

Ahmed v Slomin's, Inc.
2024 NY Slip Op 35589(U)
April 2, 2024
Supreme Court, Nassau County
Docket Number: Index No. 603877/2021
Judge: Christopher T. McGrath
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. CHRISTOPHER T. McGRATH

Justice.

-----X
JAFFOR AHMED and PAYAL THAWANI AHMED,

Plaintiffs,

-against-

SLOMIN'S, INC.,

Defendant,

-----X

IAS/TRIAL PART 28

INDEX NO. 603877/2021

MOTION NO.: 002

SUBMITTED: 03/01/2024

DECISION & ORDER

The following e-filed documents for Motion Sequence 002, listed by NYSCEF document numbers "68," "70," "71," "91," "101," "103," and "105," and attachments and exhibits have been read on this motion:

Notice of Motion.....	<u> X </u>
Plaintiff Attorney's Affirmation in Support.....	<u> X </u>
Plaintiff Expert Affirmation in Support.....	<u> X </u>
Defendant Attorney's Affirmation in Opposition.....	<u> X </u>
Defendant Representative Affirmation in Opposition.....	<u> X </u>
Memorandum of Law in Opposition.....	<u> X </u>
Plaintiff Attorney's Affirmation in Reply.....	<u> X </u>

Plaintiffs, Jaffor Ahmed and Payal Thawani Ahmed, move for an Order: 1) pursuant to CPLR §3212 granting Plaintiffs summary judgment on the issue of liability against Defendant, Slomin's, Inc.; 2) pursuant to §181 of the New York Navigation Law imposing strict liability on any party that discharges petroleum, regardless of fault; and 3) dismissing the first through nine, eleventh, thirteenth and sixteenth through twenty-seventh affirmative defenses asserted by Defendant in its Answer.

Background

Plaintiffs commenced this action to recover damages related to an oil spill from an oil tank located in the basement of their home. Plaintiffs live at and have owned the premises located at 197 Caroline Avenue, Garden City, New York 11530 since 2017. On March 1, 2019, Plaintiffs signed a Home Heating Agreement with Slomin's for automatic delivery. Plaintiffs were on an automatic delivery schedule with Defendant. Defendant made a delivery of oil to Plaintiffs'

premises. Plaintiffs allege that Defendant delivered oil to Plaintiffs' premises on February 10, 2021, and that Defendants overfilled the oil tank, resulting in a discharge of oil.

Defendant was the company servicing the oil tank and delivering oil to the premises immediately preceding the oil discharge. After the oil spill was discovered, Mr. Ahmed called Defendant, as well as the fire department, to inform them of the discharge. The February 11, 2021, report from the New York State Department of Environmental Conservation is attached. (NYSDEC reports Exhibit N Opposition Papers).

There were two fittings on top of the tank where oil was noted to be leaking from, the oil gauge and a green object referred to as a sonar gauge. Both parties deny placing the green gauge on the tank. It is alleged that the green gauge seems to be an oil level monitoring device.

Plaintiffs' Contentions

In support of Plaintiffs' application, Plaintiffs submit a copy of the following: 1) Plaintiff Jaffor Ahmed's EBT Transcript, dated January 10, 2023 (Exhibit D); 2) Plaintiff Payal Ahmed's EBT transcript (Exhibit E); 3) Defendant's, represented by John Hughes, EBT transcript, dated January 24, 2023; 4) Defendant's service records from June 29, 2020 to February 11, 2021, detailing the work done to Plaintiff's oil tank leading up to the oil spill; 4) service Contract the Plaintiffs had with Defendant; 5) delivery tickets and records from Defendant from March 8, 2019 to February 10, 2021; 6) Defendant's internal February 11, 2021 inspection report; 7) Defendant's internal records regarding Plaintiffs' account; 8) Fire Marshall's Hazardous Material Incident Information Form; 9) Laurel Environmental Geosciences, DPC (Laurel Environmental) report after evaluating the remediation which was performed at the premises; 10) Department of Environmental Conservation ('DEC') report regarding the incident; and 11) copies of photographs in Plaintiffs' possession relating to the subject oil discharge.

Laurel Environmental was retained by Plaintiffs to investigate the facts surrounding the oil discharge from the oil tank located in Plaintiffs' basement. The affidavit of Scott Yanuck, principal and owner of Lauren Environmental Geosciences D.P.C. is annexed to the moving papers.

