UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOOTH OIL SITE ADMINISTRATIVE GROUP,

Plaintiff,

-vs-

GEORGE T. BOOTH, JR.
GEORGE T. BOOTH, III
LONSDALE SLATER SCHOFIELD
JOSEPH CHALHOUB
AHSEN YELKIN
BOOTH OIL COMPANY, INC.
SCHOFIELD OIL LIMITED
118958 CANADA LIMITED
SPEEDY OIL SERVICES, INC.
BRESLUBE INDUSTRIES LIMITED
EC HOLDINGS CORP.
KATHERINE ST. PROPERTIES, INC.
now known as Eventures Ltd.
SAFETY-KLEEN CORP.

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST BOOTH OIL COMPANY, INC.

Case No. 98-CV-0696A(S)

I. Booth Oil Company, Inc. Has Not Cooperated With NYSDEC or BOSAG in the Remediation of the Booth Oil Robinson Street Site

While Booth Oil claims it has cooperated with the New York State Department of Environmental Conservation (NYSDEC), such "cooperation" did not include participation in remediation activities that have cost BOSAG more than $5.6 million to date. While it performed certain activities associated with site closure, which involve removing containerized substances from the site to prevent further release, it did not meaningfully participate in remediation activities, which address that which has already been released to the environment. BOSAG has performed all remediation activities at the site with no meaningful assistance from Booth Oil.

Even Booth Oil's efforts at closure failed to remove several underground storage tanks (USTs) which were discovered releasing petroleum in the form of diesel fuel into the environment in March 2004. Responsive measures were performed by BOSAG at a residence adjacent to the site at 88 Robinson Street at a cost to BOSAG of $170,232.05 to date.

II. Booth Oil's Share of Liability at the Site Significantly Exceeds 25% of Site Costs or $1.475 Million

Courts have allocated liability between owner-operators and generators in a number of reported cases. Gould, Inc. v. A & M Battery & Tire Serv., 987 F. Supp. 353 (M.D. Pa. 1997) (Plaintiff purchaser of battery processing facility operated from 1961-1980 was assigned a 75% share of liability while generators of batteries received a 25% share); Advance Circuits, Inc. v. Carriere Props., 1988 WL 10476, *2 (Minn. Ct. App. Feb. 16, 1988) (Court affirmed an order assigning 70% liability for response costs to recyclers of industrial by-products and 30% to generators). In Browning-Ferris, the court allocated 100% of emergency removal action and interim remedial measures costs to owners and three operators who operated a landfill site from 1971-1988. These owners and operators were also allocated 50% of the remainder of cleanup costs (5% to owners and 45% to operators). The operators received a 45% share based on their extensive involvement in site operations, responsibility for ensuring regulatory compliance, and control over the volume and nature of waste contributed to the site. Browning-Ferris Indus. of Ill. v. Ter Maat, 13 F. Supp. 2d 756, 781-82 (N.D. Ill. 1998). In Bethlehem Iron Works, the court allocated 65% of response costs to plaintiffs/former owners where they had an opportunity to conduct a proper inspection of a steel manufacturing facility before purchasing it, had significant experience in the steel business, and then conducted steel making operations on the property for almost 4 years. Bethlehem Iron Works v. Lewis Indus., 1996 U.S. Dist. LEXIS

14446, *210-15 (E.D. Pa. 1996).

In Pneumo Abex, the court assigned a 50% share to generators and a 50% share to owner/operators of a foundry which operated for 51 years from 1927-1978. Pneumo Abex v. Bessemer & Lake Erie R.R., 936 F. Supp. 1250, 1273 (E.D. Va. 1996). The court explains why the generator's share is as high as the owner/operator's share, noting that these generators had a "greater involvement in the treatment and/or disposal of the hazardous substances than many other generators of hazardous substances," and that the generators shipped material in their own cars and had company representatives visit the site on a regular basis to inspect its operations. Id. at 1269. The court also noted that these generators had refused to cooperate with the government. Id. at 1270-71.

