

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

Dept. of Attorney General
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MICHAEL A. COX, Attorney General for the State
of Michigan, ex rel, MICHIGAN DEPARTMENT
OF ENVIRONMENTAL QUALITY,

**NATURAL RESOURCES
DIVISION**

Plaintiff,

OPINION AND ORDER

v

File No. 03-1487-CE

TAPPER MOTORS, INC.,

Defendant.

At a session of said Court held in the City of Lansing, Ingham
County, Michigan, on the 30 day of April, 2004,
the Honorable Thomas L. Brown presiding.

This matter is before the Court on Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), and Defendant's request for summary disposition pursuant to MCR 2.116(I)(2).¹ Oral argument was heard on April 7, 2004, at which time the motion was taken under advisement. Having fully reviewed this matter, the Court makes the following determinations.

A motion under MCR 2.116(C)(10) tests whether the complaint is factually sufficient. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The Court examines the facts in the light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374 (1993).

¹ The Court notes Defendant's argument for summary disposition pursuant to MCR 2.116(C)(6) & (7). However, no formal motion was filed pursuant to said subrules. Nor a notice of hearing indicating that the motion was to be heard in conjunction with Plaintiff's motion.

The moving party must support the motion with affidavits or other documentary evidence. MCR 2.116(G)(3)(b). *Patterson v Kleiman*, 447 Mich 429, 434, n.6 (1994). The opposing party may not rest upon mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing there is a genuine issue for trial. MCR 2.116(G)(4). *Manning v Hazel Park*, 202 Mich App 685, 689 (1993).

The reviewing court is to evaluate such a motion by considering the substantively admissible evidence actually proffered in opposition to the motion. *Maiden, supra*, at 121. The reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. *Id.*

Under MCR 2.116(I)(2): “If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”

On August 13, 2003, Plaintiff filed a 2-Count Complaint averring that Defendant failed to comply with an August 20, 2002 Order issued by the Van Buren County Circuit Court (Count I), and that Defendant is liable for civil fines under Part 213 of the Natural Resources and Environmental Protection Act (Count II). Plaintiff requests that this Court order Defendant to comply with the Van Buren County Circuit Court Order. Plaintiff also requests that the Court assess a civil fine against Defendant of up to \$10,000 a day per Underground Storage Tank system as authorized under MCL 324.21323(1)(d).

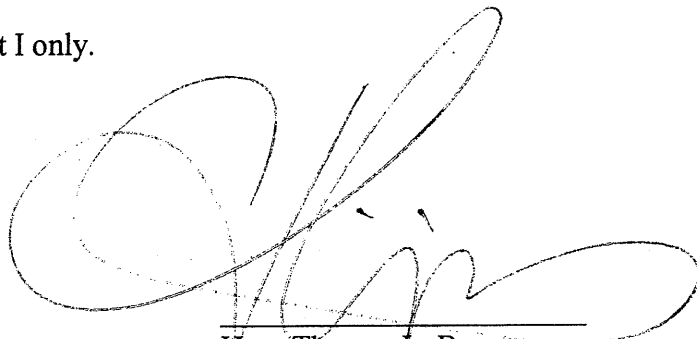
Defendant responds, however, that Plaintiff is essentially asking this Court to enforce another circuit court’s order. The Court agrees with this assessment. According to Paragraph 11 of the Complaint, Plaintiff avers that: “On August 20, 2002, the Van Buren County Circuit Court affirmed the late report penalty assessed by the [Michigan Department of Environmental Quality] and entered

an order that same day, indicating the \$20,200.00 reporting penalty was to be paid within 30 days.”² Further, at Paragraph 12, “Defendants failed to comply with the Order of the Van Buren County Circuit Court and have failed to pay the demand for penalties without sufficient cause” Defendant informs the Court that Plaintiff has filed a motion with the 36th Judicial Circuit Court in an attempt to enforce said Order. Summary disposition in Defendant’s favor, therefore, is appropriate.

With respect to Count II, Defendant correctly points out that the Attorney General has failed to support its subrule (C)(10) motion with affidavits, depositions, admissions, or other documentary evidence as required by MCR 2.116(G)(3)(b). *See Patterson, supra*. Accordingly, Plaintiff’s motion is denied. The Court is reluctant, however, to grant Defendant’s request pursuant to MCR 2.116(I)(2) based on a technicality. Moreover, unlike Count I, it is not apparent to the Court at this juncture that Defendant is entitled to summary disposition as to Count II.

IT IS ORDERED, therefore, that Plaintiff’s motion is **DENIED**.

IT IS FURTHER ORDERED that Defendant’s request for summary disposition under MCR 2.116(I)(2) is **GRANTED** for Count I only.

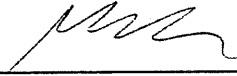


Hon. Thomas L. Brown
Circuit Judge

² Contrary to the parenthetical contained in Paragraph 11, no Order was attached to the Complaint.

PROOF OF SERVICE

I hereby certify that I served a copy of the above order upon the attorneys/parties of record by placing said order in a sealed envelope addressed to each with full postage prepaid thereon and placing said envelope in the United States Mail at Lansing, Michigan, on April 30 2004.



Michael G. Lewycky
Court Officer