STATE OF NEW YORK
SUPREME COURT : COUNTY OF GENESEE

MAIN ST. & LAKE ST. DEVELOPMENT, LLC,

Plaintiff,

V. Index No.: 59627

SUGAR CREEK STORES, INC.,
E. PHILLIP SAUNDERS,
ESSEX PROPERTY MANAGEMENT, LLC,
SAUNDERS LAND COMPANY, INC.,
JOSEPH T. SPADARO, and
S&S LIMOUSINES, INC.,

Defendants.

MINDY L. ZOGHLIN, ESQ.
Attorney for Plaintiff

STEPHEN A. MANUELE, ESQ.
Attorney for Defendant - E. Phillip Saunders

ROBERT J. SANT, ESQ.
Attorney for Defendants - Essex Property Management
and Saunders Land Company

ROBERT B. KOEGEL, ESQ.
Attorney for Defendants - Spadaro and S&S LIMOUSINES, INC.

DECISION AND ORDER

ROBERT C. NOONAN, J.

Plaintiff brought the captioned action to recover the cost of remediating

commercial property polluted by petroleum allegedly discharged from hydraulic lifts and underground storage tanks under a string of prior owners.

The Spadaro defendants ("Spadaro and S&S Limousines") have moved pre-answer to dismiss the complaint for failure to state a cause of action and based upon documentary evidence that the petroleum discharges alleged to have contaminated the property predated Spadaro's ownership and were the sole responsibility of Sugar Creek Stores (CPLR 3211[a][1&7]). Plaintiff opposes and cross-moves to amend the complaint (CPLR 3025[b]). Defendant Saunders opposes and moves to amend his answer (id). Defendants Essex Property Management and Saunders Land Company ("Essex/SLC") oppose and move to compel Spadaro to accept their amended answer or for leave to amend same (id). Additionally, Essex/SLC moves to compel inspection of the underground tanks and to dismiss the complaint as against them based upon the statute of limitations. By separate motion, Saunders has also moved to dismiss the complaint against him based upon the statute of limitations or, alternatively, compel inspection of the underground tanks. Those motions are opposed by plaintiff. No separate appearance has been made on behalf of Sugar Creek Stores which merged into Essex Property Management in 1998. Argument was heard at the November 19, 2010 Special Term of this Court.

The subject premises, consisting of two adjoining parcels at 12 West Main Street and 13 Lake Street in the Village of LeRoy, had historically been the location of a motor vehicle service station as early at the 1920s. Sugar Creek Stores purchased the property and began operation of a convenience store/gasoline

station in 1985, which continued until the discontinuance of operations at that location in 1992. During Sugar Creek's occupation, petroleum contamination was detected and remediated under the direction of the New York State Department of Environmental Conservation. When Sugar Creek ceased operations, the petroleum storage tanks used by Sugar Creek were excavated and removed.

The premises were sold to Spadaro in two separate parcels in 1999 and 2004; and then sold by Spadaro to plaintiff in July of 2008. Shortly thereafter, engineers hired by plaintiff discovered five abandoned underground storage tanks as well as persisting petroleum contamination which was estimated to be from releases of petroleum products between 1979 and 1992.

Remediation ensued, followed by commencement of this action to recover the cost thereof on March 8, 2010.

Beginning with amendment of the pleadings, "(m)otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit " (***Aurora Loan Services v. Thomas***, 70 AD3d 986, 987; citing CPLR 3025[b]; ***Lucido v. Mancuso***, 49 AD3d 220).

Plaintiff's proposed amended complaint would essentially add allegations to the effect that Saunders, SLC and Spadaro had knowledge of the contamination, the ability to remedy it and failed to do so at the time of their respective occupations and sales of the property. Considering the early stage of this litigation, there can be no claim of undue surprise or prejudice.

As for sufficiency and merit, plaintiff sets forth the same seven causes of

action in both the original and amended complaints: as to all defendants (1) strict liability under Section 181(5) of the New York State Navigation Law, (2) indemnification or contribution under Article 12 of the Navigation Law, (3) negligence, (4) public nuisance, (5) equitable or implied indemnification and (6) restitution; and (7), as against Spadaro only, breach of contract.

On the face of it, the complaint alleges that Spadaro is a discharger per se (Navigation Law §172[a]) having conducted motor vehicle maintenance involving petroleum products on the premises, which is flatly denied by Spadaro.

