STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TENNINE CORP.,

Plaintiff,

vs.

BOARDWALK COMMERCIAL, LLC; BOARDWALK CONDOS, LLC; CENTRAL MICHIGAN RAILWAY COMPANY; THE STRAITS CORPORATION; DARK PROPERTIES, INC.; and PARKPLACE PROPERTIES OF WEST MI, LLC,

Defendants.
_____/

Case No. 12-06963-CEB

HON. CHRISTOPHER P. YATES

REC'D & FILED
JUL 15 2014
JUDGE YATES

OPINION AND ORDER RESOLVING DEFENDANTS' MOTIONS
FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

This environmental-contamination case requires the Court to delve into the rich history of the north side of Grand Rapids. Once upon a time, a factory on North Monroe Avenue housed the Oriel Cabinet Company, which was later absorbed by the Berkey & Gay Furniture Company. After the acquisition, Berkey & Gay expanded the factory and deeded a right-of-way to allow the operation of a railroad line just behind the factory. As the twentieth century came to a close, the factory and the railroad fell into disrepair until an enterprising developer converted the factory into an office and residential complex. But remnants of the old factory's history remained in the form of contaminants in the soil. This case finds its origin in redevelopment work that Plaintiff Tennine Corp. ("Tennine") contends unearthed those contaminants. After the close of discovery, all of the defendants submitted motions for summary disposition under MCR 2.116(C)(10). Upon review, the Court concludes that, like the old factory, only a small portion of this lawsuit can survive.

I. Factual Background

The defendants have requested summary disposition under MCR 2.116(C)(10), which "tests the factual sufficiency of the complaint." Maiden v Rozwood, 461 Mich 109, 120 (1999). Thus, in resolving the motions, the Court must "consider[] affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." Id. Accordingly, the Court shall set forth the underlying facts in the light most favorable to Plaintiff Tennine.

Plaintiff Tennine's first amended complaint seeks relief for alleged releases of contaminants in the course of activities to remove railroad materials from the right-of-way. Tennine's principal target, Defendant Central Michigan Railway Company ("CMR"), owns the railroad right-of-way. See Defendant Central Michigan Railway Company's Motion for Summary Disposition, Exhibit G (Affidavit of William Bartlett, ¶ 2). Although Defendants Dark Properties, Inc. ("Dark Properties") and The Straits Corporation ("Straits") have owners in common with CMR, neither entity has any ownership interest in the railroad right-of-way. See Defendants' The Straits Corporation and Dark Properties, Inc.'s Motion for Summary Disposition, Exhibit K (Affidavit of William Bartlett, ¶ 2) & Exhibit L (Affidavit of Robert Sullivan, ¶ 3). In addition, although Dark Properties "was formed for the purpose of assisting Central Michigan Railway Company with the transformation of certain railway to trail use[,]" id., Exhibit L (Affidavit of Robert Sullivan, ¶ 2), neither Dark Properties nor Straits played any role in the planning or removal of the steel from the surface of the railroad right-of-way. See id., Exhibit K (Affidavit of William Bartlett, ¶¶ 4-5) & Exhibit L (Affidavit of Robert Sullivan, ¶ 4). Consequently, both Straits and Dark Properties contend that Tennine cannot justify including them as defendants in this action.

Until 2004, the railroad line served at least one purpose – it provided rail access to the Grand Rapids Press headquarters approximately one-half mile south of the Berkey & Gay factory. But in 2004, the Grand Rapids Press moved its printing operations outside the City of Grand Rapids, so the railroad line no longer served any purpose. As a result, Defendant CMR began formal proceedings to abandon the rail line. But the railroad business is heavily regulated, so abandonment of the line required much more than simply walking away from it. Also, abandonment did not automatically cause reversion to the adjoining property owners of the real property on which the railroad line ran. Instead, to preserve the rail corridor, the line could be "railbanked" and converted to a trail until it could be profitably used once again as a rail line in the future. See Preseault v Interstate Commerce Comm'n, 494 US 1, 4-8 (1990).

In 2011, Defendant CMR decided to remove the rail line's rails and ties, where practicable. CMR hired a contractor, Jaeger Salvage, to handle the project. Then, in 2012, at the behest of the Michigan Department of Transportation, CMR removed the rail steel and crossings from the road bed of Monroe Avenue. Shortly thereafter, Plaintiff Tennine filed this suit alleging that both of those undertakings disturbed the soil and led to the release of contaminants, which adversely affected its nearby property. Tennine not only advanced claims against CMR, Straits, and Dark Properties, but also identified as defendants Boardwalk Commercial, LLC ("Boardwalk Commercial"), Boardwalk Condos, LLC ("Boardwalk Condos"), and Parkplace Properties of West MI, LLC ("Parkplace") on the theory that those entities had some ownership interest in the railroad right-of-way where both of the removal projects occurred in 2011 and 2012. See First Amended Complaint, ¶¶ 10-11, 15. After the close of discovery, all of the defendants filed motions for summary disposition pursuant to MCR 2.116(C)(10), so the Court must now consider the evidence against each defendant.

