STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WARD CARY, d.b.a. CARY'S SELF SERVE,

Plaintiff,

v

File No. 98-7539-NZ
HON. PHILIP E. RODGERS, JR.

OSCAR W. LARSON COMPANY, a Michigan Corporation,

Defendant.
/

John V. Byl (P35701)
Daniel K. DeWitt (P51756)
Attorneys for Plaintiff

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Attorney for Defendant

DECISION AND ORDER
ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION
AND DEFENDANT'S COUNTER-MOTION FOR SUMMARY DISPOSITION

The Plaintiff filed a motion for partial summary disposition as to the Defendant's liability for negligence, violation of the Michigan Environmental Response Act, and violation of the Michigan Environmental Protection Act, pursuant to MCR 2.116(C)(10). The Defendant filed a timely response and counter motion for summary disposition. The Defendant seeks dismissal of Count II - Breach of Contract and Count III - Breach of Warranty, pursuant to MCR 2.116(C)(7) because those claims are barred by the applicable statute of limitations. The Defendant further seeks judgment as a matter of law on Count IV - Part 201 of NREPA, pursuant to MCR 2.116(C)(10) because there is no genuine issue of material fact. The Plaintiff timely filed a response to the Defendant's counter-motion.

These motions were heard by the Court on Monday, October 18, 1999. The Court, having considered the motions and responses, the briefs, and the arguments of counsel, and otherwise being fully advised in the premises, issues this written Decision and Order. For the reasons set forth

herein, the Plaintiff's motion is granted in all respects. The Defendant's counter-motion is denied as to Counts II and III. The Defendant's counter-motion as to Count IV is also denied.

STANDARD OF REVIEW

MCR 2.116(C)(7)

The standard of review for a (C)(7) motion is set forth in *Moss* v *Pacquing*, 183 Mich App 574, 579; 455 NW2d 339 (1990).

> In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. *Wakefield* v *Hills*, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. *Levinson* v *Sklar*, 181 Mich App 693, 697; 449 NW2d 682 (1989); *Hazelton* v *Lustig*, 164 Mich App 164, 167; 416 NW2d 373 (1987).

MCR 2.116(C)(10)

A motion for summary disposition brought under MCR 2.116(C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. The party opposing an MCR 2.116(C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. *Fulton v Pontiac General Hospital,* 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court Rule requires the party opposing a motion for summary disposition brought pursuant to MCR 2.116(C)(10) to submit documentary evidence to establish the existence of a genuine issue of material fact. The trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). If the opposing party fails to make the requisite showing that a genuine issue of material fact exists, summary disposition is appropriate. As the Michigan Supreme Court said most recently in *Lytle v Malady*, 458 Mich 153, 176; 579 NW2d 906 (1998):

> In determining whether summary disposition is appropriate, courts must consider this evidence in the light most favorable to the nonmoving party, in this case plaintiff, and

> must give that party the benefit of any reasonable doubt. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973). Courts may not make factual findings or weigh the credibility of the evidence presented, which at the summary disposition stage would be in the form of admissions, affidavits, pleadings, depositions, and other material submitted to the court in support of or opposition to the motion. Moreover, summary disposition is only appropriate where the claim or defense would be insupportable at trial because of an incurable deficiency. *Stevens v McLouth Steel Products Corp,* 433 Mich 365, 370; 446 NW2d 95 (1989). In other words, courts should be liberal in finding that a genuine issue of material fact does exist. 389 Mich at 372; 207 NW2d 316.

Therefore, this Court must decide whether the party opposing the motion has established with documentary evidence the existence of a genuine issue of material fact. *D'Ambrosio v McCready*, 225 Mich App 90; 570 NW2d 797 (1997) citing *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996).

I.

The Plaintiff first contends that there is no genuine issue of material fact as to the Defendant's liability for negligence. The Plaintiff relies upon the deposition testimony of the Plaintiff Ward Cary and the Defendant's agent, Robert Fisher, as well as other discovery documents.

The Defendant does not address this contention in its response other than to assert that, "a subcontractor severed an underground pipe running from the new underground storage tank to the dispenser island." (Defendant's motion for summary disposition at p 3 and brief at p 3.)

The Court is convinced that there is no genuine issue of material fact as to the Defendant's liability for negligence. The evidence presented by the Plaintiff, which has not been refuted by the Defendant, establishes that the Defendant was negligent when it installed the underground storage system in that it "installed a portion of the product line in the exact area between the two dispenser islands where the footings for the canopy were to be augured into the ground." According to Mr. Fisher's deposition testimony, the employee who installed the product line knew that a canopy was going to be installed after the new underground storage system was in place, yet he installed the product line precisely where it would be severed by drilling during canopy installation. Further, there can be no reasonable dispute regarding the Defendant's obligation to supervise the canopy

installation. Defendant hired the subcontractor who installed the canopy and authorized the drilling which ultimately severed the misplaced line.

The Plaintiff's motion for summary disposition as to the Defendant's liability for negligence is granted. The issue of damages remains unresolved.

II.

The Plaintiff next contends that there is no genuine issue of material fact as to the Defendant's liability for violation of the Michigan Environmental Response Act ("MERA"), MCL 324.20101, et seq., which is Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101, et seq.

