

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

MICHIGAN BELL TELEPHONE
COMPANY D/B/A AT&T MICHIGAN,

Plaintiff,

vs.

Case No. 2017-3164-CB

SCHARF'S SERVICE & FUEL OIL, INC.
and SCHARF LEASING, LLC,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition of Count IV pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied. In addition, Plaintiff has filed a reply brief in support of its motion.

Factual and Procedural History

Defendant Scharf's Service & Fuel Oil, Inc. ("Defendant SSFO") owns and operates a diesel, gasoline and propane facility at or near 660 E 10 Mile Rd, Centerline, MI ("Facility"). Defendant Scharf Leasing, LLC ("Defendant SLL") owns the real estate upon which the Facility is located ("Subject Property"). Plaintiff owns the underground utility cables in the right of way near the Facility.

On or about September 28, 2015, Plaintiff allegedly became aware that diesel fuel and other hazardous fuel products were leaking from the underground storage tanks at the Facility into Plaintiff's right of way. Plaintiff alleges that the leaked materials have caused damage to their utility cables. Plaintiff has allegedly had to relocate its

cables and has spent time and resources removing and disposing the leaked substances from the right of way.

On August 28, 2017, Plaintiff filed its complaint in this matter (“Complaint”). The Complaint contains the following claims: Count I- Negligence, Count II- Negligence-Res Ipsa Loquitur, Count III- Interference with Easement, and Count IV- Liability Pursuant to the Natural Resources and Environmental Protection Act, MCL 324.21301a, et seq. On March 29, 2018, Plaintiff filed its instant motion for summary disposition of Count IV of the Complaint. Defendants have since filed a response and request that the motion be denied. In addition, Plaintiff has filed a reply brief in support of its motion. On June 11, 2018, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

Count IV of the Complaint seeks to hold Defendants liable under MCL 324.21323b(1)(b), which provides:

- (1) Except as provided in section 21323a(2), a person that is liable under section 21323a is jointly and severally liable for all of the following:

- (b) All costs of corrective action reasonably incurred under the circumstances by any other person.

MCL 324.21323a provides that the following individuals, *inter alia*, are liable:

- (1) Notwithstanding any other provision of this act, and except as otherwise provided in this section and section 21323c, the following persons are liable under this part:

- (a) The owner or operator if the owner or operator is responsible for an activity causing a release or threat of release.

In response, Defendants argue that they are exempt from liability under the above-referenced statute because they have addressed the contamination from the releases in question in closure reports filed with, and approved by, the MDEQ. In particular, Defendants assert that they are exempt from liability by operation of MCL 324.21323a(4)(d), which provides:

- (4) Notwithstanding subsection (1), the following persons are not liable under this part:

- (d) Any person for environmental contamination addressed in a closure report that is approved by the department or is considered approved under section 21315(4). Notwithstanding this subdivision, a person may be liable under this part for the following:

- (i) A subsequent release not addressed in the closure report if the person is otherwise liable under this part for that release.

- (ii) Environmental contamination that is not addressed in the closure report and for which the person is otherwise liable under this part.

Defendants maintain that they have submitted closure reports for all reported releases at the site in question. In support of their position, Defendants rely on the affidavit of William Wagner, a project manager for PM Environmental, Inc. ("PM"). (See Defendants' Exhibit A.) Mr. Wagner testified that he was the project manager in connection with the 2012 release, that in his opinion the contamination Plaintiff found was not caused by the 1993 or 2012 releases, and that he has confirmed that closure reports have been filed with, and approved by, the MDEQ regarding all reporting releases. (Id.)

In response, Plaintiff argues that Defendants remain liable under MCL 324.21323a(4)(d)(ii) because the contamination at issue was not addressed in the closure report(s). Specifically, Plaintiff maintains that the company Defendants retained to remediate the release only remediated the contamination onsite. Further, Plaintiff cites to the final assessment report which notes that contamination likely was present in the area north of the Subject Property, which is where Plaintiff's right of way is located. (See Plaintiff's Exhibit 4, at p.17.)

After reviewing the record, the Court is convinced that the closure reports Defendants filed do not afford them protection from the claim contained in Count IV. While Defendants have presented evidence that they made efforts to remediate the contamination on the Subject Property, those efforts did not extend to the right of way in question. Accordingly, MCL 324.21323a(4)(d)(ii) operates to hold Defendants

potentially liable notwithstanding the closure reports. As a result, Defendants' position is without merit.

Defendants also argue that they were not responsible for the leaks in question; rather, Defendants maintain that the leaks were caused by failure of the piping. However, the Michigan Court of Appeals has held that using the system that contains the part(s) that caused the release is sufficient to establish that the individual is responsible within the meaning of MCL 324.21323a(1)(a). See *Department of Nat Resources and Environment v Streffling Oil Company*, unpublished per curiam of the Court of Appeals, decided July 29, 2014 (Docket No. 314336). In this matter, it is undisputed that Defendants utilized the system containing the piping that caused the leaks. As a result, Defendants are deemed responsible for the leak. Accordingly, Defendants' position is without merit.


Finally, Defendants argue that there is a genuine issue of material fact as to whether the damage to the right of way was caused by contamination caused by the 1993 or 2012 releases. In support of their position, Defendants rely on Mr. Wagner's affidavit where he opines that the contamination Plaintiff found was not caused by the 1993 or 2012 releases. (See Defendants' Exhibit A, at ¶7.) In response, Plaintiff argues that the testimony does not cite to what evidence, if any, that Mr. Wagner's opinion is based upon. While Plaintiff cites to the Final Assessment Report, which contains statements that contradict Mr. Wagner's testimony, that merely creates a question of fact. While the basis for Mr. Wagner's opinion can certainly be questioned via a deposition, discovery requests, or at trial, the Court is satisfied that his failure to specifically cite to the evidence forming the basis for his opinion in his affidavit does not

render the testimony inadmissible. As a result, the Court is convinced that a genuine issue of material fact remains as to the cause of the contamination at issue that precludes summary disposition from being granted.

Conclusion

For the reasons discussed above, Plaintiff's motion for summary disposition is DENIED. This Opinion and Order neither resolves the last claim nor closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.



JAMES M. BIERNAT, SR.
In Absence of RICHARD L. CARETTI
Circuit Court Judge

Dated: June 13, 2018

cc: Corey R. Meridew, Attorney for Plaintiff
Clifford A. Knaggs, Attorney for Defendants