

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

F.P. WOLL & COMPANY,
Plaintiff

CIVIL ACTION

v.

FIFTH AND MITCHELL STREET CORP.;
FIFTH AND MITCHELL STREET CO.;
DONALD L. KAHLER; MET PRO CORP.;
TOOL SALES AND SERVICE, INC.; and
EATON LABORATORIES, INC.,
Defendants

NO. 96-5973

MEMORANDUM AND ORDER

McLaughlin, J.

April 23, 2003

The plaintiff, F.P. Woll & Company, has sued the defendants for damages stemming from contamination of property in Montgomery County, Pennsylvania, that the plaintiff bought in 1981 ("the property"). Pending before the Court is defendant Met Pro Corporation's motion for summary judgment on the two claims that remain against it - a claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., and a claim under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 Pa. Cons. Stat. Ann. § 6021.101 et seq. The Court will grant the motion.

I. Background

The relevant facts and procedural history of this case are as follows.¹ Met Pro leased a portion of the property from at least August 1966 to July 1976. After July 1976, Met Pro's operations were moved. Def. Mot. Ex. 7, at ¶ 1; Pl. Opp'n Ex. A, at ¶ 2.

While at the property, Met Pro operated a sheet metal fabrication plant. Light gauge stainless steel and aluminum were bent, shaped, formed, and rolled at the plant. The principal products made at the plant were drinking water systems that Met Pro supplied to the government. Def. Mot. Ex. 7, at ¶¶ 4-5; Pl. Opp'n Ex. A, at ¶¶ 2-3; Pl. Opp'n Ex. B.

On April 17, 1998, Met Pro filed a motion for summary judgment. Neither Met Pro nor the plaintiff submitted any

¹ In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

evidence in support of or in opposition to the motion. The plaintiff also did not contest the motion. Def. Mot. Ex. 8, at 2-4.

On February 3, 1999, while this case was assigned to United States District Court Judge Jay C. Waldman, summary judgment was granted to Met Pro on four of the six claims against Met Pro. Summary judgment was denied on the plaintiff's CERCLA and HSCA claims. Def. Mot. Ex. 8, at 1, 14, 16, 21-23.

When Judge Waldman stated the facts in his decision on Met Pro's motion he relied upon the relevant pleadings and an expert report prepared by Environmental Resources Management ("ERM") because neither party presented evidence. The ERM report was offered by the plaintiff in opposition to a summary judgment motion made by co-defendants Fifth and Mitchell Street Corporation and Fifth and Mitchell Street Company. Def. Mot. Ex. 8, at 3-4.

The ERM report showed that chlorinated solvents such as trichloroethene ("TCE"), a hazardous substance under CERCLA and HSCA, were used at the plaintiff's property since before 1968. The report also showed that releases of TCE occurred on the property. Def. Mot. Ex. 8, at 5, 8-9, 16; Def. Mot. Ex. 1, at 2, 5, 6.

ERM concluded that Met Pro used large quantities of solvents, primarily TCE, stored in large storage tanks inside the building. ERM relied on an interview with an unidentified Met Pro employee for its knowledge about Met Pro's operations. Def. Mot. Ex. 8, at 5; Def. Mot. Ex. 1, at 2-5, 6.

ERM also concluded that it was probable that TCE was released onto the property during Met Pro's operations. ERM's basis for its opinion was the unidentified Met Pro employee who said Met Pro used TCE, ERM's experience with similar operations, and ERM's historical investigations of similar discharges of hazardous substances. Def. Mot. Ex. 8, at 8-9, **13-16**; Def. Mot. Ex. 1, at 2, 5-6.

Judge Waldman concluded that the information in the ERM report concerning Met Pro presented triable issues of fact about whether: (1) Met Pro disposed of hazardous substances on the plaintiff's property that were eventually released into the environment and (2) hazardous substances were placed or located on the property when Met Pro conducted its operations. As the plaintiff concedes, the ERM report was the only evidence in the record that linked Met Pro to any hazardous substances that were used, disposed of, placed, or located at the plaintiff's property. Def. Mot. Ex. 8, at 13-14, 16; Def. Mot. Ex. 3.

On January 25, 2000, Met Pro filed a second motion for summary judgment and a motion to preclude the testimony of Michael Eversman regarding Met Pro. Mr. Eversman is the individual who prepared the ERM report.

