

DeLuca v General Util., Inc.

2019 NY Slip Op 34498(U)

December 2, 2019

Supreme Court, Nassau County

Docket Number: Index No. 608188/18

Judge: James P. McCormack

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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

MICHAEL DELUCA,

Plaintiff(s),

-against-

GENERAL UTILITIES, INC.,

Defendant(s).

x

TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 608188/18

Motion Seq. No.: 003 & 004
Motion Submitted: 9/20/19

The following papers read on this motion:

- Notices of Motion/Supporting Exhibits/Memorandum of Law.....XX
- Affirmations in Opposition/Supporting Exhibits.....XX
- Reply Affirmations.....XX

Plaintiff, Michael DeLuca (DeLuca), moves this court (Motion Seq. 003) pursuant to CPLR §3212, for an order granting summary judgment on the issue of liability, pursuant to Navigation Law §181. Defendant, General Utilities, Inc. (GUI), opposes the motion and moves separately (Motion Seq. 004) for an order pursuant to CPLR §3126 dismissing the complaint for DeLuca's failure to comply with discovery. DeLuca opposes the motion.

DeLuca commenced this action by summons and complaint dated May 22, 2018. Issue was joined by service of an answer dated June 28, 2018. The case certified ready for trial on June 27, 2019 and a note of issue was filed on September 27, 2019.

This matter involves an allegation that GUI spilled oil at a residential property which DeLuca owns and uses as a rental property. DeLuca hired GUI to deliver oil to the property, and the arrangement was that GUI will automatically fill the property's oil tank at regular intervals, as opposed to having to be called when the oil level was low. DeLuca alleges that on February 6, 2018, a seasonal employee for GUI attempted to make an oil delivery. While there, the employee initially was unable to find the pipe in which to dispense the oil. Emails between the parties indicate GUI reached out to DeLuca to ask if there had been a change of location for the pipe, but then the employee found it and made the delivery. When DeLuca went to the property approximately one month later to collect rent, the tenant said that the GUI employee spilled oil on the property. DeLuca noticed a smell of oil and noticed that there was not only oil on the ground, but that it was also sprayed onto the house. DeLuca inquired of GUI, via email, if a report was filed by the driver. GUI stated that a report is required, but one was not filed. GUI would eventually report the spill to the NYS Department of Environmental Conservation (DEC), and would hire Milro, Incorporated to remediate the spill.

On March 30, 2018, Milro issued a report addressed to the DEC. The report, which is annexed to DeLuca's moving papers, indicated that Milro removed 1 yard of impacted soil and that their testing indicated no contamination below two feet. The report further stated: "Groundwater was not encountered during the remediation. Groundwater

is estimated to be 43' below grade at this location...". DeLuca now moves for summary judgment, arguing that GUI is strictly liable.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (see *Sillman v. Twentieth Century Fox Films Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, 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 action. (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (see *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (see *Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Navigation Law §181 holds, in pertinent part:

1. 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 §172(8) defines “discharge as follows:

“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;

It is clear that to qualify as a discharge under this section, the contaminant must have been released into the water, or onto lands from which it might flow into the water.

Though case law is hardly abundant, it appears the court may take judicial notice of the fact that, in general, oil spilled onto land can contaminate groundwater (*Merrill Transport v. State*, 94 AD2d 39 [3d Dept 1983]) (“While there is nothing in the record to positively demonstrate that the spilled oil might have flowed into protected waters, judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater near a highway and thereby cause ecological damage.” at 42-43). However, herein, DeLuca submits the report of Milro which states that the oil spill did not reach the groundwater, and that groundwater was 41 feet below the deepest point where oil was found. DeLuca also submits a report indicating that the DEC closed the case.

The court finds DeLuca had failed to establish entitlement to summary judgment as a matter of law under Navigation Law §181. While it is clear there was a spill, it is not clear that water was endangered. To the contrary, DeLuca offers evidence it was not impacted. Therefore, DeLuca’s motion for summary judgment will be denied regardless of the sufficiency of the opposition papers.

GUI's motion concerns its demand to inspect the subject premises. It appears the parties agreed such an inspection would occur, but then GUI demanded that DeLuca sign a waiver on behalf of the entity performing the inspection. DeLuca refused. In reply, GUI states that they had since agreed to perform the inspection without the need for the waiver. Neither party has indicated whether the inspection has been performed. However, the court is aware that GUI brought a separate motion to vacate the note of issue, due to the fact that the inspection had not taken place. That motion was subsequently withdrawn. The court interprets the withdrawal to mean that the inspection has taken place. To the extent it has not, DeLuca will allow one to take place within 30 days from the date of this order. He is under no obligation, or court order, to sign a waiver or release.

Accordingly, it is hereby

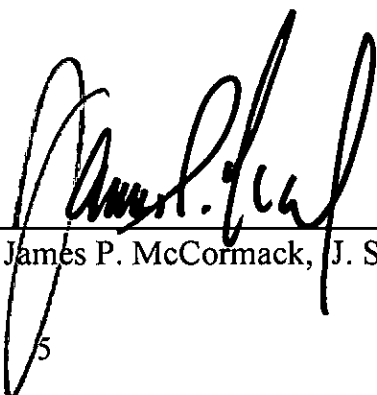
ORDERED, that DeLuca's motion (Motion Seq. 003) for summary judgement on liability pursuant to Navigation Law §181 is DENIED; and it is further

ORDERED that GUI's motion (Motions Seq. 004) to dismiss the complaint pursuant to CPLR §3126 is DENIED as moot, except that if the inspection has not taken place, it will take place within 30 days of the date of the order, consistent with the terms of this order.

This constitutes the decision and order of the court.

Dated: December 2, 2019
Mineola, N.Y.

ENTERED
DEC 02 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE



Hon. James P. McCormack, J. S. C.