In response, the Defendant asserts once again that it was not an "operator" of the facility such that it can be held liable for the contamination. In this Court's January 15, 1999 Decision and Order regarding the Defendant's earlier motion for summary disposition, this Court found the following facts were undisputed: (1) the Defendant was installing an underground storage tank ("UST") system; (2) its subcontractor was installing a canopy; (3) the Defendant placed the line to the underground tank in the wrong place; and (4) the line was severed when the footings for the canopy were being installed. This Court held:

> . . .[t]he Defendant's authority and control were that of an 'operator.' The work performed by the Defendant and its subcontractor caused the spill and contamination. The Defendant had the requisite legal control over the UST system and the installation of the footings to be responsible for the ensuing contamination. It would stand the Michigan NREPA on its head if the liable contractor and its subcontractor could not be sued because the innocent owner is the only statutory operator !!

The Court refused at that time to dismiss Count IV pursuant to MCR 2.116(C)(8). The Defendant has not presented any evidence or law which would lead this Court to reconsider this decision. There are no disputed material facts.

The Plaintiff's motion for summary disposition as to the Defendant's liability under the MERA is granted. There is no genuine issue of material fact. The Defendant negligently released hundreds of gallons of gasoline into the environment. The Defendant is liable under the MERA for

the cost of any response activity needed to clean up the gasoline spill. The Plaintiff's motion for summary disposition as to the Defendant's liability for violation of the MERA is granted.

III.

By counter-motion, the Defendant contends that, in the event it is determined to be liable for any portion of the contamination under the MERA, it is entitled to contribution from the Plaintiff. Liability under the MREA is joint and several among persons liable under Section 20126. Persons liable under Section 20126 include "the owner or operator of a facility *if* the owner or operator is *responsible for an activity causing a release* or threat of release." MCL 324.20126(1)(a). (Emphasis supplied.)

It is undisputed that the Plaintiff was the "owner" of the Cary Self Serve Station. It is undisputed that the Plaintiff was **not** responsible for the activity by which the gasoline was released. By its counter-motion, however, the Defendant raises a genuine issue of material fact regarding the nature and extent of the alleged pre-existing contamination and of the equity in awarding contribution based upon the alleged behavior of the Defendant subsequent to the spill.

For these reasons, the Defendant's motion for summary disposition for contribution is denied.

IV.

The Plaintiff contends that there is no genuine issue of material fact as to the Defendant's liability under the MEPA. The Defendant argues that the Plaintiff has not presented a prima facie case against the Defendant because the Plaintiff has not presented any evidence which demonstrates that the Defendant's conduct violated the statute.

Section 1701 provides in pertinent part as follows:

> (1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

Section 1703 provides in pertinent part as follows:

> (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.

The Defendant would have this Court interpret the undisputed facts to conclude that the Defendant was not responsible for the gasoline spill. The undisputed facts show, however, that the gasoline line was severed because the Defendant negligently placed the line in the wrong location - a location which was to be augured for the installation of the canopy footings. The subcontractor who installed the canopy would not have severed the line if it had been placed in the proper location. Further, the Defendant hired the subcontractor and authorized the drilling in the offending location. Again, this Court concludes that the undisputed facts show that the Defendant caused the release of hundreds of gallons of gasoline into the environment. The Plaintiff's motion for summary disposition as to the Defendant's liability under the MEPA is granted.

V.

In its counter-motion, the Defendant reargues its earlier motion for summary disposition of Counts II - Breach of Contract and III - Breach of Warranty, pursuant to MCR 2.116(C)(7), claiming these actions are barred by the applicable statute of limitations. The Court has already ruled on these matters and will not reconsider them.

In its response, the Plaintiff requests sanctions pursuant to MCR 2.114(D)(3) for having to respond to these identical arguments for the fourth time.

MCR 2.114(D)(3) directs this Court to impose sanctions whenever an attorney signs a document that is interposed for any improper purpose, such as to cause needless increase in the cost

of litigation. Given that this Court previously denied the Defendant's request for summary disposition on Counts II and III on the basis that these claims are time-barred and previously denied the Defendant's motion for reconsideration and, given that the Michigan Court of Appeals rejected the Defendant's application for leave to appeal, the Court can not imagine any reason for reasserting these claims other than to needlessly increase the cost of this litigation. Certainly the Court has been provided with neither law nor new undisputed facts that warrant any reconsideration of the prior decision.[1] Indeed, the Plaintiff has alleged facts and supported them with documents that may well cause the Court to not only estop the Defendant from asserting any applicable statute of limitations, but also deny the Defendant any award of contribution.

The Plaintiff's request for sanctions is granted.

CONCLUSION

The Defendant was negligent. The Defendant installed the product line to the underground storage system in the wrong location. The Defendant then authorized the drilling which severed the line. As a result, hundreds of gallons of gasoline were released into the environment - contaminating the soil and ground water. The Defendant is liable for the cost to clean up this contamination.

Since there was alleged pre-existing contamination and the nature and extent of that contamination is in dispute, there is a genuine issue of material fact about whether the Plaintiff is liable for any contribution to clean up the site.

The Plaintiff's motion for summary disposition as to the Defendant's liability for negligence, for violation of the MERA, and for violation of the MEPA is granted. The issue of damages remains unresolved.

The Defendant's repetitive arguments in its counter-motion for summary disposition as to Count II and III do not merit reconsideration and are denied. The Defendant's counter-motion for summary disposition as to the Plaintiff's liability for contribution under the MERA is denied.

The Plaintiff's request for sanctions is granted. The Plaintiff shall within 14 days of the date signed below, file with the Court an affidavit of costs, including reasonable attorney fees, incurred

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[1]The Court does not find the Plaintiff's "admissions" within the overall context of his deposition to be of significance or to warrant reconsideration of the Defendant's repetitive motions.

in responding to the Defendant's redundant counter-motion or the request for sanctions shall be deemed waived.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/27/99