Marasco v ExxonMobil Oil Corp.
2019 NY Slip Op 34866(U)
October 3, 2019
Supreme Court, Westchester County
Docket Number: Index No. 54362/2013
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PETER A. MARASCO, ANTHONY PAUL MARASCO and JOSEPHINE Z. MARASCO, trustee and successor-in-interest to CARLTON MARASCO, as owners and lessors of certain real property,

Plaintiffs,

-against-

EXXONMOBIL OIL CORPORATION successor to MOBIL OIL CORPORATION, Lessee, and EXXONMOBIL ENVIRONMENTAL SERVICES COMPANY,

Defendants.

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DECISION AND ORDER
Sequence No. 1
Index No. 54362/2013

RUDERMAN, J.

The following papers were considered in connection with plaintiffs' motion for an order granting summary judgment in their favor:

Papers	Numbered
Notice of Motion, Pleadings, Affidavits, Memorandum of Law, and Exhibits 1 - 33	1
Malandra Affidavit in Opposition, Exhibits 1 - 3, DeGloria Affidavit in Opposition, Exhibits 1 - 13, Smith Affidavit in Opposition, Exhibits 1 - 2, Affirmation in Opposition, Exhibits 1 - 8, and Memorandum of Law	2
Reply Affidavit[1]	3

Background

Plaintiffs Peter A. Marasco, Anthony Paul Marasco, and Josephine Z. Marasco as

[1] The parties' submissions will be considered despite any de minimis untimeliness.

trustee and successor-in-interest to Carlton Marasco, are the title owners of the property located at 440 South Broadway in Tarrytown, New York. In May 1986, Peter A. Marasco, Anthony Paul Marasco and Carlton Marasco leased the property to Mobil Oil Corporation, predecessor to ExxonMobil Corporation ("ExxonMobil"); the lease expired on September 30, 2006. Defendant ExxonMobil operated the premises as a retail gasoline service station with a convenience mart. In March of 1990 it reported a petroleum spill to the New York State Department of Environmental Conservation ("DEC"), which opened a file under Spill # 89-13003. ExxonMobil retained Groundwater and Environmental Service, Inc. ("GES") to perform the necessary remediation work.

At the end of the lease term, the parties entered into a six-month lease extension through March 31, 2007; pursuant to paragraph 6 of the original lease, ExxonMobil claimed the right to an additional fifteen day reversionary period at the end of this six-month extension, up to April 15, 2007, to remove their underground storage tanks. ExxonMobil completed that removal, and the initial active remediation and restoration work by April 14, 2007. However, some additional restoration work on the premises continued until June 26, 2007. The property was leased to a successor tenant beginning September 15, 2007; that tenant similarly used the property for a retail gasoline service station and convenience store. While additional soil removal thereafter proved to be necessary, and was performed on the property in December 2007 and February 2008, that work was paid for by defendants, and the successor tenant continued to pay rent to plaintiffs during that period.

Several agencies played a part in oversight of the remediation work. The New York State Department of Environmental Conservation ("DEC"), which oversees the removal of such oil

spill contamination, was provided with a Remedial Action Plan by defendants on December 13, 2006, in which was proposed the excavation and removal of impacted soil and groundwater from the subject property as well as from the adjacent property. An application for a permit to begin work was filed with the Westchester County Department of Health ("DOH"), which issued a permit on February 12, 2007. Defendants also secured a permit from the Village of Tarrytown Building Department, effective from January 31, 2007 through January 31, 2008, allowing the removal of the underground storage tanks ("USTs"). The approved remediation activities then proceeded from February 27, 2007 through April 4, 2007, with most restoration activities completed as of April 14, 2007 – although defendants acknowledge that work to restore grass and trees on the premises proceeded on April 23, 2017 and was completed on June 26, 2007. On April 24, 2007, defendants requested from the DOH a one-month extension to file their Tank Excavation Assessment and Site Divestment Summary Report; the report was submitted on May 30, 2007, the DOH confirmed receipt of that report on July 30, 2007. Defendants contend that DOH then closed out the work permit.

Plaintiffs assert that the Building Department permit No. 2007-5248 remains open, although GES sent the Building Department a letter on April 5, 2007 to close out that permit. However, according to defendants' submissions in opposition, that file has been marked closed by the Building Department. Defendants also submitted, after the return date, a Certificate of Compliance from the Village of Tarrytown dated September 19, 2019, confirming that Building Permit No. 2007-5248 is closed.

Defendants assert that between April 14, 2007 and September 15, 2007 – the date the successor tenant took possession of the property – defendants merely engaged in routine

environmental monitoring of the property, such as collecting and testing groundwater samples from monitoring wells. They continued to conduct periodic monitoring for approximately three years into the successor tenant's lease term – indeed, as discussed above, additional soil removal was performed on the property in December 2007 and February 2008 – until the NYSDEC issued a "No Further Action" letter on September 28, 2010.

The Complaint

Plaintiffs commenced this action by filing a summons and complaint on March 27, 2013. Their first cause of action, brought pursuant to Navigation Law § 181, alleges that defendants retained exclusive possession of the property from March 31, 2007 until mid-August 2007, continuing to perform remediation tasks, but paid no rent, or taxes, resulting in plaintiff's loss of income of $78,650.00. Their second cause of action sounds in unjust enrichment, based on the same contention that defendants retained rent-free possession of the property for April, May, June, July, August and half of September. The third cause of action, also seeking relief under Navigation Law § 181, claims a loss of $32,757.00 based on their delayed ability to impose a rent increase, based on the delay in their ability to rent out the property. The fourth cause of action relates to plaintiffs' inability to have a lessee cover the applicable real property taxes and special assessments during the period in which ExxonMobil allegedly retained possession of the property past the expiration of its lease; it seeks reimbursement of the tax payments on the property during that period, in the amount of $16,842.44. The Fifth cause of action asserts that defendants breached the lease by failing to restore the property to its former condition or surrender the premises in good condition, as required by the lease, and demands restitution for the diminution in value. The sixth cause of action charges defendants with negligence, and the

seventh seeks indemnification. The complaint seeks money damages for loss of rent and tax payments, an award for the diminution of the property's value, and attorney's fees.

