

**920-922 Crooked Hill Rd. Prop., LLC v Tri-Rail
Constr., Inc.**

2014 NY Slip Op 30725(U)

March 18, 2014

Sup Ct, Suffolk County

Docket Number: 15778-09

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

_____^x
920-922 CROOKED HILL ROAD PROPERTIES,
LLC,

Plaintiff,

-against-

TRI-RAIL CONSTRUCTION, INC., CHARLES
VENTIMIGLIA and NOVA CASUALTY
COMPANY,

Defendants.

_____^x

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DECISION AFTER TRIAL

The Plaintiff, 920-922 Crooked Hill Road Properties, LLC (the "Plaintiff"), is a New York limited liability company engaged in the business of leasing commercial property and the owner of a 2.4 acre industrial parcel, zoned I1, located at 920-922 Crooked Hill Road, Islip, New York (the "Premises"). Steven Fuchs is a principal of the Plaintiff. The Defendant, Tri-Rail Construction, Inc. ("Tri-Rail"), is a New York corporation engaged in the business of general construction, concrete and masonry work, demolition, and carpentry. The Defendant Charles Ventimiglia is a principal of Tri-Rail. The Defendant Nova Casualty Company ("Nova") is a New York corporation engaged in the business of indemnity and suretyship.

In or about 2005, the New York Metropolitan Transportation Authority ("MTA") awarded Tri-Rail a three-year contract to remove discarded Long Island Rail Road ("LIRR") ties from various railroad stations. There was no mention by the MTA or LIRR officials that the railroad ties contained hazardous materials. On May 26, 2005, Tri-Rail executed a commercial

lease (the "Lease") with the Plaintiff to lease yard space at the Premises to store and process railroad ties at a monthly rent of \$1,000. The Lease began on June 1, 2005, and ended on May 31, 2007. In lieu of a security deposit, the Plaintiff requested a bond of \$25,000, which Tri-Rail obtained from Nova. In Paragraph 3 of the Lease, entitled *Care and Maintenance of Premises*, Tri-Rail agreed to "maintain the premises in good and safe condition," and agreed to "surrender the premises in as good condition as received, normal wear and tear excepted." Tri-Rail further agreed to "be responsible for removal of all equipment and railroad ties upon lease termination." When the original term of the Lease expired, the parties agreed to an extension until May 31, 2008, or until the MTA contract had been performed, at a monthly rent of \$1,500.

Paragraph 15 of the Lease, entitled *Lessor's Remedies on Default*, provides that, during the term of the Lease, if Tri-Rail defaults in the payment of rent or in the performance of any of the other conditions or covenants in the Lease, the Plaintiff may give Tri-Rail notice of such default and provide Tri-Rail with a period of time to cure the default. Paragraph 15 also provides that, if Tri-Rail fails to cure the default, the Plaintiff may terminate the Lease, but that no failure to enforce any term shall be deemed a waiver. The Lease also contains a provision that allows the prevailing party to recover all costs incurred, including reasonable attorneys fees, in connection with any suit brought to enforce performance.

During the term of its contract with the MTA, Tri-Rail loaded railroad ties on its trucks from railroad stations identified by MTA officials and delivered them to one of four sites used by Tri-Rail for storing the railroad ties, including the Premises, where they were unloaded, sorted, banded, stacked, and loaded on delivery trucks. The delivery trucks then carried the railroad ties to destinations across the United States for sale, mainly to landscapers. Up to 1,000 railroad ties were brought to the Premises at a time. The railroad ties were often unloaded from delivery trucks by dropping them from a variety of heights onto the ground. The railroad ties were sorted by size, and any short or unsaleable railroad ties were placed in a dumpster. Railroad ties that disintegrated upon unloading to the ground were determined to be unsaleable and were also placed in a dumpster. Sometimes the railroad ties were moved around the Premises, causing their deterioration. As a result of Tri-Rail's handling, pieces of the railroad ties were left on the ground during the term of the Lease. Tri-Rail claims that during the term of the Lease it frequently swept and raked the ground in an effort to remove the pieces. In January 2008, the Federal government passed a law banning the sale of railroad ties for any use because they contain creosote and other harmful chemicals. After January 2008, Tri-Rail donated the remainder of the railroad ties to one of its truckers, non-party Cross Ties, who disposed of them in a regulated area. Tri-Rail concluded its work for the MTA on March 31, 2008 and vacated the Premises on May 28, 2008. Tri-Rail removed its equipment and trucks from the Premises, purportedly raked the ground to remove any railroad tie pieces, and finally graded the portion of the Premises where the railroad ties had been processed and stored.