As concluded in both the original and proposed amended complaints, "the Contamination on the Property resulted from releases of gasoline, kerosine [and] diesel fuel between 1979 and 1992." It was acknowledged that Spadaro did not purchase the property at 12 Main Street from SLC until May 13, 1999, and did not purchase the property at 13 Lake Street from SLC until May 21, 2004; thus negating Spadaro's direct involvement in those discharges. However, amended as proposed, the complaint would attribute statutory and common law liability for indemnification or contribution upon Spadaro for knowingly selling the contaminated properties to plaintiff without first remediating them.

Accepting the facts set forth in the amended complaint as true (***Leon v. Martinez***, 84 NY2d 83; ***Rovello v. Orofino Realty Co.***, 40 NY2d 633), plaintiff has at least stated a cognizable statutory claim against Spadaro as an owner having knowledge and the capacity to remedy the contamination resulting from the previous spills (Navigation Law §§176[a] & 181[1]; ***State v. Speonk Fuel***, 3 NY3d 720; compare, ***Dora Homes v. Epperson***, 344 F Supp2d 875). Neither the

affidavit of Spadaro nor the documentation of Sugar Creek's prior acceptance of responsibility conclusively establishes that plaintiff has no cause of action against Spadaro (***Lawrence v. Graubard Miller***, 11 NY3d 588, 595; ***Leon v. Martinez***, supra; ***Rovello v. Orofino Realty Co.***, supra).

Similarly, under the standard for motions addressed to the face of the pleadings (supra), plaintiff has stated a cognizable claim at common law; i.e., that, having actual or constructive notice of a defect in the petroleum stored system which arguably contributed to the underground discharge (***Strand v. Neglia***, 232 AD2d 907; ***Fetter v. De Camp***, 195 AD2d 771), Spadaro committed a negligent omission in failing to remediate the problem which contributed to the contamination of the property (***Hilltop v. Nyack Corp. v. TRMI Holdings Inc.***, 272 AD2d 521).

As submitted by Spadaro, to the extent plaintiff claims breach of contract based upon Spadaro's failure to convey a contaminant-free property, contrary to paragraph 13 of the purchase contract, such claim is barred by the doctrine of merger into the deed delivered to and accepted by plaintiff (***Roosa v. Campbell***, 291 AD2d 901; ***Falls Bridge Development v. Dioguardi Enterprises***, 2008 NY Slip Op 52638[U]). However, plaintiff's claim that Spadaro misrepresented compliance with all environmental laws in breach of paragraph 7 of the purchase contract expressly survives the closing; and the Court cannot evaluate defendant's denial and defense of equitable estoppel on this motion directed to the face of the complaint.

Subject thereto, Spadaro's motion to dismiss is denied and plaintiff's motion

to amend its complaint is granted, on condition that plaintiff serve its amended complaint within 20 days of this Decision and Order.

Consistent therewith, the motions of defendants Saunders and Essex/SLC to amend their answers to assert cross-claims for indemnification or contribution against the Spadaro codefendants are hereby granted.

Plaintiff having offered full cooperation with defendants' demand to inspect the abandoned tanks removed by plaintiff, defendants' motions to compel same are denied as academic, without prejudice.

Finally, as advanced by plaintiff, inasmuch as this action has been brought only for indemnification and/or contribution for the costs of remediation, rather than injury to property (compare, ***Jensen v. General Electric Company***, 82 NY2d 77; ***Kozemko v. Griffith Oil Company***, 256 AD2d 1199), a six year statute of limitations applies (CPLR §213[2]; ***State v. Stewart's Ice Cream Company***, 64 NY2d 83; ***Oliver Chevrolet Inc. v. Mobile Oil Corporation***, 249 AD2d 793; ***Grossjahann v. Geo. B. Wilkins & Sons, Inc.***, 244 AD2d 808; ***Al Tech Speciality Steel Corporation v. Allegheny International Credit Corporation***, 104 F3d 601) accruing at the time of plaintiff's expenditure therefor (***State v. Speonk Fuel***, supra; ***State v. Stewart's Ice Cream Company***, supra; ***Oliver Chevrolet Inc. v. Mobile Oil Corporation***, supra; ***White v. Long,*** 229 AD2d 178). Even if the three year statute of limitations provided by CPLR §214-c(2) applies, plaintiff brought the action within three years of discovery after due diligence in ascertaining the condition of the property (compare, ***Sweet v. Texaco***, 67 AD3d 1322; ***MRI Broadway Rental***

v. United States Mineral Products Company, 242 AD2d 440). The motions of defendants Saunders and Essex/SLC to dismiss on that ground is therefore denied.

Proceed accordingly. The foregoing constitutes the Decision and Order of the Court.

Dated: November 3rd, 2010
Batavia, New York

HON. ROBERT C. NOONAN
Acting Supreme Court Justice

GRANTED:
DATE: 11/30/10
S/ Mary Lou Strathearn
COURT CLERK