Mr. Yanuck states that the cause and origin of the discharge was an overfill of the Plaintiffs' oil tank. It is his opinion, based upon a reasonable degree of certainty, that the oil discharge was caused by an overfill of the tank. He bases this determination upon his observation of visual oil

stains running down the sides of the tank which originated from fittings at the top of the oil tank. Mr. Yanuck estimates \$642,000.00 as the total cost of recommended remediation.

Defendant's Contentions

Defendant opposes Plaintiffs' application and relies on Plaintiffs' previously submitted exhibits, and continues on from Plaintiffs' Exhibits by submitted the following: 1) Plaintiffs' Verified Bill of Particulars; 2) Exhibits marked at deposition, 3) Slomin's Initial Production including delivery tickets and full Slomin's records; 4) Photos taken by Plaintiffs' Expert Matt Bruno during the October 11, 2023 inspection; 5) Defendant's supplemental production with John Hughs post remediation photos and NYSDEC spill closed; 6) Plaintiffs' Response to Notice for Discovery and Inspection; 7) Defendant's Post Deposition Demands; 8) Plaintiffs' Response to Post Deposition Demands; and 9) Plaintiffs' Supplemental Response to Discovery and Inspection.

Defendant maintains that this case stems from a minor February 10, 2021, oil release at Plaintiffs' home.

Defendant references the Home Heating Agreement between Plaintiffs and Defendant for automatic deliver, dated March 1, 2019.

Paragraph 14 of the Agreement reads, in pertinent part: "It is buyer's responsibility to check fuel tank when consumption has changed and to notify SLOMIN'S. While an oil spill should not occur before, during, or after delivery with a properly designed functioning oil tank, SLOMIN'S does not guarantee that no spill will occur."

Subsequent to this signing, Plaintiffs' oil consumption habits changed, and Plaintiffs did not give notice to Defendant. Specifically, at some point in "2018 or 2019" Plaintiffs added three additional heater/ac units to his home to the already present, and at some point, thereafter, replaced all these units with ones manufactured by Lennox because they were "more powerful." (Exhibit "D", pp. 21-22). Furthermore, Plaintiffs stopped residing in their home for the majority of the time preceding the overfill. In 2020, Plaintiffs spent most of their time at Mr. Ahmed's father's residence (Exhibit "D," pp. 42,43). Mr. Ahmed estimated the family resided at his father's residence 60 to 70 percent of the time. (Exhibit "D," pp. 42, 43). In December 2020, Plaintiffs stayed at Mr. Ahmed's father's residence 'most of the month.' (Exhibit "D," pg. 45).

Additionally, there is also a dispute as to who installed the sonar gauge on Plaintiffs' tank where oil appears to have leaked. Initially, Plaintiffs testified that they have never modified the oil

tank, nor has anyone done so on their behalf (Exhibit “D” at p. 27). Plaintiffs further testified that they do not remember who installed the sonar gauge but believe it was installed by Defendant (Exhibit “D” at p.108-111). Slomin’s Supervisor John Hughs testified that Slomin’s never used such equipment (Exhibit “F,” p, 40-41). Slomin’s Master Plumber, Luke Scally, also attested to Slomin’s never using such equipment. (*See*, Scally Affidavit, Annexed to the Opposing Papers).

Defendant submits the affidavit of Luke M. Scally, a Master Plumber and supervisor for Slomin’s, Inc., with responsibilities including, but not limited to, technical advising and supervision of repairs and installation of equipment including, but not limited, to oil tanks and associated heating equipment. Mr. Scally has been employed by Slomin’s continuously since 1989. In addition to his Master Plumber’s license, he also has a Master HVAC license in multiple states. Mr. Scally explains that standard above ground 275-gallon oil storage tanks typically contain a vent alarm. Mr. Scally goes on to explain the vent alarm and how the alarm functions. A 275-gallon tank typically holds approximately 250 gallons. If a delivery is made to a tank that has not had sufficient oil consumption since the prior delivery to lower the oil level below the vent alarm, the whistle will not sound upon delivery. Slomin’s delivery persons are trained to cease delivery during the lack of a whistle, but oil is still delivered to a tank before a delivery person can make the determination. That is a reason why it is incumbent upon a Slomin’s customer to inform Slomin’s of changes in their oil consumption as enumerated in Slomin’s contract. Slomin’s delivers oil at an approximate rate of 60-70 gallons a minute. Slomin’s records indicated 38.6 gallons were delivered on February 10, 2021, the date of the incident. Only 35 seconds passed from the start of completion of the delivery.

