SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROSS R. ANZALDI
PRESIDING JUDGE, CIVIL DIVISION

COURT HOUSE
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August 25, 2009

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LETTER OPINION
NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Re: New Jersey Schools Construction Corporation v. Power Test Realty Corporation, Getty Petroleum Marketing Inc. UNN-L-4009-06

This matter has come before this Court to ultimately determine what amount of money will fairly and reasonably compensate the plaintiff, New Jersey School Construction Corp. (hereinafter "NJSCC") for the costs of remediation and restoration (of property located at 743 Newark Avenue, Elizabeth, New Jersey) pursuant to the New Jersey Spill Act. Each defendant disputes the amounts claimed to be due to plaintiff and alleges that the responsibility to pay any sums due to plaintiff rests with the co-defendant. In support of their respective positions, each defendant relies on the same documents; to

wit: a Master Lease, an Environmental Agreement, and, a Settlement Agreement, all entered into by and between the defendants. The defendants asked this Court to review those documents and draw conclusions that will support their clients' respective positions.

This Court took testimony from thirteen witnesses over nine trial days. The testimony took place on the following dates: February 24th and 26th, March 4th, 5th, 10th, 11th, 18th, and 26th, and on April 1st, 2009. In an effort to accommodate witnesses and counsel, the parties agreed that the testimony could be taken out of order; each party being permitted to call witnesses who were available at the appropriate time.

Plaintiff called the following witnesses: Edward Clark, John Vanderslice, John Ryder, and Joseph Hochreiter. The defendant Power Test, called Leo Leibowitz, Jeffrey Lieter, and Kevin Shea. Defendant Getty Petroleum Marketing Inc. (hereinafter "GPMI"), called Gregory Carr, Dale Holden, John A. Rodes, Edward Delaney, Scott Hanley, and Vincent Delaurentis.

Though substantial questions of fact are disputed, the parties have also agreed that many of the facts are not in dispute. See J-1, a List of Stipulations between defendants and plaintiff.

The subject property (now known as Elizabeth School # 30) is and was located at 743 Newark Avenue, Elizabeth, New Jersey. The title to that property, prior to the conclusion of the condemnation matter, belonged to the defendant Power Test. In 2002, a preliminary assessment/site investigation was conducted and revealed the presence of three 8,000 gallon underground storage tanks (UST's). Soil samples were thereafter conducted and, benzene was detected above the cleanup criteria. On September 11th, 2003, plaintiff commenced a condemnation proceeding against Power Test and GPMI, the tenant in possession of the subject property. GPMI, the tenant of the subject property retained the Tyree Organization to remove the operating tanks, the related pipes and dispensers. Tyree discovered that hazardous substances had been discharged in or around the vicinity of the subject tanks and the product pipes. This information was conveyed to the New Jersey Department of Environmental Protection. Later, Tyree submitted a UST remedial investigation report and was subsequently directed by DEP to perform additional work. It is undisputed that GPMI did not comply with the DEP letter dated March 10th, 2004 which required that additional work be completed including removal of all contaminated soil.

As a result of GPMI's failure to comply with the direction of DEP, plaintiff conducted a site investigation in February of 2004, and collected additional soil and underground water samples. During that testing, it was discovered that previously unknown USTs existed at the subject property.

On July 12th, 2004, a Consent Order arising out of the condemnation proceedings was entered into by and between the plaintiff and the defendants. The Consent Order awarded both defendants a total of $950,000 as compensation for the subject property.

That Order also required defendants to remove the newly discovered UST's and any associated contaminated soils at the site, at the defendants' sole cost and expense. If further testing was required, defendants' agreed to undertake that investigation and monitor same at their sole cost and expense. Defendants did not conduct such an investigation. Subsequently, a total of seven abandoned (ghost) UST's were ultimately discovered at defendants' property. Because of defendants' failure to take action, same were excavated and removed at the direction of the plaintiff. In addition, contaminated soil was discovered. Said soil was also excavated and disposed of off site. Eventually, five permanent groundwater monitoring wells designated M-1 through M-5, were installed.