II. Legal Analysis

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Thus, the Court must consider "the proffered evidence" to determine whether it "fails to establish a genuine issue regarding any material fact," and thereby compels the entry of summary disposition against Plaintiff Tennine. See Corley v Detroit Board of Education, 470 Mich 274, 278 (2004). The Court shall make this assessment with respect to each of the six defendants named by Tennine in the claims set forth in its first amended complaint.

A. Defendant Central Michigan Railway Company.

By all accounts, Defendant CMR not only had an ownership interest in the property on which the removal activities occurred, but also ordered and took responsibility for the removal activities. Plaintiff Tennine asserts that those activities gave rise to a claim under the citizen-suit provision of our state's Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.20135, and involved a trespass upon Tennine's land and a nuisance *per se*. The statutory claim can be resolved easily because the citizen-suit provision on which Tennine relies, MCL 324.20135, only permits "a person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility" to pursue relief. See MCL 324.20135(1). Interpreting the predecessor to this citizen-suit provision, our Court of Appeals reasoned that a corporate plaintiff "is not a person whose health may

be affected," so such a corporate plaintiff "lacked standing to assert its proposed claim" pursuant to the citizen-suit provision. Flanders Industries, Inc v State of Michigan, 203 Mich App 15, 34 (1993), citing MCL 299.615.[1] More recently, our Court of Appeals observed that MCL 324.20135, "known as the 'citizens suit' provision of part 201" of the NREPA, "governs only those lawsuits brought by a 'person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility . . . .'" 1031 Lapeer LLC v Rice, 290 Mich App 225, 235 (2010). Here, just as in that case and the pre-NREPA action discussed above, the corporate plaintiff has "not brought suit in the position of citizens whose health or enjoyment of the environment may be adversely affected by the contamination at issue."[2] 1031 Lapeer, 290 Mich App at 235; accord Flanders Industries, 203 Mich App at 34. As a result, the Court must award summary disposition against Tennine because it lacks standing to pursue relief under the citizen-suit provision set forth in MCL 324.20135.

In its remaining count against Defendant CMR, Plaintiff Tennine vacillates between a claim for trespass and a cause of action for nuisance. "'[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment

---

[1] The current version of the citizen-suit provision is part of the NREPA, which "was enacted by 1994 PA 451 as part of the repeal and reenactment of numerous environmental statutes." 1031 Lapeer LLC v Rice, 290 Mich App 225, 229 (2010). "Part 201 was the reenactment of the former Environmental Response Act, MCL 299.601 *et seq*[,]" see id., which was analyzed by our Court of Appeals in reaching that decision, but subsequently replaced by MCL 324.20135.

[2] Even accepting the concept of corporate personhood in its broadest formulation, see, e.g., Burwell v Hobby Lobby Stores, Inc, 134 S Ct ____, ____ (2014), no one can seriously contend that a corporation's "health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility[.]" See MCL 324.20135(1). If a corporation begins to exercise and limit its exposure to sunlight in order to avoid adverse health effects, then courts may be obliged to permit that corporation to seek relief under the citizen-suit provision of NREPA.

of it.'"[3] Adams v Cleveland-Cliffs Iron Co, 237 Mich App 51, 59 (1999). The factual underpinnings for Tennine's claim – whatever it may be – come from the removal activities in 2011 and 2012 that purportedly stirred up contaminants in the railroad right-of-way. Hence, the Court presumes that the trespass claim concerns physical intrusions upon Tennine's property during the removal activities, whereas the nuisance claim is based upon the release of contaminants that ultimately found their way onto Tennine's property. The Court shall consider each of these two theories in turn.

Plaintiff Tennine's strongest claim involves a physical trespass by Defendant CMR's chosen contractor, Jaeger Salvage, upon Tennine's property. Tennine has provided compelling evidence that railroad ties were stacked on its property during the removal activities. See Plaintiff's Objection to Motion for Summary Disposition of Defendant Central Michigan Railway, Exhibit 8 (photographs of the railroad ties) & Exhibit 10 (Affidavit of Brian Tingley, ¶¶ 4-6). Tennine has also supplied the Court with affidavits establishing that Jaeger Salvage engaged in incursions upon Tennine's property during its removal activities. See id., Exhibit 9 (Affidavit of William Q. Tingley, III, ¶ 9), Exhibit 10 (Affidavit of Brian Tingley, ¶¶ 6-7) & Exhibit 11 (Affidavit of Bridget Tingley, ¶ 3). Therefore, Tennine has provided sufficient evidence to fend off CMR's motion for summary disposition under MCR 2.116(C)(10) with respect to the trespass claim.