On July 21, 2000, Judge Waldman denied Met Pro's motions to preclude Mr. Eversman's testimony and for summary judgment. Judge Waldman denied the motion to preclude Mr. Eversman's testimony reasoning that Mr. Eversman had an adequate basis for his opinion that was separate from his conversation with the unidentified Met Pro employee. Judge Waldman also noted that Mr. Eversman was able and prepared to render an opinion without relying on the interview with the unidentified Met Pro employee. The summary judgment motion was denied because it was predicated on the preclusion of Mr. Eversman's testimony.

Additional depositions were conducted before Judge Waldman issued his July 21, 2000 decision, but after Met Pro filed its second motion for summary judgment and its motion to preclude Mr. Eversman's testimony and after the plaintiff filed its opposition on both motions. Two days before Judge Waldman's decision, Mr. Eversman was deposed for the first time. His deposition testimony was not presented to Judge Waldman before he issued his decision. Additionally, Frederick Woll, President of F.P. Woll & Company, was deposed on February 25, 2000. His

deposition testimony was also not presented to Judge Waldman before he issued his decision.

During his deposition, Mr. Eversman was questioned about the basis for his opinion that TCE was placed and probably released onto the property during Met Pro's operations. In forming his opinion, Mr. Eversman relied on: (1) an unidentified Met Pro employee, who told him that Met Pro used chlorinated solvents and fabricated metal parts; (2) Mr. Woll, who Mr. Eversman testified told him about Met Pro's operations; and (3) his experience. In Mr. Eversman's experience, industries that conducted operations similar to Met Pro's used hazardous substances and tended to spill the substances because the substances were not stored securely. Def. Mot. Ex. 4, at 34-35, 38-41, 44, 47-48, 57-67, 70, 75-76.

At his deposition, Mr. Eversman was also asked about his knowledge regarding Met Pro's use of chlorinated solvents. Mr. Eversman did not know: (1) whether there were spills of chlorinated solvents by Met Pro; (2) the amount of chlorinated solvent used by Met Pro; and (3) the type of machinery used by Met Pro. Def. Mot. Ex. 4, at 70, 74-75.

Mr. Eversman has no professional opinion on whether Met Pro released hazardous substances or contributed to the environmental contamination at the property. The most definitive

statement that Mr. Eversman offered at his deposition about Met Pro was that "based on historical operations, there is a probability that there were spills of [chlorinated solvents] at the Met Pro operations." Def. Mot. Ex. 4, at 49, 52-54, 70, 74-75.

At his deposition, Mr. Woll stated that he had no information regarding Met Pro's use of the property or Met Pro's manufacturing operations. The only information Mr. Woll had about whether Met Pro used TCE was from the ERM report prepared by Mr. Eversman. Def. Mot. Ex. 5, at 123-25.

Both the plaintiff and Met Pro have presented letters written by Met Pro officials discussing Met Pro's operations that were not produced in conjunction with Met Pro's earlier summary judgment motions. Met Pro offered a letter it wrote to the Environmental Protection Agency ("EPA") in connection with the EPA's investigation of the property. Met Pro stated that it had no knowledge that any known hazardous substances, pollutants, or contaminants were ever used or sent to the property. The plaintiff offered a letter from Met Pro to American Mutual Insurance Companies. Met Pro stated that it only discharged sanitary waste at the property, and it had no other waste that was disposed of at the property. Def. Mot. Ex. 7, at ¶ 5; Pl. Opp'n Ex. A, at ¶ 4.

11. Analysis

In his February 3, 1999, decision, Judge Waldman provided an overview of the elements of CERCLA and HSCA claims. Judge Waldman also described the standard to be applied in determining whether a defendant is entitled to summary judgment on a CERCLA or HSCA claim. The Court briefly summarizes the portions of Judge Waldman's description of the law that are relevant to the present motion.

To prevail on a CERCLA claim, a plaintiff must show that: (1) a hazardous substance was disposed of at a facility; (2) there has been a release or a threatened release of a hazardous substance from the facility into the environment; (3) the release or threatened release has required or will require the expenditure of response costs; and (4) the defendant falls within one of four categories of responsible persons. **A** "responsible person" under CERCLA includes any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed. A disposal of a hazardous substance occurs when it is discharged, deposited, injected, dumped, spilled, leaked, or placed on any land or water so that it may enter the environment. Def. Mot. Ex. 8, at 5, 7.