In addition to seeking relief pursuant to the Spill Act, plaintiff alleges that monies are also due them as a result of the defendants' unjust enrichment. Specifically, defendants received and retained the benefit of the Condemnation proceeds then failed to comply with the Consent Order entered in 2004. The DEP directed defendant to perform additional work and neither GPMI nor Power Test conducted the appropriate groundwater investigation and other remediation; and, subsequently, plaintiff was forced to complete same. Further, the defendants' failed to reimburse plaintiff the actual costs incurred, and as such, have been unjustly enriched. It is undisputed that during the time that Power Test owned the property there was a discharge of hazardous substance. Clearly, that discharge occurred from the operating tanks. As to the abandoned/ghost tanks, though the timing of the contamination was not established, there is no dispute that the contamination was discovered during the time that Power Test owned the subject property.

With its 1979 amendment, the Legislature expanded the scope of Spill Act liability. No longer was liability limited to those who had actively discharged hazardous substances. Rather, one was strictly liable if one was **"in any way responsible for any hazardous substance which the [DEP] has removed or is removing pursuant to...this act."** L. 1979, c. 346 § 8c. Marsh v. N.J. Dep't of Envtl. Prot., 152 *N.J.* 137, 146-147 (*N.J.* 1997)

Whether defendants are liable for cleanup costs thus hinges on whether they are "in any way responsible" for the pollution that occurred on the property. The Spill Act attaches strict liability for clean up and remediation for all discharges of hazardous substances or for all parties responsible for the discharge.

Under the Spill Act statue (58:10-23.11f(a)92)(a) as a "person in any way responsible for a discharge" has been outlined in *N.J.A.C.* 7:1E as:

1. any person whose act of omission resulted in a discharge;
2. each owner or operator or real property from which a discharge occurred;

3. any person who owns or controls any hazardous substance which is discharged;
4. any person who has directly or indirectly caused the discharge;
5. any person who has allowed a discharge to occur;
6. any person who brokers, generates, or transports the hazardous substance discharge.

Based upon the testimony from both plaintiff and defendants' experts, the contamination that was the result of the discharges from the operating tanks commingled at various locations with the contamination that was the result of the discharges from the abandoned tanks. Both plaintiff's expert Joseph Hochreiter and defendant GPMI's own expert testified that there was BTX from the abandoned tanks combined with MTBE from the dispenser's of the operating tanks. Hochreiter agreed that based upon a high degree of scientific certainty, the groundwater contamination at the property is the result of discharge from both operating and abandoned tanks. Therefore, GPMI cannot successfully argue that it is only partially liable for the contamination at the subject property.

Further, notwithstanding any agreements between the landlord and tenant as to responsibility, the defendants are jointly and severely liable for the discharge of hazardous substance at the subject property, and are so responsible to the plaintiff. That responsibility extends, not only to the actual costs incurred to date, but also, future costs that may be incurred.

The defendants complain as to how plaintiff addressed removal and remediation, yet they abrogated their responsibility to take appropriate action.

During the course of plaintiff's presentation of its evidence, they allege that the total costs for which they seek reimbursement amounts to $814,415. The breakout of the cost is as follows:

Excavation Costs:	$627,062.37
Site Feasibility & Remediation	$ 94,548.65
Preliminary Assessment	$ 5,000.00
Remediation Oversight	$ 61,280.22
Remediation Investigation	$156,196.50
Total:	$944,086.75
Less Reserve Account:	- $129,671.75
Balance Due:	$814,415.00

GPMI though challenging the amounts due, admit that they are responsible for the costs of remediation for all operating tanks, dispensers and pipes. GPMI argues that the total due for the entire project is not $814,415 as plaintiff alleges but only $258,368. Of that sum, only $93,574 relates to the operating tanks, dispensers and pipes.

In support of the claims of monies due and owing, plaintiff introduced testimony primarily from two witnesses, John Ryder and John Vanderslice. With reference to the former, Mr. Ryder testified that the actual costs incurred for excavation costs exceeded the original allowance amount, and that the total due for all of the excavation costs was $627,062.37. Mr. Vanderslice, formerly of Van-Note Harvey, testified that he oversaw the excavation costs, and all costs were documented by appropriate backup information. Mr. Ryder confirmed upon cross-examination, that the total sums could be reduced by five or ten percent because some of those costs may have been incurred for work done outside of the subject property, though on the school construction project.

In opposing that analysis, the defendant argued that there was no evidence introduced to show that the plaintiff's actually paid the sums claimed. They argued that there was no documentation, billings, or evidence to support this testimony. In the defense analysis, they called John Rodes, an environmental engineer. Mr. Rodes relied upon the volumetric formula to arrive at his conclusions.

The Court heard testimony from a number of witnesses who were qualified as experts in their field. In determining the conflict between the experts testimony, the Court gives weight to those experts whose opinion is based upon the facts in evidence. In weighing credibility, I also considered the reasonableness of the witness's testimony, their demeanor on the stand, their candor or evasion, whether the witness's testimony was confirmed or contradicted by testimony of others and ultimately whether that witness's testimony made sense.

Accordingly, I find that the testimony of the plaintiff's witnesses to be believable and compelling. With regard to the testimony of John Rodes, I find the opposite, particularly in his utilization of the volumetric formula. His testimony was vague and inconsistent. Specifically, Mr. Rodes acknowledged that the theory is not precise, and that he expected criticism of this methodology. He acknowledged that some of the information within which he based his opinion was incomplete and in some instances, merely surmised on his part. Accordingly, this Court rejects his testimony. Ultimately, this Court finds the testimony of the plaintiff's witnesses as to the amounts due to be credible, convincing, probative and ultimately more reliable and, based on the evidence both direct and circumstantial.

This Court shall, however, reduce the amount for excavation costs by ten percent to reflect billings that may have been incurred at the school site, but not at the subject property pursuant to the testimony of John Ryder. In addition, as to the charge of $5,000 for the preliminary assessment, this Court is persuaded by the defense that the preliminary assessment would have been the responsibility of the plaintiff, whether or not

there was any environmental contamination. In addition, the actual cost was only $1,000. Accordingly, this Court will not award that sum to plaintiff.

With regard to the site feasibility and remediation claim of $94,548.66, Ryder confirmed that all of the invoices were allocated to the site in question. However, again a portion thereof, ten percent, may have been for costs incurred not related specifically to this property, but the total project. This Court will deduct ten percent leaving a balance of these charges at $85,093.80.

The post remedial investigation costs totaled $156,196.50. I find that the evidence supports this claim and challenges thereto are without merit. Therefore, the total this Court finds to be due and owing to the plaintiff is $866,932.66, less monies in the reserve account pursuant to the 2004 Consent Order, to wit: $129,671.75, leaving a balance due and owing to the plaintiff of $737,260.91.

Said sum is owed, both under the New Jersey Spill Act as well as for unjust enrichment as a result of the Consent Order entered into by and between the parties. **There is no dispute that defendants failed to comply with the terms of the Consent Order. Accordingly, Judgment is entered in favor of plaintiff against both defendants jointly and severely.**

The remaining issues are between the defendants. They each allege that the Master Lease, Environmental Agreement and Settlement Agreement clarify ultimate responsibility between them. The general events which give rise to this dispute between the two defendants are not a result of clear negligent or intentional actions or omissions. By all accounts, neither party had knowledge of the "ghost tanks" which led to the subsequent contamination. Until the NJSCC discovered the ghost tanks in 2004, there is no evidence in the record that either the property owner or the tenant was aware of the new contamination. Under this framework, the question is whether the owner of the property or the tenant leasing the property is liable under the lease for costs associated with the remediation incurred as to the ghost tank contamination.

Before looking at the lease, the court must first address the applicability of the settlement agreement entered into by the defendants on July 12, 2004. This document is embodied in a three paragraph letter which opens, saying that purpose of the letter is in regard to the distribution of the proceeds paid by the condemning authorities. This seems to limit it only to the claims of the condemnation proceeds. In paragraph three (3), it states: "the foregoing is in full settlement of all the respective claims of the parties regarding the Proceeds, the condemnations and any sums payable in connection with or by reason of the condemnations." This also clearly suggests that the purpose of the agreement is in regard to only the actual condemnation by the NJSCC and not a complete waiver of all claims regarding the property. The condemnation proceeding and proceeds are completely separate legal entities from the present claim for costs and expenses stemming from the remediation and clean up of the property. As such, this court finds no evidence in the record that the settlement agreement was intended to be a wide-ranging waiver of all liabilities or rights to indemnification by the defendants

Turning to the court's interpretation of the lease and applying New York law as called for in the lease: "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (N.Y. 2004). The courts have "long held that the fundamental objective when interpreting a written contract is to determine the intention of the parties as derived from the language employed in the contract. Similarly, where the parties have agreed to conduct themselves in accordance with the rights and duties expressed in a contract, a court should strive to give a fair and reasonable meaning to the language used." Abiele Contr. v. New York City Sch. Constr. Auth., 91 N.Y.2d 1, 10 (N.Y. 1997). Furthermore, the court should "construe the agreements so as to give full meaning and effect to the material provisions." Excess Ins. Col. Ltd. V. Factory Mut. Ins. Co., 3 NY 3d 272, 277 (NY 2005). There is no question with this court that the drafting and negotiation of the lease was undertaken by sophisticated parties in an open and fair manner. There is no evidence of fraud or duress which would make the court hesitate in reviewing the lease as valid on its face. Both sides entered into the transaction with the assistance of qualified and competent counsel with adequate knowledge as to the terms of their agreement. Therefore, the court is required to read the document as written and interpret the lease both through the words used in the lease, as well the intentions of the parties as determined through the testimony of the witnesses. New York Law requires this court to determine the intent of the parties as related to the language used in the contract and then enforce the writing accordingly.

This court previously heard argument on the issue of lease interpretation by way of motion for summary judgment filed by the Power Test defendants. At that time, the court denied summary judgment as there were questions of fact relating to the interpretation of the terms of the master lease. Because of the potential ambiguity in the lease agreement the court could not decide the case by summary judgment and the court was required to take oral testimony as to the parties' intentions. The court therefore took testimony as outlined above from a significant number of witnesses.

An important section of the lease dealing with liability for USTs is section 7.6. This section states:

> Landlord shall complete UST upgrades for each of the USTs at the properties set forth on Schedule 2 and, to the extent required by law, the Property set forth on Exhibit C. Tenant shall be responsible for all repair, maintenance, replacement and removal of all USTs listed on Schedule 2 for which UST Upgrades have been completed and all other USTs at the premises, except Tenant shall not be responsible for the removal or closure in place of the USTs set forth on Exhibit C.

There is nothing set forth in the lease which delineates between known or unknown USTs. Power Test state that they retained responsibility with request to the specific tanks and spill identified on schedules 2 and 3 and Exhibit C of the master lease only, and that GPMI therefore assumed responsibility for all other tanks and environmental liabilities at properties included in the master lease. The parties agree that the Elizabeth site is not in

fact listed on any of the schedules or exhibits attached to the lease. Therefore, Power Test's position is that the catch all language of "any other USTs" should be applied to the ghost tanks.

The testimony of Vincent Delurentis, President and Chief Operating Officer of Getty Marketing since 1997 acknowledged that the provision of 7.6 articulating the tenant responsibility for "all other UST's at the premise" is not consistent with his understanding with the "your watch my watch" concept which GPMI has argued. Furthermore, this court is guided by the credible testimony of Power Test's witnesses including but not limited to Kevin Shea and Jeffrey Leiter. Both witnesses were involved in the drafting or execution of the master lease and testified that their understanding of the language was that Power Test was only liable for those properties outlined in the schedules and exhibits and that GPMI responsible for all other environmental conditions, even those arising from an unknown release. The court finds this testimony interpreting section 7.6 to be credible and in accordance with a fair and reasonable reading of the language of the lease. There is nothing from GPMI to counter the impression and intention of this reading of the lease. Any prior factual question as to the meaning of this section is clarified and addressed through the testimony and actions of the parties. The lease clearly states that the Tenant is liable for all "other USTs." The only reasonable reading of this language in light of the trial testimony is that it applies to both known and unknown USTs.

