2014 WL 9911768 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Bristol County

EASTLANDE MOBILE HOME PARK, INC.,
v.
Katherine YOUNG & another.*

No. BRCV2012000382.
May 5, 2014.

Bench Trial Verdict

Angel Kelley Brown, Judge.

***1** * Richard Young

This is an action to recover monies expended by the plaintiff cleaning up a leak from an oil tank in the plaintiff's mobile park. Eastlande Mobile Home Park, Inc. (“Eastlande”) filed this lawsuit asserting a claim under G. L. c. 21E, § 4A on April 12, 2012. Eastlande seeks to recover $11,000, plus attorney's fees, as reimbursement for monies it paid to clean up an oil leak from the oil tank the defendants use to heat their mobile home.

The case was heard jury-waived on February 10, 2014. The parties stipulated into evidence four exhibits. The plaintiff offered the testimony of two witnesses: Armand Desnoyers and Christopher Brogan. At close of the plaintiff's evidence, the defendants moved for a directed verdict [2], which the Court took under advisement. Defendant Richard Young then testified on his own behalf. Defendant Katherine Young was unable to participate due to her hospitalization. [3]

Based upon review of the credible evidence, the Court makes the following findings of fact:

FINDINGS OF FACT

1. Armand Desnoyers owns Eastlande Mobile Park, Inc. (“Eastlande”).

2. Eastlande is a mobile home park located at 1346 Newport Avenue, South Attleboro, MA and it includes approximately 95 mobile homes.

3. The Eastlande inspects and maintains the infrastructure of the park, including but not limited to the streets, water supply system and electric services.

4. Defendants Katherine and Richard Young lived in a mobile home located at 20 Mill Street, A8 in South Attleboro, MA. Defendants resided at this location for over 20 years prior to the incident at issue. Defendants are elderly and suffer from significant health problems.

5. On or about November 22, 2010, there was an oil leak from the above-ground oil storage tank connected to the defendants' residence at location A8.

6. A neighbor of the defendants observed the leak and contacted the local fire department. The fire department then contacted the parties and informed them that an oil leak had occurred.

7. The fire department also contacted the Massachusetts Department of Environmental Protection (DEP) because they were uncertain if the leak was a reportable release.

8. Initially, the DEP arbitrarily concluded that .25 gallons of fuel oil had leaked into the soil. After further investigation, the DEP termed the leak considerable, but still less than 10 gallons. It resulted in a small impacted area which consisted of a five foot round stain.

9. The oil filter on the leaking tank had been changed by defendants' son, four days prior to the leak.

10. DEP notified Eastlande's owner, Desnoyers, that the spill required cleaning up and provided him with a list of licensed contractors that could performed this type of work.

***2** 11. After the oil leak, Eastlande took responsibility for the cleanup. It hired TMC Services, Inc., a Bellingham-based company, to remove the contaminated soil and to provide temporary fuel storage containers. The total charges for TMC Services' work were $6,100.

12. Tom O'Rourke worked as a subcontractor excavating and filling the affected area between November 28, 2010 and April 12, 2011. O'Rourke billed Eastlande $4,300 for the removal of the fuel oil soaked soil, disposal of the contaminated soil, and for providing clean soil for the affected areas.

13. Eastlande claims an additional expense of $500 for Christopher Brogan's work. Brogan was employed as the maintenance worker for Eastlande for over ten years.

14. Eastlande also claims that it expended $400 for James Duquette's work.

15. Prior to this incident, the former fire department chief informed Eastlande that a number of the oil storage tanks within the mobile home park needed to be updated. Brogan, Eastlande's maintenance worker, undertook a systematic inspection of all of the oil storage tanks within the park. Several tanks needed to be replaced and the defendants' tank was among those tanks in need of updating. Eastlande replaced several tanks connected to homes owned by the park owner, but did not replace the defendants' tank.

16. The Park notified the defendants of the cost of cleanup on November 10, 2011, and again on February 14, 2012 in compliance with G. L. c. 21E, § 4A.

RULINGS OF LAW

The plaintiff's complaint asserts a single claim for damages under G. L. c. 21E, § 4A. This section does not provide parties with a cause of action and instead contains only the “presuit notice and settlement procedures” for bringing a claim under section 4 of the chapter 21E. *Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 656 (2008). The Supreme Judicial Court has found that the third paragraph of § 4 provides “the statutory authorization for the type of private response cost recovery lawsuit” that is now before the Court. *Id.* at 655-656; see *Commonwealth v. Boston Edison Co.*, 444 Mass. 324, 343 (2005); *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*, 415 Mass. 865, 874 (1993). Because the parties proceeded as if this was a proper section 4 claim, the Court will proceed to review the claim under that section of the statute.

