

Transactional Environmental Issues: Federal Court Addresses Buyer/Seller Dispute Regarding Post-Closing Remediation Responsibilities



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The United States District Court for the Eastern District of Louisiana (“Court”) addressed in a May 30th opinion a dispute between a buyer and seller of real property related to a contract provision addressing responsibility for preexisting contamination. See *KFC Corp. v. Iron Horse of Metairie Rd.*, No. 16-16791, 2018 WL 243111 (E.D. La. May 30, 2018).

Kentucky Fried Chicken Corporation (“KFC”) sold the property to Iron Horse of Metairie Road, LLC (“Iron Horse”) and Iron Rooster LLC (“Iron Rooster”) (collectively, “Defendants”).

KFC had purchased the property in Metairie, Louisiana in 1991. After the purchase, KFC learned that the property and an adjoining property were contaminated with perchloroethylene and its metabolites (“PERC contamination”). A dry cleaning facility that operated on the premises before KFC purchased the land was responsible for the contamination.

KFC agreed to remediate the PERC contamination on the property and the adjoining property based on a Voluntary Remedial Action Plan (“VRAP”) prepared by Professional Service Industries, Inc. (“PSI”) and approved by the Louisiana Department of Environmental Quality (“LDEQ”) in 2005. After approval, KFC prepared several addendums to the VRAP. The LDEQ approved each of the addendums.

On September 20, 2013, Iron Horse agreed to purchase the property from KFC. This agreement was memorialized in a contract (i.e., purchase agreement). The purchase agreement provided for a 30-day inspection and due diligence period, and gave Iron Horse the right to cancel during this 30-day window.

Iron Horse subsequently assigned the purchase agreement to Iron Rooster. In 2014 KFC sold the property to Iron Rooster, and Iron Horse signed an assignment, assumption and indemnification agreement.

The preamble to the indemnification agreement stated that remediation was “in progress pursuant to a voluntary remediation plan” and “was and is being handled by” PSI. After Iron Rooster purchased the property, Joseph Calderera, the Defendants’ sole member, authorized PSI to undertake confirmatory soil sampling to verify the required remediation. PSI submitted in March 2015 a revised VRAP to LDEQ on Iron Rooster’s behalf. According to Calderera, the VRAP was not accepted by LDEQ because KFC’s 2005 VRAP remained in place. Calderera asserted that KFC unreasonably refused to withdraw the 2005 VRAP.

In June 2016, the LDEQ sent letters to both KFC and Iron Rooster regarding PSI's reports and the status of remediation.

KFC filed suit and alleged that the Defendants failed to fulfill their obligations under the purchase agreement and the indemnification agreement to remediate the PERC contamination. In response, the Defendants asserted that, during the due diligence period, KFC directed their questions regarding the condition of the property and the status of the remediation to PSI. Further, they asserted that KFC engaged in abuse of rights because it wrongfully refused to execute an amended VRAP application.

In order for the Defendants to present their arguments on the merits, they first had to show that the statute of limitations on their claims had not expired. Defendants argued reliance on representations by KFC that the remediation was almost complete when they purchased the property. Also they claimed KFC owed the Defendants "a duty to timely, clearly and unambiguously disclose the extent of the contamination."

Of particular concern to the Defendants was the off-site contamination and the obligations to remediate. Consequently, they claimed damages due to KFC's failure to disclose.

An impediment for the Defendants was a failure to cite any contractual breaches by KFC. There was no indication in the contract that KFC specifically promised or warranted that remediation was underway or the status of the remediation. Further, the Court found that a statement that remediation was "in progress" was insufficiently specific to support the Defendant's allegations that PSI and KFC represented that remediation was "almost finished" and failed to disclose the need for remediation on the adjoining property.

The Defendants also argued that KFC breached its implied contractual obligation to perform in good faith. The Court, however, found that KFC acted within the scope of the agreement.

KFC argued that the detrimental reliance counterclaim by the Defendants should be thrown out because they knew or should have known about the alleged misrepresentations when they purchased the property four years earlier. If so, the one year statute of limitations had expired. The one year statute of limitations is only extended "in exceptional circumstances" where "a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort."

The Court found it undisputed that, when the Defendants purchased the property, they were aware of the past environmental contamination and fulfilled KFC's obligations. As a result, the Court found that the Defendants' constructive knowledge of the appropriate facts had existed for longer than a year. Consequently, the statute of limitations on the detrimental reliance claim had expired.

The Court, however, did find for the Defendants on the abuse of rights counterclaim. Because of the unclear nature of why KFC refused to execute the amended VRAP, the court concluded that this constituted a material dispute of fact and denied KFC's summary judgment.

In summary, because the Defendants had constructive knowledge of the remediation for longer than one year, they were not entitled to sue KFC for detrimental reliance under the agreement. Further, because KFC failed to execute its amended VRAP or even elaborate on why it failed to do so, the Defendants were able to take their case passed the summary judgment phase.

A [copy of the opinion](#) can be downloaded here.