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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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LANCER INSURANCE COMPANY a/s/o CONSOLIDATED ENERGY, INC.,

Plaintiff(s),

Index No. 7074/08

Motion Submitted: 9/9/10
Sequence No. 001

-against-

PATRICIA RIELA,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's
Defendant's/Respondent's

Plaintiff moves this Court for an Order seeking summary judgment on the issue of liability for a home heating oil spill, and its contractual indemnification claim, in the amount of $56,076.44, plus costs and interest from the date of loss, against defendant. Defendant opposes the requested relief.

Plaintiff commenced this action for indemnification as the result of an oil spill that occurred in defendant's residence on November 14, 2007. On that date, Consolidated Energy, Inc. ("Consolidated") delivered home heating oil to defendant, resulting in an overflow of said oil into defendant's basement. Consolidated, through its contractor, Ambrose Environmental Management, Inc., performed a clean-up of the spill and

remediation. Consolidated's insurer, the plaintiff herein, issued payment to Ambrose for the clean-up in the sum of $56,076.44. Plaintiff seeks to recover the cost of the clean-up from defendant, alleging that defendant was liable for the spill by failing to maintain the heating system in her home, and alleging that she tampered with the oil tank, resulting in the overflow of oil into her basement.

At the time of the spill, defendant was the owner of a single family home in Shirley, New York, which utilized oil heat.[1] The fuel oil was stored in a 275 gallon oil tank, located in the basement of her home. The defendant also relied on HEAP, a New York State assistance program enabling eligible homeowners to purchase low-cost heating oil. Defendant would call HEAP for fuel oil on an as-needed basis, requesting certain companies for delivery based upon which company had the lowest price on any given day. Consolidated had delivered oil to defendant's home on at least one other occasion approximately eight months prior to the date of the spill.

On November 14, 2007, Consolidated delivered approximately 158 gallons of oil to the defendant's oil tank. Upon completion of the delivery, defendant immediately went to the basement to start the boiler when she discovered that her basement was flooded with oil.

Defendant denies plaintiff's allegations, asserting that Consolidated's employee who delivered the fuel was negligent. Defendant also claims that contractual indemnification is inappropriate because she did not have a contract with Consolidated. Further, she argues that Consolidated should have inspected the tank prior to dispensing the oil on that date. Defendant also requests that, in the event summary judgment is granted, she receive a jury trial on the issue of damages, asserting that the cost of the clean-up should have been $35,074.44.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case the defendant (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]). In this case, plaintiff must set forth sufficient facts to establish that defendant was solely responsible for the oil spill, thus establishing its entitlement to summary judgment.

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[1]According to her deposition testimony, defendant sold the home in question and now lives in Georgia.

Navigation Law §181(1) provides that, "[a]ny person who has discharged petroleum" is strictly liable, "without regard to fault, for all cleanup and removal costs and all direct and indirect damages." Navigation Law §181(5) provides: "Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum." However, a claim may only be maintained by a person "who is not responsible for the discharge" Navigation Law § 172[3]). Further, discharge is defined as an "action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum" (***Navigation Law §172[8]***).

The owner of the property at which petroleum has been released, under Navigation Law §181(5), may have a claim under the statute provided such person **did not cause or contribute to the contamination** (emphasis added) (see ***Hjerpe v. Globerman***, 280 A.D.2d 646, 721 N.Y.S.2d 367 [2d Dept., 2001]). Once it is established that the property owner caused or contributed to the spill, the property owner will be precluded from seeking indemnification from another discharger (***General Casualty Insurance Company v. Kerr Heating Products***, 48 A.D.3d 512, 852 N.Y.S.2d 257 (2d Dept., 2008); ***Calabro v. Sun Oil Co.***, 276 A.D.2d 858, 714 N.Y.S.2d 781 [3d Dept., 2000]). Herein, the owner is not seeking indemnification, but rather, the insurer as subrogee of the oil company that actually over filled the tank is seeking indemnification.

In identifying a discharger, no proof is required of a specific wrongful act or omission that directly caused the spill in order to impose strict liability (see ***Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.***, 111 A.D.2d 957, 490 N.Y.S.2d 54 [3rd Dept., 1985]). Such liability arises as the homeowner is in a position to control the site and source of the discharge (see ***State v. Speonk Fuel, Inc.***, 3 N.Y.3d 720, 724, 819 N.E.2d 991, 786 N.Y.S.2d 375 (2004); ***State v. Green,*** 96 N.Y.2d 403, 406, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001); ***New York v. New York Central Mut. Fire Ins. Co.***, 147 A.D.2d 77, 542 N.Y.S.2d 402 [3d Dept., 1989]).