While any equitable factor can be considered in the equitable allocation of site costs, including the bankruptcy of a party, it is difficult to understand the rationale for reducing the Booth Oil share based on its bankruptcy. The effect of the bankruptcy on BOSAG's claim was to limit BOSAG's recovery to the amount of the Contingency Fund provided for in the Liquidating Plan. That is, Booth Oil's liability cannot exceed the amount in the Contingency Fund. Booth Oil claims it has approximately $450,000 in assets. If, as Booth Oil claims, it has only $450,000 to place in the Contingency Fund and it has not diverted amounts from the Contingency Fund, it cannot be required to pay more than $450,000 on the BOSAG claim. In the event of a finding that Booth Oil is liable for all the costs associated with the site, the amount of BOSAG's recovery would remain limited to the amount of the Contingency Fund. The Bankruptcy of Booth Oil stands as an obstacle to a recovery by BOSAG from Booth Oil. Booth Oil fails to articulate why its bankruptcy should lead to a further reduction of its equitable share.

The (1) improper "loans" made to EC Holdings, (2) improper payments made to Katherine Street Properties, Inc. all totaling at least $750,000, and (3) the $500,000 placed in the Contingency Fund on December 18, 1992, are difficult to reconcile with Booth Oil's claims that it had no funds to contribute to the cleanup of the site. Instead of providing an explanation of these transfers and supporting the allegation that Booth Oil's bankruptcy prevented its participation in efforts related to remediation, Booth Oil offers only a general denial that it had significant profits. These issues can and should be considered by the Court in the ultimate determination of Booth Oil's liability at the site. At this stage, even in the absence of the many aggravating factors, and even accepting for the sake of argument the alleged mitigation represented by Booth Oil's bankruptcy, the undisputed evidence would not cause Booth Oil's share of the site to be anywhere near as low as 25%. Booth Oil handled all of the used oil (approximately 100 million gallons) in such a way as to cause the contamination at the site. There is no evidence in the record indicating that any member of BOSAG released oil at the site. The alleged liability of the members of BOSAG under CERCLA is based not on conduct causing contamination, but on status giving rise to liability. Apart from Conrail, there is no allegation that any member of BOSAG is liable under the Navigation Law. Conrail's alleged liability under the Navigation Law is based not on conduct giving rise to contamination, but on its ownership of a portion of the site allegedly leased to Booth Oil. To the extent that Conrail's alleged liability is associated with any alleged failure to intervene and prevent its lessee from contaminating its property, that cannot be raised as a defense to indemnity by the lessee which caused the contamination, Booth Oil.

Setting all of the aggravating circumstances arguments aside, there is simply no rational

basis for a finding that Booth Oil is liable in contribution under CERCLA and the Navigation Law for less than 25% of site costs. Each case should be analyzed individually in light of relevant equitable factors. The equitable factors involved in this case weigh overwhelmingly in favor of an interim determination on Booth Oil's equitable share, both because there is no genuine question of fact on this issue and because it will enable the Court to reach the questions related to violations of the Liquidating Plan that will ultimately determine Booth Oil's true contribution to the cleanup of the site. A finding that Booth Oil is liable for 25% of site costs will only entitle BOSAG to participate in the distribution of the $450,000, or approximately 7% of site costs, the current Booth oil assets. The remaining 18%, or $1.025 million, is available to BOSAG only if the Court finds that amounts were diverted from the Contingency Fund. The circumstances of this case weigh in favor of the summary finding urged by Plaintiff.