---

[3] Our Court of Appeals has explained that, "[i]n certain jurisdictions, 'it has become difficult to differentiate between trespass and nuisance' because 'the line between trespass and nuisance has become "wavering and uncertain,"'" see Wiggins v City of Burton, 291 Mich App 532, 555 (2011), but our Court of Appeals nonetheless "has recognized a desire to 'preserve the separate identities of trespass and nuisance.'" Id. "Thus, in Michigan, "'[r]ecovery for trespass to land . . . is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession,'" id., but "'[w]here the possessor of land is menaced by noise, vibrations, ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance.'" Id. at 555-556.

Plaintiff Tennine's nuisance claim, in contrast, stands on shaky ground. "Unlike in the case of trespass, '[t]o prevail in nuisance, a possessor of land must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property.'" Wiggins v City of Burton, 291 Mich App 532, 556 (2011). Tennine claims that Defendant CMR's agent, Jaeger Salvage, churned contaminated soil during removal activities, thereby releasing buried contaminants onto Tennine's property. But Tennine's only evidence in support of its contaminated-soil claim is a collection of 15-year-old soil borings from nearby property owned by the Boardwalk defendants. See Boardwalk Defendants' Brief in Support of Motion for Summary Disposition, Exhibit I (Atwell-Hicks Baseline Environmental Assessment, § 4.0 – Known Contamination). Other than those dated boring samples, no testing was performed on or near the railroad right-of-way before, during, or after the removal activities. Similarly, no testing was ever done on Tennine's property to establish that contaminants found their way onto Tennine's land.

The gaping hole in Tennine's evidence cannot be filled by the affidavit of Tennine's expert, Robert Hayes, who simply speculated – based upon the 1999 soil borings from nearby property – that "potentially hazardous substances" might have been disturbed and thereafter "most likely" reached the property belonging to Tennine. See Plaintiff's Objection to Motion for Summary Disposition of Defendant Central Michigan Railway, Exhibit 3 (Affidavit of Robert A. Hayes, ¶¶ 7-11). That affidavit, which merely describes what may have happened, cannot defeat Defendant CMR's motion for summary disposition under MCR 2.116(C)(10), see Karbel v Comerica Bank, 247 Mich App 90, 107 (2001), especially when Hayes could readily have obtained soil borings from Tennine's property to confirm or refute his theory about how that property may have been contaminated. Consequently, the Court must grant summary disposition to CMR on Tennine's nuisance claim.

B. Defendants Dark Properties, Inc., and The Straits Corporation.

Plaintiff Tennine's claims against Defendants Dark Properties and Straits presuppose that those entities had some ownership interest in the railroad right-of-way or played a role in the removal activities, but the record does not bear out either of those presuppositions. The property-ownership theory rests upon the flawed contention that Dark Properties and Straits must be treated as alter egos of Defendant CMR because those entities have virtually "the same shareholders, directors, officers, and managers." "It is a well-recognized principle that separate corporate entities will be respected." Seasword v Hilti, Inc, 449 Mich 542, 547 (1995). "Michigan law presumes that, absent some abuse of the corporate form, parent and subsidiary corporations are separate and distinct entities." Id. "This presumption, often referred to as a 'corporate veil,' may be pierced only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that [is] contrary to some other clearly overriding public policy.'" Id. at 548. "Michigan courts have generally required that a subsidiary must 'become "a mere instrumentality" of the parent' before its separate corporate existence will be disregarded." Id. Tennine has offered nothing more than *ipse dixit* to support its assertion that Dark Properties and Straits are "mere instrumentalities" of CMR. This showing falls short of the requirement that a plaintiff seeking to pierce a corporate veil must present "evidence of fraud, wrongdoing, or misuse of the corporate form." Dutton Partners, LLC v CMS Energy Corp, 290 Mich App 635, 644 (2010). Thus, Tennine cannot prevail on its theory that Dark Properties and Straits had an ownership interest in the railroad right-of-way through CMR.[4]

---

[4] Although Plaintiff Tennine relies upon an out-of-court statement purportedly made by Paul Jaeger of Jaeger Salvage that he purchased the salvage rights from Defendant Straits, see Plaintiff's Objection to Motion for Summary Disposition of Defendants The Straits Corporation and Dark Properties, Inc., Exhibit 3 (Affidavit of William Q. Tingley, III, ¶ 13), such a statement constitutes inadmissible hearsay, which cannot be considered in resolving a summary-disposition motion.