At trial, Steven Fuchs, the Plaintiff's principal, testified as follows: He observed Tri-Rail process the railroad ties over the three years that it occupied the Premises. Upon vacating the Premises, Tri-Rail removed all intact railroad ties and large portions thereof. However, splinters and shards of pulverized wood from the railroad ties remained on the ground and scattered around the Premises. During the term of the Lease, Fuchs discussed the condition of the

Premises with Charles Ventimiglia, Tri-Rail's principal, who stated that he would leave the property "as clean as a whistle." Fuchs visited the Premises on the day that Tri-Rail left and observed the condition thereof. It had not been left "as clean as a whistle" because pieces of railroad ties containing creosote were strewn about the Premises. In fact, Fuchs claimed that so much of this material remained after Tri-Rail had completed its alleged clean-up that the grade of the Premises had risen approximately three to four inches. Upon making this observation Fuchs telephoned Ventimiglia, informed him that the Premises had not been left in the condition required by the Lease, and asked him what he intended to do about it. Ventimiglia stated that he had left the Premises "as clean as a whistle" and told Fuchs to call Ventimiglia's lawyer.

On June 5, 2008, Fuchs retained Eastern Environmental Solutions, Inc. ("Eastern Environmental"), to test the soil surface for contaminants. Eastern Environmental prepared a report dated June 20, 2008, which revealed that the soil tested positive for creosote and other chemicals. Fuchs claimed that this was the first time that he was aware that creosote was considered a harmful chemical. Fuchs subsequently retained Garofalo Carting ("Garofalo") to remove the debris from the surface. On July 3, 2008, Garofalo removed three to four inches of soil with debris and carted approximately 12 truckloads thereof out of the Premises. On July 20, 2008, a second test was performed by Eastern Environmental. By a letter dated August 8, 2008, Eastern Environmental advised Fuchs that the test revealed that creosote was still present in the soil. By a letter dated September 10, 2008, Fuch's attorney demanded \$75,000 on behalf of the Plaintiff to clean up the Premises. This action was commenced on April 23, 2009.

The complaint contains five causes of action for breach of contract, misrepresentation, negligence per se, failure to indemnify the Plaintiff under the bond, and fraud/deceit, respectively. The answers assert general denials. The matter proceeded to trial on June 12, 2012; June 13, 2012; June 14, 2012; June 15, 2012; July 24, 2012; July 25, 2012; and April 10, 2013. The parties submitted their post trial memoranda on January 21, 2014. The Plaintiff was represented by Richman and Levine, P.C. The Tri-Rail Defendants were represented by Rabinowitz and Galina, Esqs. Nova was represented by Neil B. Connelly, Esq., PLLC. At the trial, Steven Fuchs, Scott Hamarich, and expert witness Randy Horsak testified for the plaintiff. Charles Ventimiglia, John Barberini, and expert witness Scott Yanuck testified for Tri-Rail.

The condition of the Premises both before and after the Lease was an important issue for all parties. Fuchs testified that, when he and his partner purchased the Premises in 1993, they did not conduct any tests to determine the baseline condition of the soil. The only tests performed were with respect to the ground water, which resulted in a negative finding. After the Premises were acquired by the Plaintiff, a business named *Contractor's Supply Corp.* occupied a portion thereof. Another portion was leased to a business named *Garofalo Sanitation*. Before leasing to Tri-Rail, a portion of the Premises was leased to a used car company. Since Tri-Rail has vacated the Premises, no other tenant has occupied the space. The Plaintiff seeks damages for the clean-up of the soil upon which the railroad ties were placed, which accounts for approximately 8,000 to 9,000 square feet. The total amount of damages sought by the Plaintiff is \$183,547.92 representing the alleged cost of clean-up of the Premises, attorneys fees, and related litigation costs.

The Plaintiff also seeks payment on the bond issued by Nova. Fuchs testified that the bond is still in full force and effect.

Charles Ventimiglia, Tri-Rail's principal testified as follows: Tri-Rail purchased parts and equipment from a company named Iron Horse Equipment, which leased the Premises from the Plaintiff prior to Tri-Rail's occupancy thereof. Tri-Rail purchased pistons, engines, and transmissions from Iron Horse every few months beginning in 1999. In 2003, when Tri-Rail purchased a rear end for a dynamometer 190-4, Ventimiglia observed a mechanic from Iron Horse use a torch to disconnect a part from the machinery and allow fluids to drain directly onto the ground. Ventimiglia observed brake fluid and hydraulic fluid drain onto the ground at other times, during other purchases. Iron Horse subsequently moved to 916 Crooked Hill Road, which is adjacent to the Premises, and continued its business as before. Since the Premises are low-lying in comparison to the surrounding properties, flooding occurred every time it rained. Ventimiglia believed that the flooding may have caused contaminants from the adjacent property to flow onto the leased Premises. Ventimiglia testified that, when Tri-Rail's contract with the MTA ended, his employee John Barberini removed all of the equipment from the Premises; drove off all of the trucks; swept, graded, and raked the property; and removed everything therefrom. Barberini testified in a similar manner that he believed he had removed all of the remaining pieces of railroad ties from the Premises. After vacating the Premises, Ventimiglia denied receiving any letters from the Plaintiff informing him that he was in default or that he should clean the site. Ventimiglia testified that he knew before signing the Lease that the land was contaminated, but he did not include any protections from liability in the Lease. He did not test the soil before taking possession of the Premises, nor did he test it after vacating the Premises.