III. The Record Supports Summary Judgment on the Indemnification Cause of Action under the Navigation Law

A "faultless landowner," though jointly and severally liable under the Navigation Law to a non-discharger such as the state, is entitled to indemnification from a person who has actually released the petroleum. N.Y. Nav. Law § 181(5) (Consol. 2004); White v. Long, 85 N.Y.2d 564, 568 (1995) (holding that Navigation Law § 181(5) allows a faultless landowner to seek contribution from the actual discharger, even though the landowner itself is liable as a discharger under § 181(1)). Booth Oil provides no competent evidence that Conrail discharged oil. Booth Oil cannot rely on conclusory allegations, speculation, and conjecture giving rise to the metaphysical possibility that Conrail actually discharged oil to defeat this motion for summary judgment, but must actually present proof sufficient to form a rational basis for a finding of an actual discharge. See 9/29/04 Brown Affidavit at ¶ 20 ("Conrail may have stored oil on its

property"); Niagara Mohawk v. Consolidated Rail Corp., 291 F. Supp. 2d 105, 139 (N.D.N.Y. 2003) (holding that a party is entitled to summary judgment dismissing a discharge claim if no evidence of a release or threatened release of oil is shown); see also Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990) ("Conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,' and more than 'some metaphysical doubt as to the material facts'"). In the absence of competent proof that Conrail released oil at the site, Booth Oil Site Administrative Group (BOSAG) is entitled to indemnification under Section 181(5) of the Navigation Law.

IV. Transfers of $450,000 to EC Holdings Corp., of $300,000 to Katherine Street Properties, Inc., and of $275,000 to George T. Booth III Violated the Liquidating Plan and the Trust Established Therein as a Matter of Law

A. Booth Oil Had Significant Profits Totaling at Least $2.9 Million Between 1989 and 1991

Plaintiff did "quantify what 'significant' is" by referencing in its motion profits between 1989 and 1991 of approximately $2.9 million. See 9/29/04 Booth Oil Memo of Law at 6. Apart from indicating that it did not earn "significant profits," Booth Oil does not venture an estimate as to the amount of profits it did earn or the amount of profits that are properly characterized as surplus.

B. Booth Oil Was Required to Preserve Profits For the Benefit of the Contingency Fund Beneficiaries

While "BOCI was not required to preserve all of its profits for the benefit of its environmental creditors," it was required to preserve all of its surplus in the Contingency Fund for the benefit of certain creditors. While the definitions of "surplus" and "profit" are not necessarily co-extensive, there is no evidence in the record to indicate that the profits earned by

Booth Oil were not surplus. Booth Oil concedes that it placed $500,000 in the Contingency Fund on December 18, 1992. This fact is at least difficult to reconcile with its contention that it did not earn significant profits.

C. Pre-November 5, 1992, Payments Are Not Barred by the Applicable Statute of Limitations as a Matter of Law

Booth Oil cites this Court's Decision and Order dated November 25, 2003, for the proposition that Plaintiff's enforcement of the Liquidating Plan cause of action is barred by the statute of limitations. 9/29/04 Booth Oil Memo of Law at 8. Booth Oil does not cite to that portion of the Court's decision related to the enforcement of the Liquidating Plan cause of action (see Decision and Order at 22-24), but to those portions of the decision related to the state law accounting and fraudulent conveyance causes of action (see Decision and Order at 26, 28). 9/29/04 Booth Oil Memo of Law at 8.

The Enforcement of the Liquidating Plan cause of action is a federal cause of action. In re Hillard Dev. Corp., 238 B.R. 857, 875-76 (Bankr. S.D. Fla. 1999); see also Plaintiff's Memo of Law dated September 30, 2004 at 28-29. The accrual of a federal cause of action occurs upon discovery. Id. Such a cause of action should not begin to run until the fiduciary obligation is repudiated or otherwise ended. Golden Pacific Bancorp v. Fed. Deposit Ins. Corp., 273 F.3d 509, 518-19 (2d Cir. 2001); see also Plaintiff's Memo of Law dated September 30, 2004 at 26. In light of the foregoing and consistent with the arguments set forth in Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss and/or for Summary Judgment dated September 30, 2004 at 26-29, Plaintiff's cause of action for enforcement of the Liquidating Plan is timely with respect to the two $150,000 transfers from Booth Oil to EC Holdings Corp. that preceded November 5, 1992.