The elements of a prima facie case under HSCA are similar to the elements of a prima facie case under CERCLA.

Under HSCA, a plaintiff must show: (1) a release or a threatened release; (2) of a hazardous substance; (3) from a site; and (4) the defendant is a "responsible person" as that term is defined in HSCA. Under HSCA, a "responsible person" includes anyone who owns or operates a site at the time a hazardous substance is placed or located there. Def. Mot. Ex. 8, at 15-16.

To obtain summary judgment in a CERCLA or HSCA case, a defendant must show that there is no triable issue of fact as to the nonexistence of at least one of the elements of the plaintiff's prima facie case.' Def. Mot. Ex. 8, at 3.

Met Pro argues that Mr. Eversman's deposition testimony shows that the ERM report has no factual basis, is unreliable, and is untrustworthy. Met Pro argues that summary judgment is appropriate in light of Mr. Eversman's deposition testimony because there is no triable issue of fact as to the nonexistence of the responsible person element of the CERCLA and HSCA claims. The plaintiff argues that nothing from Mr. Eversman's deposition should change the Court's earlier conclusion that there is a

² A CERCLA or HSCA defendant may also obtain summary judgment by showing that there is no triable issue of fact as to the existence of one of the defenses available under the statutes. Def. Mot. Ex. 8, at 3, 6-7, 15-16. Met Pro has not moved for summary judgment on the basis of one of the statutory defenses. The Court, therefore, expresses no view on whether Met Pro could successfully invoke any of the CERCLA or HSCA defenses.

triable issue of fact as to the nonexistence of the responsible person element of the CERCLA and HSCA claims. The question is whether there is a triable issue of fact as to the nonexistence of the responsible person element of the plaintiff's prima facie case under CERCLA or HSCA.

Even if the ERM report, by itself, raised a triable issue of fact as to the nonexistence of the responsible person element, such an issue does not exist after Mr. Eversman's deposition. None of the bases identified by Mr. Eversman at his deposition for his opinion provide a factual foundation for the opinion. Additionally, Mr. Eversman's opinion does not refute the uncontradicted evidence that Met Pro did not use, dispose of, place, or locate hazardous substances at the property.

Two of the three bases for Mr. Eversman's opinion - his conversations with the unidentified Met Pro employee and with Mr. Woll - have been discredited by the plaintiff. The plaintiff's counsel concluded that the unidentified Met Pro employee described the operations of Eaton Chemical Company and not Met Pro. In its opposition to Met Pro's motion, the plaintiff does not contest that it made this statement or in any way attempt to repudiate it. Mr. Woll stated at his deposition that he had no information about Met Pro's operations except for the information he learned from ERM's report. The plaintiff's opposition to Met

Pro's motion does not challenge the accuracy of Mr. Woll's statement that he knew nothing about Met Pro's operations. The plaintiff also has not attempted to explain how Mr. Eversman's opinion could be supported by information from Mr. Woll when Mr. Woll denied giving Mr. Eversman the information. Neither the conversation with the unidentified Met Pro employee nor the conversation with Mr. Woll provide any factual basis that can support Mr. Woll's opinion.

The third basis for Mr. Eversman's opinion, his experience, also does not provide a basis on which he could form an opinion about Met Pro. First, Mr. Eversman had no information about Met pro's operations other than the discredited sources making his experience irrelevant. Second, Mr. Eversman's general statement that in his experience operations similar to Met Pro's used and spilled chlorinated solvents is not supported by any of the record evidence. Mr. Eversman offered no statistics or other tangible evidence to support his generalization. Finally, Mr. Eversman has no evidence that in any way links Met Pro with the use or disposal of TCE at the property. Mr. Eversman's speculation that Met Pro used and disposed of chlorinated solvents, without more, does not present a triable issue of fact regarding the nonexistence of the responsible person element.