The general thrust behind G. L. c. 21E was to create a comprehensive statutory scheme "to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties." *Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 223 (2002). Section 4 of chapter 21E states, in pertinent part;
"Any person who undertakes a necessary and appropriate response action regarding the release or threat of release of oil or hazardous material shall be *entitled to reimbursement from any other person liable for such release* or threat of release for the reasonable costs of such response action.... All claims and actions for contribution, reimbursement or equitable share by persons other than the commonwealth pursuant to this paragraph … shall be subject to, and brought in accordance with, the procedures set forth in section four A." G. L. c. 21E, § 4 (emphasis added).

Section 5 of the statute sets forth 'Persons liable' for a release. Specifically, section 5(a) outlines "five categories of persons responsible for response costs incurred as the result of releases that result in contamination." *Griffith v. New England Tel. & Tel. Co.*, 420 Mass. 365, 366 (1995).

***3** Liability under these five categories is imposed "without regard to fault." G. L. c. 21E, § 5. Three of these categories apply exclusively to hazardous materials and therefore do not apply here, where only oil, a separate category, has been released. *Griffith*, 420 Mass. at 366-367. The two categories of relevance here are section 5(a)(1), which creates liability for "the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material" and section 5(a)(5), which creates liability for "any person who otherwise caused or is legally responsible for a release … of oil or hazardous material from a vessel or site." G. L. c. 21E, § 5. See *Griffith*, 420 Mass. at 367 (oil releases only create liability for the "owner of the tank or the site where the release occurred" and/or a party that "actually caused or is legally responsible for the release of oil"). The only theories of liability applicable to this case are sections 5(a)(1) and 5(a)(5).

The Defendants' Potential Liability as Owners or Operators of the Site

In order to prove liability under section 5(a)(1), Eastlande needed to show, by a preponderance of the evidence, that the defendants owned or operated the leaking oil storage tank. The evidence at trial consisted of only two conflicting statements about the ownership of the tank. Desnoyers, the owner of Eastlande, testified that mobile home owners in the park own their homes and anything kept in their yards, including above-ground oil storage tanks. On the other hand, Richard Young testified that he only owned his mobile home, nothing else.

No documentary evidence was offered at trial to prove ownership of the oil tank. No land lease agreement, copy of Eastlande's bylaws, or even the written terms and conditions of occupancy, which are required by law under G. L. c. 140, § 32P, were introduced into evidence. The Court reasonably expects any one of these would have explicitly identified the ownership and maintenance responsibilities of the parties. Looking further afield to establish which party owned the oil tank, the defendants reference 940 Code Mass. Regs. §§ 10.00 et seq, which contains regulations governing manufactured housing communities. Of particular note is section 10.05(4) which requires manufactured housing community operators to provide residents with basic utilities, including "electricity, natural gas, or other heating fuel." [4] 940 Code Mass. Regs. § 10.05(4). Subsection 4(d) requires these utilities to be "installed to the point of connection at each manufactured home and maintained in good repair and operating condition by the operator without charge to residents." *Id.*

***4** In light of Eastlande's legal obligation to provide a source of heating fuel, the Court must operate under the presumption that the oil tank belonged to Eastlande and that it was required by law to properly maintain it. While evidence of an alternative arrangement between Eastlande and the defendants certainly could have been introduced, no such evidence is before the Court. The fact that Eastlande's maintenance worker systemically examined each oil tank in the community and gave each oil tank a rating, after which Eastlande replaced the deficient tanks (excluding the defendants'), lends further support for the defendants' argument that they did not own the oil tank.

An examination of chapter 21E's specific language also undercuts Eastlande's claim under section 5(a)(1). Section 2 of the statute defines 'Owner' or 'Operator' as "any person owning or operating such a site." G. L. c. 21E, § 2. Site includes any storage container where oil has been stored.[5] G. L. c. 21E, § 2. However, the definition goes on to specifically exclude "any consumer product in consumer use." *Id.* Because a consumer product, as it appears to be the source of the leak in this case, cannot be a 'site' upon which owner/operator liability is based, Eastlande's claim is not viable under the plain language of the statute. Additionally, all the cases relying on this this theory pertains to large commercial premises.

In light of the insufficient evidence of the oil tank's ownership before the Court and the statutory language that excludes claims of this nature, the Court finds that Eastlande failed to meet its burden of proof to establish liability under G. L. c. 21E, §(5)(a)(1). Therefore, the Court goes on to consider whether liability is established under section 5(a)(5).

The Defendants' Potential Liability For Causing the Release

In order to prove the defendants' liability under section 5(a)(5), Eastlande must prove that the defendants caused the release of oil at the site. *John Beaudette, Inc. v. J.P. Noonan Transp., Inc.*, 419 Mass. 311, 314 (1995); *Griffith v. New England Tel. & Tel. Co.*, 414 Mass. 824, 829-830 (1993). See *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93, 96 (D. Mass. 1990). The scant evidence presented at trial does not support a finding that the defendants caused the release.