D. Post-November 5, 1992 Payments Were Improper Distributions of Surplus and Were Payments to Equity Security Holders as a Matter of Law

Booth Oil's defense of the transfers to EC Holdings Corp., Katherine Street Properties, Inc. and George T. Booth III is based on two conclusory statements:

> The payments . . . did not violate the terms of the Liquidating Plan of Reorganization confirmed by the United States Bankruptcy Court because they were not made to equity shareholders as stockholders. Money paid to any shareholders was not diverted from the contingency fund.

9/29/04 Booth Oil Memo of Law at 8. Booth Oil makes no attempt to explain how a bankrupt corporation in liquidation, which is required to place surplus in a contingency fund, can "loan" $450,000 to EC Holdings or to describe why Katherine Street Properties, Inc. was paid $300,000. Under Booth Oil's formulation, Booth Oil could pay its shareholders as much as it wanted so long as those payments were not characterized as payment to shareholders as stockholders.

The proper reading of the Liquidating Plan would require all surplus to be placed in the Contingency Fund. While the definition of surplus and its relation to profits can be debated, cash that is not necessary for operations is difficult to describe as anything other than surplus. When that cash is distributed as a loan to a recently established corporation in exchange for a demand note on which no payment to Booth Oil is ever made, that "loan" requires at least an explanation. The existence of such cash is accompanied by a duty to place it in the Contingency Fund. Booth Oil had no right to make a transfer of those funds to any other entity where that transfer was not necessary to operations. These amounts were not Booth Oil's to transfer. The recipient of the transfer is important in the first instance only because it provides further evidence that the transfer was not necessary to the ordinary operation of the business and can

only be described as a transfer of surplus. When the transfer is beneficial to a shareholder, such as George T. Booth III, the transfer violates a separate provision of the Liquidating Plan (from that establishing the Contingency Fund) which prevents distributions to equity security holders.

These transfers violate both the provisions establishing the Contingency Fund and the provision prohibiting payments to equity security holders. Booth Oil's failure to articulate a reasonable basis for a finding that the amounts (1) were not surplus and therefore were not required to be placed in the fund and (2) did not constitute payments to equity security holders, leads to a finding that these payments violated the Liquidating Plan as a matter of law.

Booth Oil indicates that the environmental creditors were not the only Contingency Fund beneficiaries. Plaintiff acknowledges that the Pension Benefit Guarantee Corp. and certain taxing authorities were also potential Contingency Fund beneficiaries. Booth Oil offers no explanation of what amounts were paid from the fund and what claims against the fund remain. While Plaintiff may not be entitled to specific dollar amounts to the extent there are current claims with the same or superior priority, it is entitled to participate in the distribution of these amounts consistent with the Liquidating Plan and rules governing such distributions. To the extent that amounts should have been placed in the Contingency Fund, BOSAG has an interest in those amounts being placed in the Contingency Fund as well as an interest in the distribution of those amounts to BOSAG based on its claim and consistent with the existence or absence of any competing claims.

BOSAG believes that (1) all claims of taxing authorities have been resolved, (2) the only pending environmental claim is the subject of this action, and (3) the Pension Benefit Guarantee Corp. claim is subject to liquidating distribution principles such as equitable subordination. The

beneficiaries of a payment to the Pension Benefit Guarantee Corp. are the officers and directors of Booth Oil since they are personally liable for the underfunding of the pension. It is not clear that under the circumstances the Pension Benefit Guarantee Corp. claim would not be subordinate to the BOSAG claim. On this motion BOSAG seeks enforcement of the Liquidating Plan bringing the amounts described above into the Contingency Fund and ordering that they be distributed consistent with the terms of the Plan. Whether or not BOSAG "would have been the recipient" of specific amounts is not the question. The question is whether it will be the recipient of these amounts and whether there are other creditors with claims that should be paid from these funds.

WHEREFORE the plaintiff's motion should be granted in its entirety and Booth Oil's motion should be denied in its entirety.

Dated: October 15, 2004
Buffalo, New York

s/ R. William Stephens
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