Even if Mr. Eversman had any foundation for his opinion, there is not a triable issue of fact as to the nonexistence of the responsible person element of both the CERCLA and HSCA claims. The statements in the letters that Met Pro wrote stating that it did not use or dispose of any hazardous substances have not been challenged. Not only are the statements uncontradicted, but the plaintiff attached the American Mutual Insurance Companies letter to its opposition to the summary judgment motion without refuting the statement in the letter that "Met Pro only discharged sanitary wastes at these sites." Met Pro cannot be a responsible person under CERCLA because the unchallenged evidence shows that it did not use or dispose of hazardous substances at the property. Met Pro cannot be a responsible person under HSCA because the same unchallenged evidence shows that hazardous substances were not placed or located at the Met Pro operations during the time Met Pro occupied the property. Summary judgment, therefore, is appropriate.

An appropriate order follows.

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

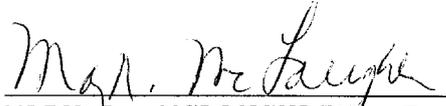
F.P. WOLL & COMPANY, : CIVIL ACTION
Plaintiff :
v. :

FIFTH AND MITCHELL STREET CORP., NO. 96-5973
FIFTH AND MITCHELL STREET COMPANY,
DONALD L. KAHLER; MET-PRO CORP., :
TOOL SALES AND SERVICE, INC., and :
EATON LABORATORIES, INC., :
Defendants :

ORDER

AND NOW, this 23^d day of April, 2003, upon consideration of Defendant Met Pro Corporation's Renewed Motion for Summary Judgment (Docket No. 231), the plaintiff's opposition thereto, and Met Pro's reply in support of its motion, and following oral argument, IT IS HEREBY ORDERED that the motion is GRANTED and JUDGMENT IS HEREBY ENTERED for defendant Met Pro Corporation and against the plaintiff as to the plaintiff's claims under the Comprehensive Environmental Response, Compensation and Liability Act and the Pennsylvania Hazardous Sites Cleanup Act for the reasons set forth in a memorandum of today's date.

BY THE COURT:



MARY A. MCLAUGHLIN, J.

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

F.P. WOLL & COMPANY, : CIVIL ACTION
Plaintiff :

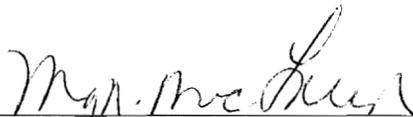
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FIFTH AND MITCHELL STREET CORP., : NO. 96-5973
FIFTH AND MITCHELL STREET COMPANY, :
DONALD L. KAHLER; MET-PRO CORP., :
TOOL SALES AND SERVICE, INC., and :
EATON LABORATORIES, INC., :
Defendants :

ORDER

AND NOW, this 23rd day of April, 2003, upon
consideration of Defendant Met Pro Corporation's Renewed Motion
to Preclude Testimony of Plaintiff's Expert Witness, Michael
Eversman, Regarding Defendant Met Pro Corporation (Docket No.
230), IT IS HEREBY ORDERED that the motion is DENIED as moot
because summary judgment has been granted to Met Pro Corporation
for the reasons set forth in a memorandum of today's date.

BY THE COURT:



MARY A. MCLAUGHLIN, J

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

F.P. WOLL & COMPANY
Plaintiff

v.

NO. 96-CV-5973

FIFTH AND MITCHELL STREET CORP.,
FIFTH AND MITCHELL STREET COMPANY,
DONALD L. KAHLER; MET PRO CORP.,
TOOL SALES AND SERVICE, INC., and
EATON LABORATORIES, INC.,

Defendants

ORDER

AND NOW, this 23^d day of April, 2003, upon
consideration of Defendant Eaton Laboratories's Petition to Stay
Proceedings (Docket No. 228); Plaintiff F.P. Woll & Company's
letter to the court dated March 28, 2003; and Defendant Met Pro's
letter to the Court dated April 1, 2003; and after a hearing on
April 10, 2003, it is hereby ORDERED that said motion is GRANTED.

The Clerk of Court is ORDERED to mark this action
closed for statistical purposes and to place the matter in the
Civil Suspense File, and it is further ORDERED that the Court
shall retain jurisdiction and that the case be restored to the
trial docket on June 9, 2003. This order shall not prejudice the

rights of the parties to this litigation.

It is further ORDERED that a telephone conference will be held on June 10, 2003 at 4:30 p.m. Plaintiff's counsel shall initiate the telephone call.

BY THE COURT:


MARY A. MCLAUGHLIN, J.