The burden of proof rests with the Plaintiff, who must establish the truth and validity of each claim by a fair preponderance of the credible evidence (*see, Liberty Doorworks, Inc. v Baranello*, 35 Misc 3d 1222 [A] at *5). Stated otherwise, in order for the Plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the factfinder as more nearly representing what took place than the evidence opposed to it (**Id.**). If it does not, or if the evidence weighs so evenly that the factfinder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the Defendant (**Id.**). Only when the evidence favoring the Plaintiff's claim outweighs the evidence opposed to it may the Plaintiff prevail. (**Id.**).

The court finds that the Plaintiff has met its burden with respect to its claim for breach of contract. The court finds that Tri-Rail breached Paragraph 3 of the Lease by failing to "surrender the Premises in as good a condition as received, normal wear and tear excepted." The totality of the evidence clearly establishes that Tri-Rail's activities at the Premises created and caused a large quantity of chips, shards, and broken pieces of creosote-infused railroad ties to remain on the ground in the area occupied by Tri-Rail after it vacated the Premises, despite its attempts to remove them. Tri-Rail admitted that it graded the property and that such grading caused this material to be combined with and mixed into the soil. Having created such a mix, the only way to return the Premises to "as good a condition as received" was to remove so much of the soil as contained the railroad-tie fragments. When the grading by Tri-Rail occurred, the Federal Government had already labeled creosote a dangerous material. Clearly mixing any

portion of the railroad ties with the soil, whatever the soil's previous condition, devalued the Premises.

The court credits the testimony of Steven Fuchs that the wood chips migrated to the drains and to the catch basins on the Premises, that he was required to retain the services of certain contractors to clean such drains to remove and install an additional dry well on the Premises. In addition the court notes that Garofalo Carting was hired to remove soil from the Premises into which the railroad tie shards had been mixed all of which caused monetary damages to the Plaintiff. This testimony is consistent with other credible evidence in the record. On the other hand, the testimony of Tri-Rail's employee, John Barberini, regarding his clean-up measures at the end of the Lease term is that of an interested witness. Moreover, his testimony and Mr. Ventimiglia's testimony regarding the extent of their clean-up is improbable in light of all of the other credible evidence in the record. The credible evidence establishes that, although Tri-Rail was able to remove some of the chips and shards left on the Premises by the railroad ties, a large quantity of such chips and shards remained thereon and as a result of Tri-Rail's grading of the soil became mixed therewith.

Tri-Rail contends that the action should be dismissed because the Plaintiff failed to serve a notice of default on them pursuant to Paragraph 15 of the Lease. Paragraph 15, by its language, makes clear that it applies to a default that occurs during the term of the Lease and not to a breach of a term at the expiration of the Lease. Paragraph 15 gave the Plaintiff the right to terminate the Lease prior to its stated expiration date if Tri-Rail defaulted in the payment of rent or in the performance of any of the other conditions or covenants in the Lease. In that circumstance, it is logical to provide for notice and an opportunity to cure. However, even in that circumstance, the language of Paragraph 15 is permissive, not mandatory, and provides that the Plaintiff "may" give Tri-Rail notice of such default and "may" terminate the Lease if the default is not cured. Paragraph 15 does not specify a time frame within which the Plaintiff must give notice to Tri-Rail and clearly provides that "no failure by [Plaintiff] to enforce any term shall be deemed a waiver by [Plaintiff] to exercise its remedies." Moreover, although the Lease provides that the notice be given in writing and sent by mail, the Lease does not require that the written notice be in any particular form.

The court finds that Tri-Rail's reliance on Paragraph 15 of the Lease is unavailing. The notice and opportunity-to-cure provisions thereof are specifically linked to the Plaintiff's right to terminate the lease and to regain control of the Premises. It is undisputed that the Lease had already terminated in accordance with its express terms and that Tri-Rail had vacated the Premises when the Plaintiff discovered the conditions that are the subject of this action. Moreover, Steven Fuchs testified that he telephoned Charles Ventimiglia on the day that Tri-Rail vacated the Premises and requested that he complete the clean-up. Finally, written notice was sent in September of 2008.

In view of the foregoing, the court finds that the Plaintiff has established by a preponderance of the credible evidence that Tri-Rail breached the Lease by failing to surrender the Premises in as good a condition as received. The Plaintiff is awarded damages on the first cause

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of action against Tri-Rail for breach of contract in the amount of \$41,539.00, which represents the costs incurred by the Plaintiff to repair the drywells and catch basins and to remove the soil from the Premises that had been mixed with railroad tie shards, together with interest from September 10, 2008. The court declines to award the additional damages requested by the Plaintiff. The Plaintiff may recover on the bond. The Plaintiff has failed to meet its burden of proof on the remaining causes of action against Tri-Rail and Ventimiglia. In any event, they are duplicative of the breach-of-contract cause of action.

The Lease provides that the prevailing party may recover its reasonable attorney fees and the costs of litigation. Moreover, as Tri-Rail correctly points out, it is entitled to attorney fees based on a prior order of this Court. Accordingly, the issue of attorney's fees is referred to a hearing, which shall be held on May 1, 2014, at 10:30 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

Dated: March 18, 2014

HON. ELIZABETH HAZLITT EMERSON

J.S.C.