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.
/

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DECISION AND ORDER
ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

The Defendant filed a Motion for Summary Disposition. The Plaintiff filed a timely response. The Defendant filed a reply to the Plaintiff's response. The motion was heard on Monday, November 9, 1998. The Plaintiff objected to "new" issues raised by the Defendant's reply. The Court gave the parties additional time to brief these issues. Both parties having filed additional briefs and the Court having considered the motion, response, reply, oral arguments and additional briefs and otherwise being fully advised in the premises, now renders its Decision and Order.

By its motion for summary disposition, the Defendant argues that Counts I - Negligence, II - Breach of Contract, and III - Breach of Warranty are barred by the applicable statutes of limitations. The Defendant also argues that the Plaintiff lacks standing to bring Counts II and III for breach of contract and breach of warranty because it was not a party to the contract between the Defendant and Bay Oil for the installation of the canopy and that it was during the performance of this contract that the gasoline pipeline was severed. Finally, the Defendant argues that the Plaintiff cannot bring an action under the Michigan Natural Resources and Environmental Protection Act ("NREPA") because

the Plaintiff itself is a responsible party, the Defendant was not an "operator" within the meaning of the statute, there has not been a successful cost recovery action initiated by the State, and the statute does not provide a remedy for past harm.

The pertinent undisputed facts in this case are these. The Plaintiff, Ward Cary d/b/a Cary's Self Serve ("Cary"), contracted with the Defendant, Oscar W. Larson ("Larson"), for the purchase and installation of an underground storage tank ("UST") system and a new canopy at Cary's Self Serve gasoline station in Central Lake. The Defendant subcontracted with Bay Oil for the installation of the canopy. The parties' contract consists of "a proposal for the installation of . . . equipment. . .," a schematic of the proposed location of the underground storage tanks, and an invoice.

On or about August 11, 1992, during the installation of the UST system, the Defendant Larson placed the gasoline line in the wrong location. While Bay Oil was excavating for the footings of the canopy, the misplaced gasoline line was severed and gasoline spilled, contaminating the site.

Initially, the Defendant's legal counsel assisted the Plaintiff and Defendant in obtaining State moneys to fund the cleanup. In 1995, the State fund became insolvent. On or about June 23, 1998, the Plaintiff was notified by the Michigan Department of Environmental Quality ("MDEQ") that the MDEQ was looking to the Plaintiff to complete the remediation and that the Plaintiff may be subject to fines and penalties.

By this action, the Plaintiff seeks to recover the $40,000.00 it paid the Defendant for the UST system and canopy and for past remediation costs it has incurred. The Plaintiff also seeks a declaration that the Defendant is liable for future remediation costs.

Count I of the Plaintiff's Complaint states a claim against the Defendant for negligent performance of the contract to supply and install the UST system and canopy. The Defendant contends that this negligence claim is time-barred because it is governed by the three-year statute of limitations for actions for injury to persons or property pursuant to MCL 600.5805 and it was almost six years from the date of the occurrence until this action was filed. The Plaintiff counters that the negligence count is not time-barred because it did not accrue until the Plaintiff discovered its damages when the MDEQ notified it by letter dated June 23, 1998 that it was looking to the Plaintiff to complete the clean up and that the Plaintiff may be liable for fines and penalties.

Count II alleges that the Defendant breached its contract with the Plaintiff "to install the underground gasoline storage tanks at Cary's Self Serve in a safe, prudent and workmanlike manner." Count III alleges that the Defendant expressly and impliedly warranted "the quality of its service would be good and workmanlike." The Defendant asserts that they are also governed by the three-year statute of limitations for "actions to recover damages for injuries to persons and property" (MCLA 600.5805; MSA 27A.5805) because the contract provisions and warranties arose by implication of law, not from express provisions of the parties' agreement, and the Plaintiff is seeking to recover for "damages to property." The Defendant alternatively asserts that these Counts are time-barred because they are governed by the four-year statute of limitations under Article 2 of the Uniform Commercial Code ("UCC") governing the sale of goods. The Plaintiff counters that these claims are governed by the six-year statute of limitations for "actions to recover damages or sums due for breach of contract (MCLA 600.5807; MSA 27A.5807) and that the UCC is inapplicable because its contract with the Defendant was for services and not goods.

The Michigan Supreme Court in *State Mutual Cyclone Ins Co v O&A Electric Coop,* 381 Mich 318, 325; 161 NW2d 573 (1968) stated:

> . . . the legislature [when enacting MCL 600.5805] expressed approval of this Court's decision in *Baatz* to the effect that it makes no difference what form of action the plaintiff institutes seeking recovery for damages to property or person, but in all cases such action comes within the 3-year limitation rule.

See also, *Freis v Holland Hitch Co,* 12 Mich App 178, 183-184; 162 NW2d 672 (1968) wherein the Court of Appeals enumerated the three governing criteria: (1) allegation of an express contract. In the absence of an express contract, an action for injury to person or property must be brought within three years. (2) the nature of the injury. All actions to recover damages for injuries to persons or property must be brought within three years. (3) the substance of the pleadings. Look to the real nature of the wrong on which the suit is based. If the wrong arose by virtue of some implied agreement between the parties, unless that wrong constitutes a breach of some particular express provision of that agreement, actions for injury to person or property must be brought within three years.

Thus, at first glance it would appear that the three-year statute of limitations applies to the Plaintiff's negligence, breach of contract and breach of warranty claims because there was no express contract between the parties. The three-year statute of limitations only applies, however, **if** the

Plaintiff is seeking to recover for damage to its property. By Counts I, II and III, the Plaintiff seeks to recover the amount paid for the work the Defendant performed pursuant to the contract to install the UST system and canopy and for past as well as future response costs. The Plaintiff is **not** seeking to recover damages for injury to the property, i.e., diminution in value.

The applicable statute of limitations for an action involving negligent performance of a contract, whether express or implied, where the resulting injuries are not to person or property, but rather are financial only, is the six-year statute of limitations pursuant to MCL 600.5807; MSA 27A.5807. See, *National Sand , Inc v Nagel Constr, Inc,* 182 Mich App 327; 451 NW2d 618 (1990), cited with approval in *Local 1064 v Ernst & Young,* 449 Mich 322; 535 NW2D 187 (1995); *Borman's, Inc v Lake State Development Co,* 60 Mich App 175; 230 NW2d 792 (1975); *Tel-Twelve Shopping Center v Sterling Garrett Construction Co,* 34 Mich App 434, 191 NW2d 484 (1971); and *Schenburn v Lehner Assoc, Inc,* 22 Mich App 534; 177 NW2d 699 (1970).

In *Tel-Twelve Shopping Center v Sterling Garrett Construction Co,* 34 Mich App 434; 191 NW2d 484 (1971), the Court of Appeals was faced with the issue of whether a suit for breach of labor and materials contract and subrogation was barred by the three-year statute. In *Tel-Twelve*, the plaintiff and defendant entered into an agreement whereby for a certain sum of money the defendant would furnish labor and materials incident to and necessary for grading and utilities work for the plaintiff. An adjacent land owner sued Tel-Twelve seeking reimbursement for the damages caused by the alleged negligence of the defendant as agent of the plaintiff. This action was resolved by settlement. Thereafter, Tel-Twelve sued the construction company on breach of contract and negligence theories. The complaint alleged certain acts of negligence of defendant in performing the contract with plaintiff, for which plaintiff paid damages to the adjacent land owner and was subrogated to the rights of the adjacent land owner as a result of the consent judgment entered in the earlier litigation.

The defendant asserted that the plaintiff's action was barred by the three-year statute because the complaint sought reimbursement exclusively for damages to property. After examining the pleadings, the Court found that the plaintiff's claim was not based on actual damage to his property, but that the plaintiff sought damages for injuries to his financial expectations. Thus, the breach of contract count was controlled by the six-year, rather than three-year, statute of limitations. The subrogation count, however, was barred by the three-year statute because that claim had accrued at

the time the adjacent land owner sued this plaintiff and more than three years had run since that time. The reason the three-year statute applied was because as subrogee, Tel-Twelve, had only those rights the adjacent land owner would have had and the adjacent land owner's cause of action was for actual damage to his property so that the subrogation action would be controlled by the three-year statute just as the underlying tort would be controlled by the three-year statute.

