milro Associates, Inc. (the company hired by Petro to clean up the spill) to the New York State Department of Environmental Conservation, dated October 23, 2006, indicating that the groundwater was not impacted by the spill, the Court finds such hearsay letter to be insufficient to defeat a motion for summary judgment (*see e.g. Orelli v Showbiz Pizza Time, Inc.*, 302 AD2d 440 [2003]; *Feis v A.S.D. Metal & Machine Shop*, 234 AD2d 504 [1996]).

Accordingly, this motion by plaintiffs for partial summary judgment on the issue of liability is **GRANTED**. Upon service of this Order with notice of entry upon defendants, the Calendar Clerk of this Court is directed to place this action of the Calendar Control Part Calendar for the next available date for a trial as to damages. Plaintiffs are reminded that a Note of Issue must be filed prior to trial.

The foregoing constitutes the decision and Order of the Court.

Dated: April 14, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION