

FILED

DATED: 12/24/97. AB

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 91-1719

G & H DEVELOPMENT, INC.,)
 Plaintiff)
v.)
RAYMOND G. LEWIS, JR.,)
 Defendant)

DEFENDANT'S MEMORANDUM IN
SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT

I. PLAINTIFF'S ALLEGATIONS

The Plaintiff, G & H Development, Inc.'s ("G&H"), claim sets forth claims in negligence and G.L. c. 21E arising out of contamination at 870-884 State Street, Springfield, Massachusetts. G&H's claim is against his northerly neighbor, Raymond G. Lewis, Jr. ("Mr. Lewis"), who owns a parcel, denominated as 13-15 Hayden Street, behind G&H's property fronting State Street in the Winchester Square section of Springfield.

In its complaint, G&H alleged the following facts:

1. That Mr. Lewis has owned the Hayden Street parcel since 1967. [Complaint, para 3.]
2. That G&H purchased the State Street property in 1990, although testing carried out in 1989 had already determined it was contaminated with chloroform, trichloroethylene, chlorobenzene, and perchloroethylene -- all of them chemicals "commonly used in the dry cleaning business." [Complaint, para. 4-8.]
3. That Mr. Lewis "negligently or intentionally dumped, allowed or permitted the dumping of hazardous waste on his property at [13-15] Hayden Street, Springfield, Massachusetts," and that this waste seeped onto G&H's property. [Complaint, para 9-10].

4. That the dry cleaning chemicals were released onto the Hayden Street parcel when Mr. Lewis owned it, and have since entered G&H's property, making Mr. Lewis "legally responsible" pursuant to G.L. c. 21E, Sec. 5.

At this time,^{1/} Mr. Lewis moves for summary judgment on G&H's claims.

II. FACTS CONCEDED THROUGH DISCOVERY BY G&H

G&H's Answers to Mr. Lewis' Interrogatories^{2/} revealed the following:

1. That G&H knew the State Street property was contaminated when G&H purchased it in 1990. [Int. #2].
2. That G&H designated no expert witnesses to testify at trial. [Int. #7].
3. That G&H itself has no substantiation for its claim that Mr. Lewis' conduct caused any contamination on the State Street property [Int. #10],^{3/} and that G&H is unaware of the identity of any other person with knowledge of facts relevant to its claim. [Int. #8].

^{1/} The Tracking Order applicable to this case set a deadline of October 21, 1992 for the presentation of summary judgment motions. On October 20, 1992, a judgment issued in Mr. Lewis' favor under Mass.R.Civ.P. 33(a) for G&H's failure to answer Mr. Lewis' interrogatories. Due to the delays attendant in G&H's revival of its claim, this motion is presented at this time.

^{2/} A true copy of G&H's answers to interrogatories is attached hereto as Exhibit A.

^{3/} G&H's response, admitting it had no knowledge of facts or the identities of witnesses which would support its claim, it promised "[p]laintiff will supplement at a later time." At the time the interrogatory answers were served, discovery had already closed. As of the date of the filing of this motion, no further answers have been served, despite Mr. Lewis' "Request for Supplementation" of those answers pursuant to Mass.R.Civ.P. 26(e).

III. UNCONTRADICTED FACTS ESTABLISHED BY MR. LEWIS'
AFFIDAVIT AND INTERROGATORIES

Mr. Lewis submits herewith his Affidavit and his interrogatories answers, attached hereto as Exhibits B and C, setting forth under oath the following facts:

1. That neither Mr. Lewis nor anyone else has operated any dry cleaner business or any kind of commercial business on the property since he bought the Hayden Street property in 1967.
2. That a residence stood on the Hayden Street property from approximately 1930 to 1978.^{4/}
3. That he has never used, placed, or dumped chemicals on his property, nor has he allowed anyone else to do so.
4. That he has made regular visits to his property to clean it and inspect it, periodically has erected fences, and otherwise taken appropriate steps to keep vandals and unauthorized persons off the property.
5. That dry cleaning businesses occupied G&H's State Street property between 1927 and the mid-1950's.^{5/}

^{4/} Public records of the City of Springfield Assessor's office indicate that a two-family house stood on this parcel from at least 1941, and that it was lawfully demolished in 1980. See Exhibit D, attached hereto.

^{5/} Public records show that "City Laundry" was operating at 870 State Street as early as 1926. See 1926 Deed, attached hereto as Exhibit E. From 1927 to 1953, New England Laundries, Inc. owned the property. See Business Certificate and 1927 Deed, Exhibits F and G, respectively. From 1954 to 1957, Royce-Superior Laundry, Inc., carried on its business at this address. See Exhibit H, attached hereto. At the time Mr. Lewis purchased the Hayden Street property, its deed described one of his boundries running along land "now or formerly occupied by the City Laundry, Inc." Exhibit I, attached hereto.

IV. ARGUMENT AND AUTHORITY

A. There is no evidence that Lewis was responsible for the pollution on G&H's State Street property

G&H's negligence claim against Mr. Lewis alternatively must fail for lack of proof of (i) a breach of duty by Mr. Lewis, and (ii) causation linking any conduct attributable to Mr. Lewis and the contamination of G&H's property.

1. No evidence exists to show Mr. Lewis breached any duty of care

G&H admits in its discovery responses that it possesses no facts implicating Mr. Lewis in the contamination of the State Street property, and that it is unaware of any other person possessing facts relevant to its claim against Mr. Lewis.