The Instant Motion

Plaintiff Peter A. Marasco, pro se, and the other plaintiffs represented by counsel, now jointly move for summary judgment on the issue of liability; their notice of motion also claims entitlement to "damages in the form of consequential damages, attorneys fees, consultant fees, ... and punitive damages." The notice of motion characterizes the action as "a claim for lost rental income and taxes paid based upon Section 181 of the Navigation Law."

The affidavits submitted by plaintiffs in support of their motion set forth that although they had found a new tenant to rent the property, at an increased rate, for the period beginning at the expiration of the ExxonMobil lease, they were unable to enter into that new lease because ExxonMobil required more time to remediate the oil spill on the property. Therefore, plaintiffs assert, they were obliged to enter into a six-month extension with ExxonMobil, through March 31, 2007. Then, although ExxonMobil ceased paying rent after March 31, 2007, it continued in possession of the property until mid-August 2007, and plaintiffs were therefore unable to lease the property to the new tenant until September 15, 2007.

Plaintiffs contend that they have made a prima facie showing of entitlement to judgment as a matter of law, based on the proof of the spill, the continued remediation work following the expiration of the lease term, and their inability to re-lease the premises for five months after ExxonMobil's lease expired due to ExxonMobil's continued activities on the property.

Defendants oppose, emphasizing that the property was fully remediated entirely at ExxonMobil's expense, and that the satisfactory completion of the remediation is established by

the DEC's "No Further Action" letter and the closed-out permits. They submit affidavits disputing plaintiffs' claims, and arguing that plaintiffs have failed to establish that the loss of rental income and the payment of property taxes during the period from the end of ExxonMobil's lease and the start of the successor tenant's lease was caused by, or even related to the spill and remediation. Defendants also argue that since their ongoing monitoring of the property proceeded both before and after the successor tenant took possession, plaintiffs cannot reasonably contend that it was defendants' continuing restoration activities that caused the delay in the rental of the property to the successor tenant. Moreover, they contest plaintiffs' claim that it was the spill that caused the successor tenant's difficulty in obtaining the necessary permits from the Village of Tarrytown to open a new gasoline service station.

Discussion

The essence of this action, and of the current summary judgment motion, is based on rights created by Navigation Law § 181 (1). The statute provides that "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." "The purpose of the statute is, inter alia, to require the prompt cleanup and removal of oil and fuel discharge, to minimize damage to the environment, to restore the environment to its 'pre-spill condition' and to compensate those damaged by such discharge" (*AMCO Intl. v Long Is. R.R. Co.*, 302 AD2d 338, 340 [2d Dept 2003]). Notably, plaintiffs do not claim that they paid any cleanup or removal costs. Rather, they rely solely on the statute's reference to "indirect damages" for their claim that defendants are strictly liable for their asserted financial losses, specifically, losses in rent caused by their inability to lease the property to the successor tenant

immediately upon the expiration of ExxonMobil's lease, and the property taxes for which they were responsible for that period.

However, indirect costs such as plaintiffs seek are available under Navigation Law § 181 only if they were proximately caused by the oil discharge. Plaintiffs' submissions do not establish as a matter of law that the delay in the commencement date of the lease to the successor tenant was caused by the spill or the ongoing remediation process by defendants, rather than other possible causes, such as the successor tenant's actions or inaction, unrelated to the contamination. Moreover, although there is evidence that some restoration efforts continued after the ExxonMobil lease expired, it is not established that those restoration efforts constituted a holding-over of the property such as prevented a new tenant from taking possession. Indeed, the fact that further remediation took place during the successor tenant's tenancy tends to support a contrary result. Issues of fact preclude the summary judgment plaintiffs seek under the Navigation Law. Further, to the extent plaintiffs' submitted affidavits make additional factual assertions that appear to support other causes of action of the complaint, such as the claim that defendants breached the lease by failing to restore the property to its former condition or surrender the premises in good condition, all such claims involve disputed issues of fact that preclude summary judgment.

Nor have plaintiffs established an undisputed right to punitive damages. Even assuming that such a right may exist in this context, plaintiffs' submissions do not establish by clear and convincing evidence the requisite "willful or wanton negligence or recklessness" that is "sufficiently blameworthy" or "reprehensible" (*Randi A. J. v. Long Is. Surgi-Center*, 46 AD3d 74, 86 [2d Dept 2007]; *see* 1B NY PJI 2:278 at 886).

If it is determined at trial that plaintiffs have a meritorious claim under the Navigation Law, they may recover litigation costs including attorney's fees as "indirect damages" (*see* AMCO *Intl. v Long Is. R.R. Co.*, 302 AD2d at 341). However, no right to attorney's fees is demonstrated at this juncture.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied, and it is further

ORDERED that the parties are directed to appear on Tuesday, November 19, 2019 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York, to schedule a trial.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
October 3, 2019

HON. TERRY JANE RUDERMAN, J.S.C.