In this case, the question is whether there is sufficient evidence for the Court to conclude that defendant was a discharger under Navigation Law §181, and that her actions or inactions contributed to or caused the accident. Clearly, Plaintiff actually discharged the oil, however it now claims that the homeowner is responsible for the condition of the tank, which led to the accident.

In support of its motion, plaintiff submits, *inter alia*, the deposition testimony of its oil deliveryman, one of its owners, Joseph Russo, and the testimony of the defendant. Plaintiff also submits the affidavit of its expert, Jack E. O'Krepky, a senior metallurgical engineer.

Plaintiff contends that there was a sufficient amount of oil already in the tank and that the boiler was nonfunctional due to a clogged filter, not the absence of oil as indicated by defendant. Consequently, the pumping of oil into the tank caused an overflow, and the added pressure caused the already compromised oil gauge on the tank to give way. Plaintiff contends that the defendant tampered with the gauge, also referred to as a "plug." As a result of the alleged tampering, the plug, which is supposed to be a permanent fixture on the tank, was not securely affixed to the tank, as evidenced by the apparently compromised sealing surrounding the plug. Defendant denies tampering with the plug.

Plaintiff's engineer, Jack E. O'Krepky, stated that the oil burner filter was excessively clogged, causing the boiler to shut down. Also, the threads of the plug were rusted, suggesting that it had been removed, however no evidence was offered as to when that removal occurred nor the identity of the alleged "remover". Consolidated's owner, who personally inspected the site on the day of the accident, reported that the plug was not in place on the oil tank when he entered defendant's basement. Further, according to Joseph Russo, the threads on the plug were stripped, indicating that it had been removed and replaced improperly, and that the outside of the tank was wet with oil. Mr. Russo posited that defendant removed the plug in one or more previous attempts to perform her own measurement of oil through that opening, which allegation was denied by Defendant.

Mere speculation is not a sufficient basis upon which to grant summary judgment. Furthermore, Plaintiff has not excluded other causes for the alleged defective plug, nor has it established that it is without fault for the spill or that Defendant was solely responsible for the spill (*see* ***General Casualty Insurance Co. V. Kerr Heating Products,*** 48 A.D.3d 512, 852 N.Y.S.2d 257 (2nd Dept., 2008); ***Cleary v. Wallace Oil Co.,*** 55 A.D. 3d 773, 865 N.Y.S.2d 663 [2nd Dept., 2008]).

There appear to be issues of credibility evident from the parties submissions, which cannot be resolved by this Court on a summary judgment motion. Such issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. (***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §3212:6,*** at 14; ***Donato v. ELRAC, Inc.,*** 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); ***Frame v. Markowitz,*** 125 A.D.2d 442, 509 N.Y.S.2d 372 [2d Dept., 1986]).

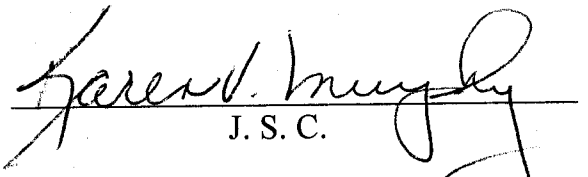
In support of her contention that Consolidated was negligent in failing to inspect the tank prior to pumping the oil, defendant submits a document entitled, "Heating Oil Storage Tanks; Guide for Quality Installation and Maintenance, 2nd Edition, August 2006" authored by the National Oilheat Research Alliance. Inasmuch as the publication is not admissible evidence, nor is it a legal mandate, the contents of the publication cannot be considered by the Court in determining the issue of liability raised by the instant motion. However, since the defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether

the plaintiff's papers submitted in opposition were sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Smith v. Hartman***, 73 A.D.3d 736, 899 N.Y.S.2d 648 (2d Dept., 2010); ***Quiceno v. Mendoza***, 72 A.D.3d 669, 897 N.Y.S.2d 643 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

Accordingly, plaintiff's summary judgment motion is denied.

The foregoing constitutes the Order of this Court.

Dated: January 6, 2011
Mineola, N.Y.



J. S. C.