"[I]n order to recover response costs pursuant to Section 4 of G. L. 21E, from a defendant … under Section 5(a)(5), a plaintiff must prove that the defendant caused a release of hazardous material [or oil] at the site and that release caused the incurrence of response costs." *John Beaudette, Inc.*, 419 Mass. at 315. Defendant Richard Young testified that his son had changed the oil filter on the tank in question four days prior to the leak. Without more evidence as to whether this action caused or contributed to the leak, this Court cannot find that Eastlande met its burden of proving causation. Specifically, the son who changed the oil filter did not testify, the Court heard from no experts as to how changing the oil filter could cause a leak, and Eastlande did not put forth evidence that any portion of the oil tank had been broken or put back together incorrectly.

***5** The DEP Release Log Form, on its face, buttresses Eastlande's case because it states that the leak came from the oil filter and that each mobile home owner owns his or her own oil storage tank. However, this Court has no way of knowing whether the statements within it are based upon an independent investigation by DEP or simply a restatement of Desnoyer's discussion with the DEP official that visited the site. The Court cannot draw any inferences in the plaintiff's favor from the DEP report where it is unclear if it is based on DEP's investigation or simply rehashes self-serving statements. Ultimately, without expert testimony regarding the cause of the leak, the Court finds insufficient evidence to support plaintiff's claim under G. L. c. 21E, § 4.

The Defendants' "Motion for a Directed Verdict"

As referenced-above, the Court took the defendants' motion under advisement and must review it under Mass. R. Civ. P. 41(b)(2). See *Skowronski v. Sachs*, 62 Mass. App. Ct. 630,632-633 (2004). Eastlande's case-in-chief contained no evidence of causation under G. L. c. 21E, § 5(a)(5) and insufficient evidence of ownership of the oil tank under G. L. c. 21E, § 5(a)(l). Accordingly, this court could have allowed the defendants' motion at that juncture. However, because the Court continued to hear the case, a verdict on the case as a whole is more appropriate.

Conclusion

Eastlande put forth insufficient evidence to prove the defendants' liability under G. L. c. 21E, § 4. The regulations governing mobile home park operators requires that tenants be provided with a source of heating and that the operator maintain that source up to its connection with the mobile home. The Court received no evidence that rebuts this general presumption except for the self-serving statement of Desnoyers, Eastlande's owner. Eastlande's alternative theory of liability also fails because there

was insufficient evidence to prove that the defendants caused the oil leak. Accordingly, judgment must issue in favor of the defendants.

ORDER

Based upon the foregoing, it is *ORDERED* that judgment enter for defendants.

DATE: May 5, 2014

<<signature>>

Angel Kelley Brown

Justice of the Superior Court

Footnotes

2 While a motion for a directed verdict is procedurally improper during a jury-waived trial, the court may nonetheless review it as a motion for an involuntary dismissal under Mass. R. Civ. P. 41(b)(2). See *Skowronski v. Sachs*, 62 Mass. App. Ct. 630, 632-633 (2004).

3 The parties agreed to go forward in the absence of defendant Katherine Young and reported that her testimony was not necessary for trial.

4 "(4) Basic Utilities:
(a) An operator shall make available, or cause to be made available, the following to each manufactured home site:
1. Electrical service....; and
2. Natural gas connection ....
(b) An operator shall supply and pay for the following to each manufactured home site:
1. a supply of potable water … ; and
2. a sanitary sewage disposal system … ; and
3. electricity, natural gas, or other heating fuel, except for that which is metered through a meter which serves only the individual manufactured home and the occupancy agreement provides for payment by the occupant,
(c) A licensee may recover expenses incurred under 940 CMR 10.05(4)(b) l., 2. and 3, through nondiscriminatory rent increases, except as otherwise limited by 940 CMR 10.00.
(d) The basic utilities described in 940 CMR 10.05(4)(a) and (b), as applicable, shall be installed to the point of connection at each manufactured home and maintained in good repair and operating condition by the operator without charge to residents, except as damage thereto is caused by the negligent act or omission or willful misconduct of a resident. All such installation and maintenance shall be in accordance with applicable laws, codes, and professional standards.
(e) Residents shall not be required to pay charges for hook-up and use of basic utilities described in 940 CMR 10.05(4)(a) and (b), pursuant to 105 CMR410.354 and 410.355, except that use charges may be imposed and determined by metering at a manufactured home site by a utility or utilities.
(f) An operator shall not willfully or intentionally interrupt any utility service furnished under 940 CMR 10.05(4)(a) or (b), and shall be liable for any such interruption pursuant to M.G.L. c. 186, § 14."

5 " 'Site', any building, structure, installation, equipment, pipe or pipeline, including any pipe into a sewer or publicly-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any other place or area where oil or hazardous material has been deposited, stored, disposed of or placed, or otherwise come to be located. The term shall not include any consumer product in consumer use or any vessel." G. L. c. 21E, § 2.

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