



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY

DECISION MOTION

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
SITE REMEDIATION COMPLIANCE
AND ENFORCEMENT,**

Petitioner,

v.

**HAINESVILLE GAS & AUTO SERVICE SITE
AND AMER LEE,**

Respondents.

OAL DKT. NO. ECE 08587-14

AGENCY DKT. NO. PEA 130001-019608

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Eric S. Pasternack, Deputy Attorney General, for petitioner Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Amer Lee, respondent pro se and as closely-held company representative for
Hainesville Gas & Auto Service

Record Closed: April 23, 2015

Decided: November 16, 2015

BEFORE **GAIL M. COOKSON**, ALJ:

These related matters were filed as appeals by Hainesville Gas & Auto Service (Hainesville) and Amer Lee, its representative and owner of the business (Amer Lee) (jointly respondents) from two Administrative Orders and Notices of Civil Administrative Penalty Assessments (AONOCAPAs) issued by petitioner New Jersey Department of Environmental Protection (NJDEP) on or about July 22, 2013, and served upon respondents on or about August 24, 2013. The AONOCAPAs allege that Hainesville, which is located at 274 Route 206 North, Sandyston Township, Sussex County, otherwise known as Block 805, Lot 2 on the tax maps of Sandyston (Property or Site) is contaminated with hazardous substances that were discharged to the land and waters from or around certain Underground Storage Tanks (USTs). The AONOCAPAs further allege that respondents are those certain persons or entities that are strictly liable to remediate the Property pursuant to the Underground Storage of Hazardous Substances Act (UST Act), N.J.S.A. 58:10A-21 and its regulations N.J.A.C. 7:14B, and the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11b and its regulations, N.J.A.C. 7:1E-5.7(a)2ii, as set forth in more detail below.¹

Amer Lee, as the current owner of the Site, responded to the AONOCAPAs and requested administrative hearings on or about September 8, 2013. These matters were transmitted by the NJDEP to the Office of Administrative Law (OAL) on July 9, 2014, for determination as contested cases to be considered together pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matters were assigned to me on July 14, 2014. I convened a case management conference telephonically on August 1, 2014, and again on other dates, during which respondent provided an update on the prior owner

and the third-party responsible party, and his position regarding their lack of responsibility. During those conferences, the Deputy Attorney General for the NJDEP requested leave to file dispositive motions on the issue of strict liability of these respondents for the remediation at the Site. Accordingly, a briefing schedule was agreed upon.

Petitioner NJDEP submitted a Notice of Motion for Summary Decision and Brief with attachments in support under cover of March 13, 2015. Respondent submitted their Brief in opposition and supporting Certification on April 13, 2015. I permitted a brief reply by the NJDEP under cover of April 23, 2015. Accordingly, the motion is now ripe for determination.²

MOTION UNDER CONSIDERATION

NJDEP moves for summary disposition on the AONOCAPAs on the grounds that the facts are not in dispute and that the NJDEP is entitled to an order affirming the penalties assessed as a matter of law. It argues that liability has been established through undisputed facts and is strictly applied pursuant to the relevant environmental statutory schemes. It further argues that the penalties assessed in the AONOCAPA were an appropriate exercise of the NJDEP's discretion and that the respondents must be ordered to comply with the affirmative obligations of the AONOCAPAs.

Respondents oppose the motion, arguing that it was a fuel delivery truck – Hailey Transport/Monmouth Petroleum (Hailey Transport) – that was responsible for the 1997 spill. They further assert factually that the cause of the spill was not a leaking UST but a faulty or disengaged nozzle or negligent driver for Hailey Transport. Those responsible parties and their insurance company – Reliance Insurance – are the parties that should have to remediate the Property. Therefore, neither Hainesville nor Amer Lee personally is a “discharger” under the relevant laws of the State of New Jersey as a matter of law or undisputed facts.

¹ Both AONOCAPAs also reference the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3 and the Site Remediation Reform Act, N.J.S.A. 58: 10C-1 et seq.

STATEMENT OF MATERIAL FACTS

1. Hainesville was formed on or about 1993 as a corporation but had been in business since 1980. Amer Lee is the sole owner of Hainesville. Hainesville remained in business until in or about 2005. [Answers to Interrogatories, #1, attached as Exhibit D to NJDEP Brief]

2. Ameean Lee³ is the owner of the Property on which Hainesville operated a retail gas service station. Although it is also stated that Amer Lee was the owner of the Site according to Sussex County tax records as of November 11, 2009, to the present. [See AONOCAPA ¶¶ 3, 5, attached as Exhibit A to NJDEP Brief]

3. Hainesville is the owner of the USTs on the Site. [UST Facility Certification Questionnaire, attached as Exhibit E to NJDEP Brief]