Plaintiff Tennine's assertion that Defendants Dark Properties and Straits participated in the removal activities fares no better than its property-ownership theory concerning those defendants. Dark Properties and Straits have presented compelling evidence that Defendant CMR paid for all of the removal activities, see Defendants' The Straits Corporation and Dark Properties, Inc.'s Motion for Summary Disposition, Exhibit J, and that neither Dark Properties nor Straits played any role in the removal activities. Id., Exhibit K (Affidavit of William Bartlett, ¶¶ 4-5) & Exhibit L (Affidavit of Robert Sullivan, ¶ 4). In response, Tennine states – without any citation to the record – that Paul Jaeger "indicated that his company [Jaeger Salvage] had been enlisted by The Straits Corporation to do the work[.]" The Court need not go spelunking in the voluminous record for support for that assertion because Jaeger's statement constitutes inadmissible hearsay that the Court cannot consider in resolving the motions for summary disposition. See Maiden, 461 Mich at 121 ("The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion."). Beyond that, Tennine offers the broad assertion that "the Straits Corp. provides management services for Central Michigan Railways[,]" see Plaintiff's Objection to Motion for Summary Disposition of Defendants The Straits Corporation and Dark Properties, Inc., Exhibit 3 (Affidavit of William Q. Tingley, III, ¶ 13), but that proposition adds nothing to Tennine's argument that Dark Properties and Straits took part in the removal activities to such an extent that they should be subjected to civil liability for the roles that they played. In sum, Tennine has failed to present sufficient evidence to create a genuine issue of material fact concerning the involvement of Dark Properties and Straits, so the Court must award summary disposition to both of those defendants under MCR 2.116(C)(10) on all of Tennine's claims against them.

C. The Boardwalk Defendants and Parkplace Properties of West MI.

The factual underpinnings of Plaintiff Tennine's claims against the Boardwalk defendants and Defendant Parkplace are, at best, murky. Those defendants own property in the vicinity of the railroad right-of-way, but none of them planned or oversaw any removal activities in 2011 or 2012. Tennine concedes that "the Boardwalk Defendants did not indeed directly cause the release or threat of release of hazardous substances (i.e., they didn't do the work, or hire the work to be done)." See Plaintiff's Objection to Motion for Summary Disposition of Defendants Boardwalk Commercial, LLC, Boardwalk Condos, LLC, and Parkplace Properties of West MI, LLC at 6. Tennine contends, however, that all three defendants bear legal responsibility because "Albert of the Jaeger demolition crew . . . said that they were there with the permission of Beth Visser, the Boardwalk's manager." See id., Exhibit 1 (Affidavit of William Q. Tingley, III, ¶ 9 (events of November 18, 2011)). But that statement from "Albert" constitutes inadmissible hearsay, which cannot be considered in resolving a summary-disposition motion. See Maiden, 461 Mich at 121. Moreover, any rational person who heard such a statement would conclude that Beth Visser authorized Jaeger Salvage to enter upon the Boardwalk defendants' property (which she could authorize), rather than Tennine's property (which she could not authorize).

Plaintiff Tennine presents a second theory of liability against the Boardwalk defendants and Defendant Parkplace in asserting that one (or perhaps all) of those defendants may have owned the railroad right-of-way in 2011 and 2012 because of reversion following the abandonment of the right-of-way in 2004. Neither law nor logic supports this argument. Although Tennine blithely suggests that abandonment of the railroad right-of-way occurred when the rail line fell out of use in 2004 and reversion flowed from that abandonment, federal law precludes such automatic abandonment. See

Nat'l Ass'n of Reversionary Property Owners v Surface Transportation Bd, 158 F3d 135, 137 (DC Cir 1998) ("A railroad may no longer abandon or discontinue use of a railroad corridor without the [Surface Transportation Board]'s approval."), citing 49 USC § 10903. Beyond that, Defendant CMR has stated unequivocally that it "own[s] all right, title and interest" in the railroad right-of-way where the removal activities took place, see Defendant Central Michigan Railway Company's Motion for Summary Disposition, Exhibit G (Affidavit of William Bartlett, ¶ 2), and Tennine has presented no evidence to counter that statement. Thus, the Court must award summary disposition under MCR 2.116(C)(10) to the Boardwalk defendants and Parkplace because the record contains no evidence demonstrating their involvement in any removal activities or their ownership of the railroad right-of-way where the removal activities occurred.

III. Conclusion

For the reasons set forth in this opinion, the Court must grant summary disposition in favor of the defendants on nearly all of the claims asserted by Plaintiff Tennine. Indeed, all that remains for trial is a single claim for trespass against Defendant CMR. Accordingly, the Court shall schedule a settlement conference in which Tennine and CMR must participate. All of the other defendants are excused from further participation in these proceedings by virtue of their successful motions for summary disposition.

IT IS SO ORDERED.

Dated: July 15, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge