Dickson

STATE OF VERMONT
WINDSOR COUNTY, SS

State of Vermont Agency of Transportation and Agency of Natural Resources Plaintiff v. John F. Hennessey, Jr. Defendant	SUPERIOR COURT Docket No. 693-10-08 Wrcv

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Plaintiffs (hereinafter "the State" for ease of reference) have filed a motion for summary judgment concerning the activities of Defendant on his property in Chester, Vt. The Defendant has not replied to the summary judgment motion.

Undisputed Facts

Defendant lives at 138 Cummings Road in Chester, Vt. on a parcel of approximately two acres (hereinafter referred to as "the site"). Defendant has collected and stored a great deal of material on the property, including old cars, scrap metal, barrels, farm equipment, metal parts, sinks, axles, ladders, oil tanks and storage trailers. This material includes "junk" as defined under Vermont law. No State or local permits, licenses or certificates of approval have been issued to the Defendant to operate a junkyard, salvage yard, solid waste collection or storage facility, or hazardous waste collection or storage facility.

The site has been inspected by the State numerous times over the past four years. In general, Defendant has been cooperative. Several hearings have been held concerning the State's requests for relief. Several prior orders required the Defendant to take certain actions at the site. The last of these orders was filed November 3, 2009. There has been some, but by no means full, compliance with the Court's orders. The site is currently in better condition than it was at the time this litigation was commenced.

In prior hearings this Court has found that Defendant operated and maintained a "junkyard" at his premises. This activity continues at this time. As of July 1, 2009, the term "junkyard" in applicable statutes was replaced with the term "salvage yard."

During inspections by State representatives Defendant admitted that he operates a business selling the materials on his property to others. He also buys used or discarded items of interest and stores them on the property. State inspectors observed junk stored on

the site on multiple occasions in 2006, 2007, 2008 and 2009. Although considerable effort has been made by Defendant to clean up his property, a great deal of junk remains at the site.

Despite prior Court orders that Defendant either stop operating the junkyard or obtain necessary permits, he has done neither. The Court has previously found that Defendant lacks the necessary permits to operate a junkyard or to store junk materials on his premises. At the time of the most recent hearing in this case in November 2009, Defendant continued to store junk material on his property. Defendant is currently under Court order to remove 50% of all junk materials from the site by November 30, 2010 and the remaining 50% by November 30, 2011 to a permitted site unless he has obtained the necessary permits by that time. Defendant must establish that any unpermitted materials remaining on the site after November 30, 2011 are not junk materials or solid waste. Since the last hearing, Defendant has not provided proof to the State that any junk has been properly removed from the site.

In 2006, 2007, 2008 and 2009, the State inspectors observed waste tires, discarded painted wood and plastic items scattered about the site. This material constitutes "solid waste" as defined under Vermont law. On several occasions, Defendant was observed to be engaged in the treatment of solid waste by burning it. Defendant has since removed many of the waste tires from the property however some remain.

Defendant has not obtained the necessary licenses and approvals to operate a facility for the collection, treatment, storage or disposal of solid waste. Defendant is under Court order to remove all solid waste from the site and transport it to a certified processing or disposal facility in the same time frame and amounts as pertain to the removal of the junk material.

During inspections in 2006 and 2008, unlabeled drums of liquid were observed on the site. Defendant admitted that some of the drums contained waste oil. Shortly before another inspection in October 2009, Defendant removed two drums of waste oil to a receiving facility. None of the drums on the site at the time of the last inspection in 2009 were found to contain any hazardous waste.

Inspections by State personnel in 2006, 2007 and 2008 determined that Defendant had released hazardous waste onto his property in the form of spilled waste oil, diesel fuel, hydraulic fluid, gear oil and petroleum liquids. Defendant admitted these spills.

In November 2008, the Court ordered Defendant to hire a consultant to provide advice on the proper remediation of these spills. Defendant did not do so. After further hearing and order, the Defendant continued to refuse to hire a consultant. Accordingly, pursuant to court order, the State entered the Defendant's property and conducted a site assessment. The State's assessment determined that some soils would need to be removed but that no further assessment of releases of hazardous waste was necessary. The environmental assessment cost the State $2994.18. In August 2009, the Court

ordered Defendant to pay the State for the cost of the assessment by October 15, 2009. Defendant has failed to do so.

Conclusions of Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518, 521 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

At the time this action was commenced, the operation of a junkyard required a license from the Agency of Transportation. 24 V.S.A. § 2242. Effective on July 1, 2009, junkyards were renamed as salvage yards and a certificate of registration was required through the Agency of Natural resources. 24 V.S.A. § 2242(a)(2). Defendant has failed to obtain a junkyard license or a certificate of registration. Further, the operation of a junkyard or a salvage yard requires location approval by municipal authorities. Defendant has not received this approval either.

The evidence is overwhelming that Defendant is storing "junk" as defined in 24 V.S.A. § 2241. The site is littered with scrap metals and scrapped motor vehicles and parts among other items. Defendant continues to lack any State or local permits for the operation of the junkyard or salvage yard.

10 V.S.A. § 6605 requires any person operating a solid waste management facility to obtain certification from the Agency of Natural resources. Treatment, storage or disposal of solid waste outside of a certified facility is prohibited by solid waste regulations. Defendant is not operating a certified facility. The Defendant is storing solid waste on the site contrary to the provisions of law. In addition, Defendant has admitted burning solid waste on the site without proper licenses and certifications.

The storage of hazardous waste requires compliance with hazardous waste regulations. Defendant has admitted storing waste oil in unlabelled drums at the site. Waste oil is considered a hazardous material. 10 V.S.A. § 6602(16). Defendant had other unlabelled drums at the site, necessitating investigation by the State to determine if they contained hazardous waste. 10 V.S.A. § § 6610a, 6612, and 8221.

Vermont law prohibits the release of hazardous waste into the water or lands of the State. 10 V.S.A. § 6616. When hazardous waste is released into the water or lands of the State the person responsible for the release is liable for abating the release as well as for the costs of investigation, removal and remediation. 10 V.S.A. § 6615(a)(1). Here the State's investigation and the Defendant's admissions show hazardous waste was discharged into the ground at the site.

Defendant was given several opportunities to hire a consultant to advise as to proper and necessary remediation. Defendant was ordered to do so and failed to follow the orders of the Court. Consistent with those orders, the State was thereby given the power to enter the site and conduct its own investigation. It was required to do so when Defendant failed to comply with the Court's orders. Defendant is liable for the costs incurred by the State in so-doing.

ORDER

For the reasons stated herein, the relief requested by the State in its motion for summary judgment is **GRANTED**. Defendant is liable to the State for the operation of a junkyard without a license; storing and/or disposing of solid waste at the site outside of a certified solid waste facility; illegal storage of hazardous waste, release of hazardous materials at the site; and the State's costs of $2994.18 with pre-judgment interest at 12% from November 3, 2009 until the date of judgment.

In addition, Defendant is permanently enjoined from accepting any junk at the site without obtaining all required approvals and certifications; from storing any junk at the site after November 30, 2011 without obtaining proper approvals and certifications; from accepting, treating or disposing of solid waste at the site without required approvals and certifications; from storing solid waste at the site after November 30, 2011 without all approvals and certifications; and from accepting, treating, storing or disposing of hazardous waste at the site without all required approvals and certifications.

Defendant is further permanently enjoined as ordered by the Court in its November 3, 2009 order to remove all junk material and solid waste from the site by November 30, 2011 and 50% of it by November 30, 2010 unless proper permits are obtained in the interim; and to establish that any materials remaining at the site after November 30, 2011 are not junk materials or solid waste.

Defendant shall allow access to the State to enter the site during normal business hours to conduct inspections of the premises and conduct such investigations as may be necessary to monitor compliance with the orders of the Court in this matter and compliance with applicable Vermont regulations.

Defendant is further ordered to pay fifty dollars ($50) for every day he is not in compliance with the terms of the Court's permanent injunction. In arriving at this figure the Court has made reference to 24 V.S.A. §2282 which provides for a penalty of up to $50 for each day of non-compliance. The Court believes this statute provides guidance

for the establishment of a proper coercive sanction in the event of non-compliance with the terms of the permanent injunction.

A hearing shall be scheduled to assess civil penalties. The State is to advise the Court on the anticipated length of the hearing. The parties are encouraged to discuss the issues concerning civil penalties in advance of the hearing.

The State is to submit a proposed judgment order, consistent with the terms of the conclusions and order herein, within ten (10) days.

Dated at Woodstock this 9th day of March, 2010.

Harold E. Eaton, Jr.
Superior Court Judge