4. At certain relevant times, Hainesville contracted with Monmouth Petroleum for delivery of super unleaded gasoline to the Property. Monmouth Petroleum contracted with Hailey Transport to make a delivery of gasoline on or about April 22, 1997. [Answers to Requests for Admissions and Interrogatories, attached as Exhibits C and D to NJDEP Brief]

5. On or about April 22, 1997, a spill occurred on the Property when Hailey Transport overfilled a UST on the Property, which caused the filling nozzle to disengage from the filling port, spilling approximately thirty (30) gallons of gasoline on the asphalt and grass surrounding the UST area. It was reported and the NJDEP assigned the incident # 97-04-22-1423-34. [Communications Center Notification Report, attached as Exhibit F to NJDEP Brief]

6. Apparently, Hailey Transport reported the spill to its insurance carrier

² Due to other pressing matters and general caseload considerations, the undersigned did not have the opportunity to enter a determination on these motions earlier.

³ There is no explanation of the relationship, if any, between Ameean Lee and Amer Lee, or as to ambiguity in the ownership history but those facts are not material to the within determination.

which hired S&M Management, Inc., of Milford, Pennsylvania, to prepare a report. MIG Consulting reviewed that report and others at the request of Amer Lee as part of its defense of this litigation issued under cover of April 5, 2015. It was the conclusion of MIG that NJDEP might never have received the S&M Report. [MIG Consulting LLC Letter with Attachments, Exhibit A to Respondents' Brief]

7. S&M, or others acting on Hailey Transport's behalf, conducted only shallow soil sampling and arranged for lab results that might have been significantly impacted by dilution to result in detection levels for BTEX below NJDEP ground water quality standards. [Id.]

8. Apparently, in June 2003, a prospective purchaser of the Property undertook environmental testing (also through MIG Consulting) during the contract's due diligence provisions and found upon conducting ground water sampling that some volatile organic compounds were detected at concentrations exceeding the NJDEP's Ground Water Quality Standards. [MIG Environmental Phase II Investigation Report, attached as Exhibit H to NJDEP Brief]

9. On or about December 3, 2003, Ameean Lee allegedly reported that the USTs were leaking at the Property but that no remediation had been undertaken. The NJDEP assigned the incident # 03-12-03-0931-58. [Report of Incident, attached as Exhibit G to NJDEP Brief]

10. According to MIG in its 2015 report for respondents for these proceedings, its own 2003 Phase II Report for potential purchasers might have been provided by third parties to the NJDEP, resulting in the generation by the NDEP of the 2003 incident report. MIG concluded that there was no new spill but that any ground water impacts reported in 2003 were the direct result of the 1997 Hailey Transport spill and that there was no evidence of any leaking from Hainesville's USTs. [Exhibit A to Respondents' Brief]

11. On or about December 18, 2003, Ameean Lee applied for a Memorandum of Agreement (MOA) with the NJDEP because of suspected UST leakage. [Memorandum of Agreement Application, attached as Exhibit K to NJDEP Brief]

12. The NJDEP approved the application and the MOA on January 28, 2004. Prior thereto, NJDEP had sent Ameean Lee detailing the remedial actions that would be necessary. [Letter of William Patterson, dated December 3, 2004, attached as Exhibit L to NJDEP Brief]

13. Ameean Lee retained PetroScience as an environmental consultant on the MOA. He stated that the application was made in order to secure funding for remediation of the Property from the Underground Storage Tank Finance Act. He confirmed that ground water had been impacted and that soil impacts were suspected. No grant or loan was forthcoming.⁴ [Id.; Certification of Amer Lee, attached to Respondent Brief]

14. Nine (9) years later in January and March 2013, NJDEP communicated with Amer Lee regarding the Site remediation obligations that remained outstanding. On July 10, 2013, the NJDEP conducted a follow-up compliance evaluation.

15. On August 8, 2013, the NJDEP issued the two AONOCAPAs that are the subject of this proceeding. The first AONOCAPA assessed penalties for respondents' failure to comply with the requirements of the Spill Act and the Remediation of Contaminated Sites regulations, N.J.A.C. 7:26C-2.3(a)1 through 9, failure to pay fees and oversight costs, and failure to conduct and submit an initial receptor evaluation in the total amount of \$40,000.

16. The second AONOCAPA assessed penalties for respondents' failure to comply with the requirements of the Underground Storage Tanks regulations, N.J.A.C. 7:14B-1.6, and the Remediation of Contaminated Sites regulations, N.J.A.C. 7:26C-2.3(a)1 through 9, failure to pay fees and oversight costs, and failure to conduct and submit an initial receptor evaluation in the total amount of \$40,000.

⁴ No information was submitted by either party on the result of that grant or loan application but I note that there are several conditions prerequisite to receipt of those funds and several reasons listed as a basis for possible denial. N.J.S.A. 5810A-37.7.