Mr. Lewis submits that G&H's negligence claim is ripe for summary judgment, since Mr. Lewis has demonstrated by reference to affidavits, interrogatories and evidence which would be admissible at trial, that G&H has no reasonable expectation of proving an essential element of its case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

In Kourouvacilis, the plaintiff's claim was moribund due to a void in proof that the claimed damages were due to a design or manufacturing defect of an automobile. In responding to discovery, plaintiff identified persons upon whom she expected to rely to establish her claim. Those persons were deposed and their testimony proved unhelpful to plaintiff's cause. By isolating plaintiff's sources of proof, and showing that such persons testimony would not make out plaintiff's case, summary judgment was appropriately granted. Id. That case adopted the

federal Celotex standard, where an asbestos personal injury claimant, in responding to discovery, failed to identify any witness who was expected to testify to her decedent's exposure to Celotex's product, and summary judgment was appropriately granted. Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986).

In the present case, G&H's response to Mr. Lewis discovery, like Celotex and Kourouvacilis, supra, revealed that there no witness to support an essential element of G&H's claim, that Mr. Lewis did something or failed to do something which caused or failed to prevent contamination at G&H's State Street property. In view of that void in G&H's proof on an essential element of its case, summary judgment is appropriate.

2. **G&H has no proof that any conduct of Mr. Lewis was the likely cause of the contamination at the State Street property**

All the available facts point to the conclusion that G&H's predecessors at the State Street property operated dry cleaning businesses on those premises prior to 1967. G&H now complains that chemicals commonly used in the dry cleaning business contaminate its property. From these facts, the only reasonable inference which can be drawn is that the dry cleaning chemicals which now exist on G&H's land were deposited there by the dry cleaners which formerly operated on those premises.

In order to maintain its claim, G&H must offer evidence on the essential element of causation. Its burden is most comprehensively set forth in Bigwood v. Boston & N. St. Ry., 209 Mass. 345, 348 (1911):

By bringing their actions, the plaintiffs assumed the obligation to show that the negligence of the defendant caused their injury. This was an affirmative burden and could not be left to surmise, conjecture or imagination. There must be something amounting to proof, either by direct evidence or rational inference of probabilities from established facts. While plaintiff is not bound to exclude every other possibility of cause for his injury except that of the negligence of the defendant, he is required to show by evidence a greater likelihood that it came from an act of negligence for which the defendant is responsible than from a cause for which the defendant is not liable. If on all the evidence it is just as reasonable to suppose that the cause is one for which no liability would attach to the defendant than to one for which the defendant is liable, then a plaintiff fails to make out his case.

In the present case, there is no evidence available to G&H which shows a greater likelihood that the contamination at the State Street property was caused by Mr. Lewis and not the dry cleaners which operated there for decades. Conjecture cannot substitute for proof of causation. Given the state of the record, summary judgment should be granted in Mr. Lewis' favor.

B. No triable issues of fact are presented by G&H's G.L. c. 21E claim

There are two bases of non-liability on G&H's Count II against Mr. Lewis, sounding in a claim under G.L. c. 21E, Sec.

5. Each is offered alternatively below:

1. G&H cannot make out an actionable claim under G.L. c. 21E

Chapter 21E, Section 5 "provides that the costs of cleanup are to be borne by those who are responsible for the release [of hazardous material] because they own the land or because they caused the spill." Acme Laundry Co. v. Sect'y of Environmental Affairs, 410 Mass. 760, 764 (1991). Mr. Lewis

did neither. Mr. Lewis does not and did not "own the land" for which cleanup costs are sought, that land is owned by G&H. As has been admitted by G&H above, it has no evidence Mr. Lewis' conduct "cause[d] the spill."

The statutory authority under which G&H claims Mr. Lewis is liable requires Mr. Lewis to be either an owner of the contaminated property or a participant in causing its contamination. Since Mr. Lewis was not the owner and no evidence exists to create a triable issue that his conduct played any role in the contamination, summary judgment is appropriate to terminate this claim.

2. The available evidence establishes that the contamination was caused by a third party for whose conduct Mr. Lewis is not responsible

Even assuming arguendo that Mr. Lewis is a responsible party under G.L. c. 21E, Sec. 5(a), the law further provides that no liability attaches to individuals such as Mr. Lewis where he can prove "that he exercised due care with respect to the oil or hazardous material, that he took precautions against the the foreseeable acts and omissions of any third party and the consequences that could foreseeably result from such acts or omissions . . ." G.L. c. 21E, Sec. 5(c)(3).

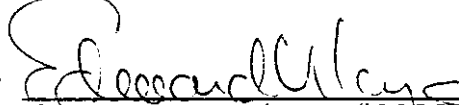
Mr. Lewis affidavit demonstrates he did not, by his own hand or by any conduct which can be imputed to him, contaminate the Hayden Street parcel or G&H's State Street property with dry cleaning chemicals. His affidavit, together with the materials appended to this memorandum, permit a reasonable

inference that one or more of the dry cleaning businesses occupying G&H's State Street property deposited their chemicals there. Mr. Lewis' affidavit shows that took reasonable care of his premises; he regularly visited and inspected the property, erected fences, and otherwise took care to keep vandals and unauthorized persons away.

V. CONCLUSION

For all the foregoing reasons, the Defendant, Raymond G. Lewis, Jr., respectfully requests the Court to enter summary judgment in his favor on either or both of Plaintiff's claims against him.

RAYMOND G. LEWIS, JR.,
Defendant

By 
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