

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSHUA HILL, INC., et al. : CIVIL ACTION
v. :
WHITEMARSH TOWNSHIP AUTHORITY, :
et al. : NO. 96-5648

MEMORANDUM AND ORDER

BECHTLE, J.

JUNE , 1999

Presently before the court is defendants Whitemarsh Township Authority's and Whitemarsh Township's (collectively "Defendants") motion for summary judgment and plaintiffs Joshua Hill, Inc.'s and Marc A. Zaid's ("Plaintiffs") response thereto. For the reasons set forth below, the court will deny the motion.

I. BACKGROUND

In their original Complaint, Plaintiffs brought numerous contract and environmental claims regarding their purchase of real estate (the "subject property") from Defendants in 1988. Defendants had used the subject property as a municipal waste landfill from approximately 1961 until the early 1970s. Litigation in this action has proceeded in the United States Bankruptcy Court for the Eastern District of Pennsylvania, in this court and in the United States Court of Appeals for the Third Circuit. At this time, Plaintiffs' sole remaining claim in this action is for response costs pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"). 35 P.S. §§ 6020.101-

6020.1305.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the non-moving party has the burden to produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

III. DISCUSSION

The HSCA provides standards of liability and remedies associated with the cleanup of sites that are releasing or threatening to release hazardous substances into the environment. 35 P.S. § 6020.102. Pursuant to the provisions of the HSCA,

Plaintiffs seek recovery of the costs of responding to the presence of hazardous substances allegedly located on the subject property, including their clearing and remediation. The parties dispute whether Defendants, during their operation of the landfill, caused a "release" of hazardous substances onto the subject property within the meaning of the HSCA.

Under the HSCA, a person is liable for response costs for a public nuisance where that person allows a release of a hazardous substance. 35 P.S. § 6020.1101. In addition, "[a] person who is responsible for a release or threatened release of a hazardous substance from a site . . . is strictly liable for . . . response costs." 35 P.S. § 6020.702(a). Together, 35 P.S. §§ 6020.1101 and 6020.702 have been read to constitute a private cause of action for response costs under the HSCA. Smith v. Weaver, 665 A.2d 1215, 1220-21 (Pa. Super. Ct. 1995). Under the HSCA, a "release" is defined as:

[s]pilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposal into the environment.

35 P.S. § 6020.103.

In support of their claims under the HSCA, Plaintiffs have submitted an expert report prepared by the environmental firm Blazosky Associates, Inc. ("BAI"). Plaintiffs retained BAI to: (1) review historical records pertaining to the landfill operations at the subject property; (2) review prior environmental testing performed on the subject property; (3)

perform updated testing on the quality of the ground water beneath the subject property; (4) identify the likely source of any contamination found in the ground water; and (5) prescribe a remediation program with estimated clean-up costs. (Pls.' Opp. Ex. B. at 1.1.) BAI conducted ground water testing at two of five monitoring wells ("MW") located on the subject property. (Pls.' Opp. Ex. B. at 5.0.) Testing at MW-4 revealed a concentration of lead that exceeded established regulatory limits. Testing at MW-1 revealed the presence of ten volatile organic compounds ("VOCs"). Two VOCs, Tetrachloroethene ("PCE") and Methylene Chloride, exceeded established regulatory limits. Id. BAI's testing confirmed earlier environmental testing performed at the subject property by Roy F. Weston, Inc. which concluded that "[g]round water samples were found to be impacted by several VOCs and metals including PCE, Benzene, Methylene Chloride and Lead, all of which were found in concentrations which exceeded their established regulatory limits." (Pls.' Opp. Ex. B. at 6.0.) BAI also found that "the reported concentrations of chemical constituents identified within the ground-water samples obtained from the site monitoring wells are consistent with chemical constituents that are routinely monitored in leachate that is produced from municipal solid waste." Id.

BAI examined the area around the subject property and concluded that "it is unlikely that any other source could be contributing to the degradation of the ground water directly beneath the site." Id. Thus, BAI concluded that "the waste

disposed on the subject property (formerly known as the Whitemarsh Township Sanitary Landfill) is considered, to a reasonable degree of technical certainty, to be the most likely source of the contaminants that were identified as being present within the ground water beneath the property." Id.

In support of their motion for summary judgment, Defendants assert that: (1) the BAI Report does not explicitly opine that there has been a release on the subject property; (2) MW-1 is 50 feet up gradient of the closest landfill site on the property, and thus, it is unreasonable to conclude that the landfill was the source of the VOCs found in MW-1; (3) the VOCs detected are not common landfill leachate typical of municipal solid waste breakdown (which is the type of landfill the property was used for by Defendants); and (4) the most likely source of the contaminants is offsite as there are dry cleaning operations up gradient from MW-1 and because one of the VOCs, PCE, is a common dry cleaning solvent. With respect to Defendants' first argument, although the BAI report does not specifically use the term "release" in its report, it does state that the waste disposed on the property is the most likely source of the contaminants in the ground water. (Pls.' Opp. Ex. B. at 6.0.) The court finds that a jury could reasonably infer from this statement that Defendants' caused a "release" on the subject property within the meaning of 35 P.S. § 6020.103. With respect to Defendants' remaining arguments, the court notes that they are based on assertions made in Defendants' own expert report,

conducted by Tri-State Environmental Services, Inc. ("Tri-State"). (Defs.' Mot. Ex. 4.) Because the Plaintiffs' BAI Report and Defendants' Tri-State Report differ on their opinions as to the source of the contaminants, the court finds that genuine issues of material fact exist in this action, and thus, Defendants' motion should be denied.¹

IV. CONCLUSION

For the foregoing reasons, the court will deny Defendants' motion for summary judgment.

An appropriate Order follows.

¹ In addition to the original BAI Report, Plaintiffs submitted an additional affidavit of BAI, which specifically opines that there has been a release of a hazardous substance from the property to the groundwater beneath the property. (BAI Aff. ¶ 8.) The affidavit also states that the landfill wastes remaining in place pose a threat of an additional release of hazardous substances from the property to the groundwater underneath the property. Id. ¶ 9. The affidavit also criticizes the Tri-State Report and gives an explanation of how the groundwater in MW-1 could be contaminated by the landfill site even though it is 50 feet down gradient from MW-1. Id. ¶¶ 12-28. Defendants object to the affidavit and assert that it constitutes a second expert report submitted after the court's designated 12/31/98 deadline for Plaintiffs' expert reports. The original BAI Report is sufficient to create a genuine issue of material fact in this action and the court need not consider the supplemental affidavit in its resolution of the instant motion.

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ORDER

AND NOW, TO WIT, this day of June, 1999, upon consideration of defendants Whitemarsh Township Authority's and Whitemarsh Township's motion for summary judgment and plaintiffs Joshua Hill, Inc.'s and Marc A. Zaid's response thereto, IT IS ORDERED that said motion is DENIED.

LOUIS C. BECHTLE, J.