The second section of the lease which the court found relevant in its decision in favor of the Power Test defendant is the requirement under Section 9.2. That section states that the "tenant shall be solely responsible, at its own cost and expense, for compliance with all environmental laws..." Pursuant to the master lease, GPMI retains responsibility to comply with Environmental laws applicable to the property such as the UST act. Power Test argued that GPMI's efforts regarding the UST's, contamination, and Ghost Tanks fell far short of its obligations under the UST Act, N.J.S.A. 58:10A-21. Stating that NJDEP demanded that GPMI perform additional investigation and remediation with respect to the operating tanks and GPMI has not complied with the requests. The testimony of Mr. DeLaurentis concedes that GPMI was responsible under the lease to return the property free of hazardous substances regardless of whether it was GPMI's release, and he conceded that they did not in fact surrender the property free of hazardous substances. Section 9.2 provides the court with significant evidence on the intention and responsibilities of the parties. The tenant, under the master lease has considerable responsibility as to the environmental condition of the property. The Lease and the environmental agreement required the tenant to return the property free of environmental hazards and rid the property of any environmental constrictions. Mr. DeLaurentis admitted that GPMI did not remediate that which they acknowledge was their responsibility, to wit: any contamination caused by the operating tanks. He further acknowledged that they did not comply with the directives from the DEP to remediate additional areas requested by DEP. When reading the language in the lease in a fair and reasonable manner, section 9.2 required GPMI to return the property in compliance with environmental laws and the court is confident through the testimony of the witnesses that this provision was not met.

When confronted with the issue of which testimony was found to be believable, credible and persuasive, the court found the interpretation brought forth by Power Test's witnesses; Liebowitz, Leiter, and Shea to be credible. Their consistent argument outlined how the intention and actions of the parties throughout the history of the lease points to the sole conclusion that Power Test's responsibility is limited to those matters listed on the various schedules and all remaining liabilities, including ghost tanks are GPMI's responsibility. Furthermore, the testimony of Mr. Delaurentis confirmed key portions of Power Test's argument. Specifically, he stated that the concept of "your watch, my watch" was proposed during negotiations but was ultimately deleted from the lease. He also admitted that there is nothing in the lease which supports such an interpretation. Mr. Liebowitz's testimony also confirmed that it was his understanding that GPMI would be responsible for any liabilities discovered after its creation. Also, the parties confirmed that the lease that was negotiated was a triple net lease. This type of lease required that the tenant not only pay rents on the property, but also makes the tenant responsible for all other costs and carrying charges at the subject property. This detail is in line with Power Test's argument that GPMI is responsible for the costs of the clean up at the property.

Ultimately, the party's intent is supported in the explanation set forth by Power Test's analysis. It is supported by all the testimony, the documents submitted, and the actions of the parties in addressing the contamination and finally it is supported by the relevant law such as the UST Act. This court is satisfied that the testimony supports a finding that the tenant should be responsible for all environmental contamination at the subject property caused, not only by the operating tanks but by all of the tanks known or unknown. When all sections of the master lease are looked at as a whole and with guidance of the trial testimony of the witnesses, it is clear that the parties set out a clear division of liability as to any environmental contamination on the property. Power Test's interpretation of the lease reflects the parties' intentions and actions and fits with a fair and reasonable reading of the lease. Therefore, in light of the above analysis, this court concludes that the terms of the master lease should be read in favor of the Power Test defendants and the costs owed to the plaintiff should be paid by defendant GPMI as required under section 10.1, the defense and indemnification clause of the master lease.

Power Test Defendants to submit a proposed form of judgment reflecting this ruling to the Presiding Judge of the Civil Division.

Very Truly Yours,

Ross R. Anzaldi