SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 14

_____X

BURNSIDE 711 LLC,

Plaintiff,

-against-

AMERADA HESS CORPORATION,

Defendant.

_____X

Index No.: 011625/11
Motion Sequence...01, 02
Motion Date...12/20/11
XXX

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Memorandum of Law in Support.....x
Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x
Notice of Motion (Mot. Seq. 02).....x

Upon the foregoing papers, the Defendant, Amerada Hess Corporation's (hereinafter "Hess") motion (Mot. Seq. 01), seeking an order pursuant to CPLR § 3211 (a) (1) and (a) (5) dismissing the complaint, and the Plaintiff's motion (Mot. Seq. 02), seeking an order pursuant to the Rules of the Court of Appeals § 520.11 admitting Craig S. Provorny, Esq., pro hac vice, to represent the Plaintiff herein, are determined as hereinafter provided.

The background of this action has been adequately set forth in the Plaintiff's Memorandum of Law. The Memorandum provides, in pertinent part, as follows:

"Defendant leased property located at 711 Burnside Avenue, Inwood, Nassau County, New York ("the Property") between about March 1964 through 1979 (The "Lease"). (Complaint, ¶ 3). In the late 1970s during defendant's tenancy of the Property, Longwood Associates alleged that defendant damaged a revolving sign and a section of asphalt on the Property. (Affidavit of J. Jay Tanenbaum, ¶ 2). After several months of negotiations, Alfred Gold and J. Jay Tanenbaum, co-owners of Longwood Associates, entered into a release (the "Release") with defendant, drafted by defendant, which specifically released defendant for the damages to the revolving sign and asphalt and defendant's obligations to maintain the Property under the Lease, in exchange for $500. (*Id.*, ¶¶ 4, 6). At the time the parties executed the Release, neither Mr. Tanenbaum nor Mr. Gold were aware of underground contamination of the Property. *(Id.*, ¶ 10).

Additionally, in 1979, defendant closed underground storage tanks it had on the Property, which involved removing the flammable, inerting vapors from the tanks and then filling the tanks with sand. (*Id.*, ¶¶ 11-12). Shortly thereafter, Longwood Associates alleged that defendant damaged the underground storage tanks during this process of 'inerting' the tanks and rendered them inoperable. (*Id.*, ¶ 13). Again after several months of negotiation, Mr. Gold and Mr. Tanenbaum, on behalf of Longwood Associates, entered into a second release (the "Second Release") with defendant, also drafted by defendant, which specifically released defendant from liability for conversion of the three underground storage tanks, in exchange for $30,500. (*Id.*, ¶¶ 14-16). At the time the parties executed the Second Release, neither Mr. Tanenbaum nor Mr. Gold were aware of underground

contamination of the Property. (*Id.*, ¶ 20)."

In paragraph 3 of the complaint dated August 3, 2011, the Plaintiff alleges that Hess leased property located at 711 Burnside Avenue, Inwood, Nassau County, from 1964 through 1979. In paragraph 4 thereof, the Plaintiff alleges that during that time, Hess "owned underground gasoline storage tanks and was the sole operator of a station on the Property."

According to paragraph 5 of the complaint, Hess closed the underground storage tanks on the Property by filling them with sand.

The Plaintiff further alleges that in 2009, environmental testing indicated a "significant release of gasoline to the soil and ground water from the tanks." (Complaint, ¶ 8). On or around December 8, 2009, the New York State Department of Environmental Conservation (the "DEC") was notified of the alleged gasoline release and the DEC subsequently demanded a full investigation of the site. (Complaint, ¶¶ 9, 10). According to paragraphs 16 and 17 of the complaint, the DEC approved a Remedial Action Plan for the Property on June 1, 2010. The Plaintiff allegedly hired Hydro Tech Environmental Corporation to remove the underground gasoline storage tanks and to "remediate the soils." (Complaint, ¶¶ 18, 19). The Plaintiff alleges that it has "incurred significant costs associated with closure of the tanks and remediation of the soils." (Complaint, ¶ 21). Based upon the foregoing, the Plaintiff seeks to hold Hess strictly liable for these remediation costs pursuant to Article 12 of the New York Navigation Law. (Complaint, ¶¶ 22, 23).

The Defendant now seeks to dismiss the Plaintiff's complaint seeking damages for underground contamination to the Property based upon the Release and the Second

Release (collectively referred to as "the Release").

In opposition, the Plaintiff asserts that the subject Releases do not clearly and unambiguously encompass the subject matter of the complaint, namely environmental contamination under Article 12 of the New York Navigation Law, and do not bind the Plaintiff. While the Releases bind the successors and assigns to Longwood Associates, the Plaintiff is not clearly a successor or assign to Longwood Associates. The Plaintiff has different ownership than Longwood Associates because the ultimate members who own the Plaintiff are not the same as those who owned Longwood Associates. This difference in ownership raises a material issue of fact regarding whether the Plaintiff is a successor or assign to Longwood Associates. Consequently, the Plaintiff is not clearly a party to the Releases and its claims cannot be thereby released even if the court holds the Releases do encompass environmental contamination.

To succeed on a motion pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Leon v. Martinez,* 84 N.Y.2d 83 [1994]; *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.,* 11 N.Y.3d 146 [2008]; *1911 Richmond Ave. Associates, LLC v. G.L.G. Capital, LLC*, 60 A.D.3d 1021 [2nd Dept. 2009]; *DiGiacomo v. Levine*, 76 A.D.3d 946 [2nd Dept. 2010]).

A motion to dismiss based upon a release pursuant to CPLR § 3211 (a) (5) will

be granted only if "the language of the release clearly and unambiguously covers the subject matter of the latter action." *Luxury Travel Coach v. 4020 Assoc., Inc.*, 241 A.D.2d 443 (2nd Dept. 1997); *O'Neill v. O'Neill*, 29 Misc 3d 1204(A) (N.Y. Sup. Ct. 2010).

Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" *(Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269 [2011], quoting *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 93 [1st Dept 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v. 3669 Delaware*, 92 N.Y. 2d 934, 935 [1998], quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 536, [1969]). A release "should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice" (*Mangini v. McClurg, supra*, at p. 563). A release may be invalidated, however, for any of the "traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake" (*Id.*).

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Fleming v. Ponziani*, 24 N.Y.2d 105, 111 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must "establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable

reliance by the plaintiff, and resulting injury" (*Global Mins. & Metals Corp. v. Holme*, supra).

Significantly, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is "fairly and knowingly made" (*Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.*; *supra,* quoting *Mangini v. McClurg*, *supra*, at p. 556-567; *Alleghany Corp. v. Kirby*, 333 F2d 327, 333 [2d Cir. 1964]; *Johnson v. Lebanese American University*, 84 A.D.3d 427 [1st Dept. 2011]).

Applying these principles to the case at bar, the Court finds that the subject releases are clear and unambiguous and should constitute a complete bar to an action on a claim that falls within its scope (*cf. Johnson v. Lebanese American University*, *supra*).

Accordingly, it is hereby

ORDERED, that the Defendant's motion (Mot. Seq. 01) seeking dismissal of the Plaintiff's complaint is **GRANTED** and the complaint is **DISMISSED**; and it is further

ORDERED, that in light of the Court's dismissal of the Plaintiff's complaint, Plaintiff's motion (Mot. Seq. 02) to admit Craig S. Provorny, Esq., pro hac vice, is rendered moot.

All applications not specifically addressed herein are **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
February 6, 2012

Hon. Randy Sue Marber, J.S.C.
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