17. Respondent has not conducted the remediation pursuant to N.J.A.C. 7:26C-2.3(a)3.

18. Respondent has not submitted an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.12(c).

ANALYSIS AND CONCLUSIONS OF LAW

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a full evidentiary hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” On a summary decision motion, however, the movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Nevertheless, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Id. at 75. Although the pleadings may raise a factual issue, the question before the judge is whether those facts are “material” to the legal issues to be tried.

It is also clear as a matter of law that liability for a violation of environmental protection statutes like the Spill Compensation and Control Act is imposed not on the basis of negligence but as a matter of strict liability. N.J.S.A. 58:10-23.11g(c). While I can appreciate respondents’ argument to the effect that the common use of the term “responsible” carries with it the connotation of fault, our courts have long held that for “responsible party” liability under the Spill Act to hold, ownership or control over the property at the time of the discharge will suffice. State Dept. of Env’tl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983)(quoting State Dept. of Env’tl. Prot. v. Exxon Corp., 151 N.J. Super. 464, 470-74 (Ch. Div.1977)). Thus, the NJDEP bears the burden only of proving the statutory violation. The landowner’s or operator’s intent to violate or

negligence is not an essential element for these types of causes of action. See State Dept. of Env'tl. Prot. v. Lewis, 215 N.J. Super. 564, 572–76 (App. Div. 1987).

While respondents might have clear evidence that Hailey Transport is the culpable party which should have completed the remediation properly with or without its insurance carrier, the NJDEP does not have a legal obligation to go after that most negligent party. Respondents may have a very viable cause of action for contribution against Hailey Transport and Reliance Insurance but that does not undermine the administrative action here. See Morristown Assocs. v. Grant Oil Co., 220 N.J. 360, 383 (2015)(contribution lawsuits have no statute of limitations consistent with the Spill Act and the cases which cast a “wide net” over those responsible for contamination of lands and waters). It does not undermine the NJDEP’s statutory responsibility to proceed in an administrative action against any responsible party, including the current owner or operator. N.J.S.A. 58:10-23.11f(a)(2)(a), and -23.11g(c)(3).

In the Spill Act AONOCAPA, I **CONCLUDE** that NJDEP has shown on the basis of undisputed and largely admitted material facts that the Property had been environmentally contaminated by a 1997 spill of unleaded gasoline delivered to the Hainesville gas station that has not been properly cleaned up. In the Spill Act AONOCAPA, I also **CONCLUDE** that NJDEP exercised its discretion with respect to the level of penalties to be assessed, yet consistent with the penalty matrix. N.J.A.C. 7:26-5.5(i). Respondent has been an owner of the Property for the entire relevant period with full knowledge of what had transpired in 1997, including a hazardous spill with soil and potential ground water impacts. In this instance, NJDEP was lenient in assessing respondent for only “one day” under each of the potentially continuing and longstanding violations. Such is certainly reasonable under all the circumstances and shall not be adjusted herein.

With respect to the Underground Storage Tank AONOCAPA, I **CONCLUDE** that NJDEP has not shown that there are no genuine issues of material fact. When all inferences are taken in favor of respondents, it becomes clear that there has only been unsupported allegations presented as to whether there were leaking tanks on the

Property, the reporting of which to the agency is clouded by factual doubts and is not supported by any competent direct evidence. I **CONCLUDE** that petitioner has failed as a matter of law and genuine issues of material fact to prove that the Hainesville USTs were leaking and were any primary or contributing cause to the Site contamination. Furthermore, to the extent that different statutory schemes were asserted in these AONOCAPAs, and even if statutory liability had been established in this summary decision motion, I would **CONCLUDE** that the two different AONOCAPAs are largely duplicative and should have been merged together, rather than “splitting hairs” and doubling the penalties assessed.

Accordingly, it is clear as a matter of law and I **CONCLUDE** as a matter of undisputed fact that respondents are liable for the full amount of the penalties assessed in the Spill Act AONOCAPA in the total amount of \$40,000; and for the costs and attendant regulatory obligations of remediating the Property to the statutory standards, without prejudice to any rights on the part of the respondents to seek contributions from other responsible parties in a court of competent jurisdiction.

ORDER

For the reasons set forth above, the motion for summary disposition filed by the petitioner New Jersey Department of Environmental Protection is and the same is hereby **GRANTED IN PART** and **DENIED IN PART**. It is further **ORDERED** that the Spill Act AONOCAPA with a total penalty assessment of \$40,000 shall be **AFFIRMED**. It is further **ORDERED** that respondents are also liable to complete remediation of the Site, make oversight payments, and submit the initial receptor evaluation.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the

Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



November 16, 2015

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

11/16/15

Mailed to Parties:

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