In reaching this result, the Court relied on the case of *Schenburn v Lehner Associates, Inc,* 22 Mich App 534, 177 NW2d 699 (1970), wherein the plaintiff brought an action alleging that defendant negligently performed a survey of plaintiff's property such that the survey was inaccurate. The plaintiff was subsequently sued and claimed that the judgment against him was a result of defendant's negligence. He sought to recover legal fees incurred in defending the suit, plus loss of time from work, damage to his reputation, loss of friends, anxiety, and damage to his career. The Court in *Schenburn* applied the six-year statute of limitations and stated: "plaintiff's claim was not based on actual damage to his property or physical injury to his person, but that the plaintiff sought damages for injury to his financial expectations" citing *State Mutual Cyclone Ins Co v O&A Electric Coop,* 381 Mich 318, 161 NW2d 573 (1968) and *Freis v Holland Hitch Co*, 12 Mich App 178, 162 NW2d 672 (1968).

The case at hand is unlike the cases in which the Courts have found that the three-year statute applies. For example, in *Nelson v Michigan Bean Co,* 22 Mich App 540; 177 NW2d 655 (1970), the defendant sold the plaintiffs a new system for raising hogs which caused the death of plaintiffs' hogs and loss of their business. The three-year statute was held to apply because "injury for which recovery was sought consisted primarily of property damage." In *Smith v Gilles,* 28 Mich App 166; 184 NW2d 271 (1970) which was an action against the driver and his insurer for damages arising out of an automobile accident, the court held that "underlying damages for which recovery was sought were clearly within the realm of personal injuries and damage to property and were not of a contractual nature, so that the wrong lay essentially in tort and was rightfully barred by the three-year statute." In *Harrington v Nelson,* 32 Mich App 347; 188 NW2d 679 (1971) which was a suit to recover for injury to property, the court held that where plaintiffs alleged in one count that the defendants entered their land and converted dirt and gravel to their own use and in a second count an implied contract, "both the contract and the tort action were barred" by the three-year statute.

In summary, when a plaintiff seeks to recover for damages to property, unless the defendant has breached an express contractual provision, the three-year statute of limitations applies. In the instant case, the Defendant did not breach an express contractual provision so the three-year statute will apply, but only if this is an action to recover for damages to property. The Plaintiff is not seeking to recover for damages to its property, i.e., diminution in the value of the property. Instead, the Plaintiff is seeking to recover the amount paid to the Defendant pursuant to the contract and the past and future recovery costs that it has or will become obligated to pay because of the Defendant's negligence. Thus, the MCL 600.5805 three-year statute does not apply, but rather, the MCL 600.5807 six-year statute of limitations applies. The Defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) is denied.

The Defendant's alternative argument is that the contract between the Plaintiff and the Defendant was a contract for the sale of goods, namely the UST system, and is governed by Article 2 of the Uniform Commercial Code ("UCC") which contains a four-year statute of limitations. Additionally, the Defendant argues that the "economic loss doctrine" applicable in UCC cases bars the Plaintiff's tort claims. See, *Neibarger v Universal Cooperatives, Inc,* 439 Mich 512, 520-521; 486 NW2d 612 (1992) The Plaintiff maintains that the contract was one for services, namely the installation of the UST system and canopy, and is not governed by the UCC, but rather is governed by the six-year period of limitation of MCL 600.5807; MSA 27A.5807.

The contract in the instant case consisted of "a proposal for the installation of . . . equipment," a schematic showing the UST system, and an invoice. The contract was for the sale of goods and services.

When deciding whether the UCC applies to a contract for the sale of goods and services, Michigan courts apply the predominant factor test. *McFadden v Imus,* 192 Mich App 629, 632; 481 NW2d 812 (1992). The issue was well-stated in *Neibarger, supra* at 536, 486 NW2d 612:

> It is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture. If a purchaser were able to avoid the UCC by pleading negligent execution of one of the services required to produce the product, Article 2 could be easily and effectively negated. A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a

service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of the service.

The statute of limitations was raised as a defense by the Defendant's MCR 2.116(C)(7) motion. The Court must take the well-pleaded allegations in the pleadings and the factual support submitted by the non-moving party as true, and summary disposition is proper only if the moving party is then shown to be entitled to judgment as a matter of law. *Home Ins Co v Detroit Fire Extinguisher Co, Inc,* 212 Mich App 522, 527; 538 NW2d 424 (1995).

Under this standard, this Court is convinced that there exists a material issue of fact regarding whether the contract was for the sale of goods or whether the thrust of the contract was to provide a service. Therefore, this portion of the Defendant's motion must be denied.

Regardless of which statute of limitations applies, there is a related question regarding any compelling equities which might work to enlarge the limitations period. In other words, is the Defendant estopped from setting up the laches-limitations defense?

The Defendant initially assisted the Plaintiff in seeking and obtaining funding from the State to remedy the contamination. The Defendant's attorney represented both of the parties. Only after that funding source became insolvent in 1995 did the Defendant refuse to work cooperatively with the Plaintiff. This was more than three years after the contamination occurred. Until then, there was no reason for the Plaintiff to bring an action against the Defendant. The Defendant's initial cooperative conduct induced the Plaintiff to forbear from bringing suit. Thus, the Defendant is precluded from arguing a laches-limitations defense. See, *Lothian v Detroit,* 414 Mich 160; 324 NW2d 9 (1982). It is the opinion of this Court that these facts and circumstances estop the Defendant from asserting a laches-limitations defense.

The Defendant also moved for summary disposition on the grounds that the Plaintiff does not have standing to maintain Counts II and III for breach of contract and warranty because the Plaintiff was not a party to the contract between the Defendant and Bay Oil for the installation of the canopy. It is the Defendant's contention that it was during the excavation by Bay Oil for the footings of the canopy that the gasoline pipeline was severed causing the spill and contamination. The Plaintiff, on the other hand, alleges that the Defendant's negligence caused the spill and contamination because the pipeline was put in the wrong location to begin with and the Defendant failed to adequately supervise its subcontractor, Bay Oil, during the installation of the canopy.

> Standing is a legal term denoting the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. *Detroit Fire Fighters Ass'n v Detroit,* 449 Mich 629, 633; 643, 651, 537 NW2d 436 (1995). To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected and allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy sought to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. *Wortelboer v Benzie Co.*, 212 Mich App 208, 214, 537 NW2d 603 (1995); *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

Donaldson v Alcona Co Bd of Co Road Comm'rs, 219 Mich App 718, 722; 558 NW2d 232 (1997).

If the Defendant's negligent performance of its contract with the Plaintiff caused the contamination, clearly the Plaintiff has standing. If the Defendant's subcontractor caused the contamination because of its negligent performance of its contract with the Defendant, the Plaintiff has standing as a third-party beneficiary of that contract.

Rights of third party beneficiaries are governed by MCL 600.1405, which states in pertinent part:

> Sec. 1405. Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Plaintiff was a third-party beneficiary to the Defendant's contract with because Bay Oil undertook to do something directly to or for the Plaintiff such that the Plaintiff can be properly considered a party for whose benefit the promise was made. *Greenlees v Owen Ames Kimball Co,* 340 Mich 670; 66 NW2d 227 (1954) and *Reith-Riley Const Co, Inc v Department of Transporta.,* 136 Mich App 425; 357 NW2d 62 (1984).

Since the Plaintiff was a third-party beneficiary of the contract between the Defendant and Bay Oil to install a new canopy at the Plaintiff's self-serve gasoline station, the Plaintiff has standing to bring the breach of contract and breach of warranty claims. Whether the negligence was that of the Defendant or Bay Oil or some combination, Plaintiff may maintain this cause of action.

By Counts IV and V, the Plaintiff seeks to recover remediation activity costs that have or will be incurred in cleaning up the Cary's Self Serve site. The Defendant contends that, as a responsible

party itself, the Plaintiff lacks standing to maintain such an action, that the action is premature because the State has not brought a successful cost recovery action against the Plaintiff, that the statute does not provide a remedy for past pollution, and that it was not an "operator" within the meaning of the statute.

Nothing in the statute precludes the Plaintiff from bringing this action against the Defendant. See, *Trout Unltd v City of White Cloud*, 195 Mich App 343; 489 NW2d 188 (1995). Under the standard set forth above for determining standing, the Plaintiff clearly has standing to pursue these claims. Further, the plain language of the statute does not require a prior successful cost recovery action by the State against the Plaintiff, nor does it apply only to the prevention of future harm.

The one remaining question is whether the Defendant was an "operator" within the meaning of Part 201 of the Michigan Resources Environmental Protection Act ("NREPA") and is, therefore, a responsible party from whom the Plaintiff can seek recovery cost contribution. The Defendant contends that it was not an "operator" and cites *Farm Bureau v Porter & Heckman,* 220 Mich App 627 (1996) for the proposition that "contractors, such as Defendant, are not 'operators' under Part 201 of the NREPA."