Lastly, he states that he reviewed what is described as a Sonar Gauge in Slomin’s service records and exhibited in deposition photos. In his 34 years of experience, he states that Slomin’s does not and has never used or installed such equipment. Slomin’s has not and does not make deliveries on the basis of any sonar gauge devices but based on factors including time of year and weather conditions.

Discussion

Navigation Law § 181(1) provides that “[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.”

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.” Such a claim may only be maintained by a person who is not responsible for the discharge (*See* Navigation Law § 172 [3]; *Hjerpe v. Globerman*, 280 A.D.2d 646, 647, 721 N.Y.S.2d 367 [2001]). Although even faultless owners of contaminated lands are dischargers for purposes of liability under Navigation Law § 181, where they have not caused or contributed to and thus are not responsible for the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage. (*See White v. Long*, 85 N.Y.2d 564, 569, 626 N.Y.S.2d 989, 650 N.E.2d 836 [1995]).

Once it is established that the property owner caused or contributed to the spill, the property owner will be precluded from seeking indemnification from another discharger (*See Sweet v. Texaco, Inc.*, 67 A.D.3d 1322, 1323, 890 N.Y.S.2d 233 [2009]; *Hjerpe v. Globerman*, 280 A.D.2d at 647, 721 N.Y.S.2d 367 [2001]). Any degree of fault would doom plaintiff's Navigation Law cause of action (*See Hjerpe v. Globerman*, 280 A.D.2d 646, 647, 721 N.Y.S.2d 367 [2001]; *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 859, 714 N.Y.S.2d 781 [2000]). An owner's “failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger.” (*State of New York v. Green*, 96 N.Y.2d at 407, 729 N.Y.S.2d 420, 754 N.E.2d 179 [2001]; *See Massaro v. Rockland Fuel Oil Corp.*, 218 A.D.3d 458, 192 N.Y.S.3d 524 [2023]).

Here, the Plaintiffs established their entitlement to judgment as a matter of law on the issue of liability by demonstrating that Defendant was the discharger of oil on their property. (*See* Navigation Law § 181; *Massaro v. Rockland Fuel Oil Corp.*, 218 A.D.3d 458, 459, 192 N.Y.S.3d 524, 527 [2023] [quoting *Hjerpe v. Globerman*, 280 A.D.2d at 647, 721 N.Y.S.2d 367 (2001)]).

However, in opposition, Defendant raised a triable issue of fact as to whether the Plaintiffs contributed to the oil spill by failing to notify Defendant of their decreased oil usage. Additionally,

there is also a question of fact as to who was responsible for installing the sonar gauge and whether the sonar gauge's presence altered or manipulated the tank that suffered the overfill. (*See* Navigation Law § 181; *Massaro v. Rockland Fuel Oil Corp.*, 218 A.D.3d 458, 459, 192 N.Y.S.3d 524, 527 [2023]). Accordingly, Plaintiffs' motion for summary judgment as to liability is hereby **denied**.

As to Plaintiffs' application to dismiss Defendant's Affirmative Defenses, "[w]hen moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law.'" (*Bank of N.Y. v. Penalver*, 125 A.D.3d 796, 797, 1 N.Y.S.3d 825 [2015] [quoting *Vita v. New York Waste Servs., LLC*, 34 A.D.3d 559, 559, 824 N.Y.S.2d 177 (2006)]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." (*Bank of N.Y. v. Penalver*, 125 A.D.3d at 797, 1 N.Y.S.3d 825 [2015] [quoting *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723, 869 N.Y.S.2d 597 (2008)]). "[I]f there is any doubt as to the availability of a defense, it should not be dismissed." (*Chestnut Realty Corp. v. Kaminski*, 95 A.D.3d 1254, 1255, 945 N.Y.S.2d 708 [2012] [quoting *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d at 723, 869 N.Y.S.2d 597(2008)]).

As to Slomin's Affirmative Defenses, all but nine, sixteen and twenty-seven are potentially meritorious. Plaintiffs filed this action less than two months after the discharge of oil and, this, the defense of laches and statute of limitations is not applicable. Furthermore, the UCC does not apply to this case. Defendant conceded that it would consider withdrawing nine, sixteen and twenty-seven at the close of discovery. Defendant's above-outlined affirmative defenses are hereby **dismissed**.

Any relief not specifically addressed or granted is **denied**.

This constitutes the decision and order of this court.

Dated: April 2, 2024
Mineola, New York



ENTERED HON. CHRISTOPHER T. McGRATH
J.S.C.

Apr 11 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE