R 7-9-07

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

BLARNEY CASTLE OIL COMPANY,

Plaintiff,

v

File No. 06-25507-CH
HON. PHILIP E. RODGERS, JR.

STEVEN E. CHESTER, as Director of the Michigan Department of Environmental Quality,

Defendant.
/

DEPT. OF ATTORNEY GENERAL
PETOSKEY
JUL 09 2007
RECEIVED

James Moskal (P41885)
Attorney for Plaintiff

John P. Mack (P28407)
Attorney for Defendant

DECISION AND ORDER ON
CROSS MOTIONS FOR SUMMARY DISPOSITION

This is an action to quiet title that arises out of the Defendant Michigan Department of Environmental Quality's ("DEQ") imposition of a lien on real property owned by Plaintiff Blarney Castle Oil Company ("BCOC") under Section 20138 of NREPA to recoup environmental clean up costs.

FACTUAL BACKGROUND

BCOC is a retail and wholesale petroleum supplier. It owns and operates gas stations and supplies gasoline to many more stations throughout the State of Michigan. This litigation involves a station located at 636 East Front Street in the City of Traverse City. This station was originally owned by Stevens Oil Company and in the late 1960's was leased to Daniel E. Weber ("Weber") who operated the station until late 2001.

In 1978, BCOC purchased the assets of Stevens Oil Company, including the subject gas station, by signing an option to purchase. BCOC leased the station until 1986 when it purchased a vendee's interest in the real estate and fixtures pursuant to a land contract with Stevens. In 1995, Stevens tendered a warranty deed transferring title to BCOC.

On March 20, 1987, BCOC signed a Blarney Castle Equipment Agreement ("Agreement"), which was not signed by Mr. Weber, but by which BCOC claims it leased the premises to Mr. Weber to operate as a retail gas station. According to the Agreement, BCOC is "a distributor of petroleum, gasoline, fuel oil, lubricants and other allied products and owns equipment necessary to the dispensing and merchandising of said products" and agrees to allow Weber to use the equipment in return for the purchase of all petroleum products from BCOC. The Agreement further provided that BCOC had "all rights of ingress and egress to the customer's premises for the purpose of installation, servicing, replacing or removal of said equipment." Said equipment included three underground storage tanks ("USTs"), an underground motor oil disposal tank, connective piping and gasoline pump islands. [1]

In 2001, the Traverse City engineering consulting firm Otwell Mawby was performing an environmental investigation for a dry cleaning business located south of the subject property. It detected concentrations of *methyltertiary butyl ether* (MTBE) in the groundwater directly north of the subject property, down gradient from the subject property. MTBE is not used in the dry cleaning business, but is a known additive to gasoline. The subject gas station was the closest gas station upstream from the contamination.

The MDEQ requested that BCOC conduct an environmental investigation at the site. BCOC's sampling also detected concentrations of other common gasoline components, benzene toluene ethyl benzene and xylene (BTEX) in proximity to the pump islands and the USTs. As required by Part 201 of NREPA, BCOC reported a confirmed release of hazardous substances to the MDEQ. The MDEQ notified both BCOC and Mr. Weber that they were responsible for the investigation and clean up costs.

Subsequent testing continued to confirm the presence of MTBE and BTEX in the soil and groundwater in the proximity of the USTs and fuel-dispensing pumps. As of December, 2005, the MDEQ had expended almost $60,000 on investigation and response activities. Under Section 20318 of NREPA, the MDEQ filed a lien on the property to recoup these costs. BCOC instituted this action to quiet title by having the lien removed.

The parties, together with their counsel, appeared before the Court for a final settlement conference on Friday, April 26, 2007, and agreed that this matter could be resolved by cross-

[1] The Agreement also contained a indemnification, hold harmless provision, but BCOC admits that it is not relying on this provision of the Agreement to absolve it of liability. Therefore, this argument is waived and the Court will not address it.

motions for summary disposition because the issue involved was one of statutory interpretation.[2] The Court established a briefing schedule and scheduled oral argument for June 18, 2007.

Having reviewed the briefs and exhibits submitted by the parties and having heard the oral arguments of counsel, the Court now issues this decision and order and, for the reasons stated herein, grants the MDEQ's motion for summary disposition and denies BCOC's motion for summary disposition.

ISSUE

WHETHER BCOC IS RESPONSIBLE FOR AN ACTIVITY CAUSING A RELEASE OR THREAT OF RELEASE AND IS THEREFORE LIABLE FOR CLEAN UP COSTS

BCOC claims that it is not liable for the environmental clean up costs because the MDEQ cannot prove that it is "responsible for an activity causing a release or threat of release", as required by the MCL 324.20126. The MDEQ refutes this assertion and relies upon a showing that the underground storage tanks ("USTs") have been registered to Plaintiff since May 8, 1986 and that BCOC has participated in the management and operation of the USTs, including upgrading and testing the cathodic protection, contracting to perform fiberglass lining on the tanks, conducting periodic statistical inventory record reporting and receiving periodic inventory readings from its lessee, Mr. Weber, and conducting tank tightness tests. In addition, the MDEQ cites the known release August 2001 that was reported by BCOC. The MDEQ also relies upon the fact that BCOC operated the USTs by supplying the gasoline and filling the tanks for more than 30 years.

APPLICABLE LAW

The Michigan Constitution mandates that the Legislature provide for the protection of the environment. Const 1963, art 4, § 52. The Legislature enacted the Michigan Environmental Response Act (MERA) in 1982. Under MERA, liability for environmental cleanup in Michigan was strict, joint and several. Any owner or operator of a contaminated site was strictly, jointly and severally liable for the cost of required clean up.

In 1995, MERA was repealed and the Natural Resources and Environmental Protection Act ("NREPA") was enacted. Part 201 of NREPA provides that owners and operators "responsible for an activity causing a release or threat of release" are jointly and severally liable for clean up costs. MCL 324.20126(1)(a) and (2). The MDEQ has the burden of proving liability.

[2] The parties filed joint stipulated facts at the oral argument.

MCL 324.20126(6). Once the MDEQ "proves a prima facie case against a person, the person shall bear the burden of showing by a preponderance of the evidence that he or she is not liable under this section." *Id.* This change from strict liability to causation-based liability applied retroactively, regardless of when the contamination occurred or was discovered. MCL 324.20102(h) and MCL 324.21301a.

Michigan originally also had two separate UST statutes. The UST Regulatory Act which regulated the registration, installation, operation, maintenance and removal of USTs was re-codified as Part 211 of the NREPA, MCL 324.21101, *et seq.* Part 211 of NREPA imposes obligations on owners and operators of USTs to register the USTs, pay annual registration fees, report releases from USTs, conduct release detection monitoring, UST upgrading and establishes UST closure requirements. The Leaking Underground Storage Tank Act was incorporated into NREPA as Part 213, MCL 324.21301, *et seq.* The owner or operator of USTs is liable for UST contamination under Part 213, if he or she is liable under Part 201.

ANALYSIS

The undisputed facts are that Dan Weber leased the subject site and operated a retail gasoline station on it from the 1960's until 2001. BCOC has owned the subject site and the equipment for storing and dispensing gasoline located on the site since 1978. BCOC was also the exclusive provider of petroleum products, including gasoline, that was sold on the site since 1978. BCOC reported a confirmed release in 2001 and soil and groundwater contamination has been detected ever since.

The questions presented are whether the MDEQ has established a prima facie case that BCOC is "responsible for an activity causing a release or threat of release" and, if so, whether BCOC has proven "by a preponderance of the evidence" that it is not liable. MCL 324.20126(1)(a).

Under Part 201, an "operator" is "a person who is in control of or responsible for the operation of a facility." An "owner" is defined as "a person who owns a facility." It is undisputed that BCOC owns the facility in question, even if it is not an "operator." A "release" is defined as follows:

> "Release" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance.

As the MDEQ points out, the phrase "responsible for an activity causing" is not defined in Part 201. BCOC would have the Court interpret the NREPA as requiring the MDEQ to prove that BCOC was responsible for a single, specific, discrete, identifiable act of releasing contaminates in order to sustain its burden of proof. The MDEQ relies upon established rules of statutory construction to define "responsible for an activity causing" and insists that doing so leads to the conclusion that BCOC is liable under Part 201. The textual reading of the statute by the MDEQ is persuasive.

The Court must consider "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 156-157; 719 NW2d 553 (2006). Critical terms should be given their ordinary meaning. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). To do this, courts will turn to dictionary definitions. *Greene v AP Products, Ltd*, 475 Mich 502, 509-510; 717 NW2d 855 (2006), reh den 477 Mich 1201 (2006).

Merriam-Webster's On-line Dictionary defines "responsible" as follows:

1 a : liable to be called on to answer **b** (1) **:** liable to be called to account as the primary cause, motive, or agent <a committee *responsible* for the job> (2) **:** being the cause or explanation <mechanical defects were *responsible* for the accident> **c :** liable to legal review or in case of fault to penalties
2 a : able to answer for one's conduct and obligations **:** trustworthy, to be able to choose for oneself between right and wrong
3 : marked by or involving responsibility or accountability <*responsible* financial policies> <a *responsible* job>

Merriam-Webster's On-line Dictionary defines "cause" as

1 : to serve as a cause or occasion of <*cause* an accident>
2 : to compel by command, authority, or force <*caused* him to resign>

Merriam-Webster's On-line Dictionary defines "activity" as

1 : the quality or state of being active
2 : vigorous or energetic action: liveliness
3 : natural or normal function: as **a :** a process (as digestion) that an organism carries on or participates in by virtue of being alive **b :** a similar process actually or potentially involving mental function; *specifically* **:** an educational procedure designed to stimulate learning by firsthand experience
4 : an active force
5 a : a pursuit in which a person is active **b :** a form of organized, supervised, often extracurricular recreation
6 : an organizational unit for performing a specific function; *also* **:** its function or duties

Merriam-Webster's On-line Dictionary defines "threat" as

1 : an expression of intention to inflict evil, injury, or damage
2 : one that threatens
3 : an indication of something impending <the sky held a *threat* of rain>

BCOC owns the subject site. BCOC owns the USTs, connective piping and gasoline pump islands on the site. BCOC was the exclusive provider of gasoline to the site for almost thirty years. The detected contaminants are gasoline additives. The release could not have occurred "but for" BCOC's activities. Therefore, the Court is inclined to agree with the MDEQ that BCOC is responsible for an activity (the delivery, storage and dispensation of gasoline) causing a release. If BCOC had not delivered and stored gasoline at the site, gasoline contaminants could not have been released into the soil and groundwater.

In addition, and perhaps even more importantly, enforcement and remediation efforts would be seriously hampered if the MDEQ had to prove in each case of detectable contaminants that an owner or operator was responsible for a specific, single, discrete activity causing a release. The Court believes the Legislature included the phrase "or threat of release" to cover the activities of owners and operators that, by their very nature, pose a threat of a release, e.g., supplying the gasoline for and owning and operating USTs. In such cases, the NREPA does not require the MDEQ to prove the owner or operator is responsible for a single, specific, discrete activity causing a release. Instead, the owner or operator who is responsible for an activity causing a threat of release is liable.

Again, in the instant case, BCOC delivered gasoline to a facility that it owned, stored the gasoline in USTs that it owned and from which the gasoline was dispensed through connective piping and pumps that it owned. By their very nature, the storing and dispensing of gasoline are activities causing a threat of release. BCOC is liable under Part 201 for any response activity costs. The lien imposed by the MDEQ is valid and enforceable.

CONCLUSION

Part 201 of MREPA provides that "[t]he owner or operator of a facility if the owner or operator is responsible for an activity causing a release or *threat of release*" is liable for response activity costs. The MDEQ has met its burden of establishing a prima facie case against BCOC. BCOC has not proven by a preponderance of the evidence that it is not liable.

The MDEQ's motion for summary disposition is granted. BCOC's motion for summary disposition is denied. Counsel for the MDEQ shall prepare a proposed judgment consistent with this decision and order and submit it to the Court pursuant to MCR 2.602(B)(3).

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/06/04