The Michigan NREPA is similar in intent to, and patterned after, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). Both acts provide for the identification of environmental contamination and for response activity to remediate it. Both acts impose strict liability for cleanup on persons who fall within one of the enumerated categories of potentially responsible parties. *Port Huron v Amoco Oil Co,* 229 Mich App 616, 622; 583 NW2d 215 (1998).

To establish a prima facie case under the CERCLA, a plaintiff must show that (1) a release of hazardous substances has occurred, (2) at a facility, (3) causing a plaintiff to incur response costs, and (4) the defendant is a responsible party. *CPC Int'l, Inc v Aerojet-General Corp,* 777 F Supp 549, 570 (WD Mich, 1991), aff'd in part and rev'd in part on other grounds sub nom *United States v Cordova Chemical Co of MI, 59 F3d 584 (CA 6, 1995).* See also, *Port Huron, supra* at 623, n. 5.

There is no dispute in the instant case that (1) a release of hazardous substances has occurred, (2) at a facility, (3) causing plaintiff to incur response costs. What is in dispute is whether the Defendant is a responsible party.

In order to be a responsible party, the Defendant must fall within one of the enumerated categories. The Michigan NREPA, MCL 324.20101 *et seq;* MSA 13A.20101 *et seq*, provides in pertinent part that, "if there is a release or threatened release from a facility that causes the incurrence of response activity costs, the following persons shall be liable under this section: (1) The owner or operator of the facility. . . ."

It is undisputed that the Defendant did not own or have any ownership or possessory interest in the facility. The question therefore is whether the Defendant was an "operator of the facility."

The Defendant contends that it was not an "operator" and cites *Farm Bureau v Porter & Heckman, supra,* for the proposition that "contractors, such as Defendant, are not 'operators' under Part 201 of NREPA." The Defendant has misconstrued the *Farm Bureau* case by giving it a much broader interpretation than is warranted. In that case, the defendant was a plumbing and heating repair business that serviced the plaintiff's furnace. The plaintiff's furnace developed a leak such that fuel oil leaked onto the ground through a pin-size hole resulting in soil and groundwater contamination. The plaintiff alleged that the defendant should have discovered the leak during one of its service calls and taken action to avert the contamination. One of the issues in that case was whether the defendant was an "operator."

The Court found that "operator" is defined in the statute as "a person that is in control of or responsible for the operation of a facility. Operator does not include [six exceptions are listed, none of which is at issue here]." *Id.* at 641. The Court turned to federal law interpreting the CERCLA to determine whether the defendant was an operator. The Court found that "a defendant operates a 'facility' only if it has authority to control the area where the hazardous substances were located." *Id.* at 645. The Court of Appeals reviewed the case of *Kaiser Aluminum & Chemical Corp v Catellus Development Corp,* 976 F2d 1338 (CA9, 1992) in which the federal court discussed the potential operator liability of contractors and reiterated the "well-settled rule that 'operator' liability under [CERCLA] only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Id.* at 646. The Court of Appeals concluded that the federal courts have required that the defendant have authority to control the operation or process by which the contamination occurs. The defendants in several federal cases were held liable where they "actually performed the operations that caused the contamination." *Id.* at 648.

In *Farm Bureau, supra*, the Court found that "the defendant's authority and control were not that of an operator, but of a service company called to inspect and repair in response to a specific complaint . . . .there is no evidence that any operation of the system by defendant caused the leak and contamination or that defendant had control over the system as the oil was leaking and causing the contamination." *Id.* at 649. Thus, the Court held that the defendant in *Farm Bureau* was not an "operator."

Obviously the facts in the instant case are quite different. Accepting all of the well-pleaded allegations as true, the Defendant was installing an underground storage tank ("UST") system and its subcontractor was installing a canopy. The Defendant placed the line to the underground tank in the wrong place and it was severed when the footings for the canopy were being installed. The 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 subcontractee could not be sued because the innocent owner is the only statutory operator!! Count IV, then, states a valid cause of action against the Defendant. The Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) must be denied.

IT IS ORDERED THAT the Defendant's Motion for Summary Disposition be and hereby is denied.

Honorable Philip E. Rodgers, Jr.
Circuit Court Judge

Dated: 1/15/99