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United States District Court, C.D. California.

California Department of Toxic Substances Control et al.
v.
NL Industries, Inc. et al.

Case No. 2:20-cv-11293-SVW-JPR
|
Filed 03/22/2023

Attorneys and Law Firms

Paul M. Cruz, Deputy Clerk, Attorneys Present for Plaintiffs: N/A

N/A, Court Reporter / Recorder, Attorneys Present for Defendants: N/A

Proceedings: ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [513]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

***1** Before the Court is a motion for partial summary judgment filed by defendant Quemetco, Inc., contending that it cannot be liable for any response costs incurred by Plaintiffs because its purportedly sole shipment to the Vernon Plant were federally permitted. ECF No. 513

For the forthcoming reasons, the motion for partial summary judgment is DENIED.

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Initials of Preparer PMC

II. Background [1]

The factual history of this case is recounted in several of the Court's prior Orders. Briefly, this case is brought under the Comprehensive Environmental Response, Conservation, and Liability Act ("CERCLA") for cleanup costs associated with a lead smelter located in Vernon, California (the "Vernon Plant").

The Vernon Plant sits in the center of the Preliminary Investigation Area (the "PLA"), which is a roughly circular area that extends in an approximately-1.7 mile radius around the Vernon Plant. The PLA includes an industrial area immediately surrounding the Vernon Plant within an approximately halfmile radius (the "Industrial Area"), and residential areas that extend up to 1.7 miles to the north and south of the Vernon Plant (the "Residential Areas"). After a bench trial, the Court concluded that Plaintiffs could not recover response costs in the Residential Areas.

Again, Congress enacted CERCLA "to provide for liability, compensation, cleanup, and emergency response for hazardous substances release into the environment and the cleanup of inactive hazardous waste disposal sites." *3550 Stevens Creek Associates v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir.1990) (citing Pub.L. No. 96–510, 94 Stat. 2767 (1980)). "CERCLA generally must be construed liberally to accomplish its dual goals of promptly cleaning up hazardous waste sites and making polluters, rather than society as a whole, pay." *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 584 (9th Cir. 2018).

"To establish a *prima facie* right to recovery under § 9607(a), a plaintiff must demonstrate that:

> (1) the site on which the hazardous substances are contained is a 'facility' as defined in CERCLA; (2) a 'release' or 'threatened release' of a 'hazardous substance' from the facility has occurred; (3) the 'release' or 'threatened release' has caused the plaintiff to incur response costs that were 'necessary' and 'consistent with the national contingency plan;' and (4) defendants are within one of four classes of persons subject to liability under § 9607(a). *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1152 (C.D. Cal. 2003), *aff'd sub nom. Carson Harbor Vill v. Cnty. of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006) (citation omitted).

***2** Plaintiffs contend that Quemetco is liable as an "arranger" or "transporter" under CERCLA and the HSAA because it shipped spent lead-acid automotive batteries to the Vernon Plant.

Quemetco counters that it cannot be liable Plaintiffs' response costs because the cost recovery provisions of neither CERCLA nor the HSAA apply to "federally permitted releases," and any air emissions from the Vernon Plant that could be connected to the spent lead-acid batteries Quemetco allegedly transported were subject to the Vernon Plant's Title V permit under the federal Clean Air Act of 1970. This permit covered both stack and fugitive air emissions on May 9, 2000, so Quemetco argues that all of its air emissions after that date were federally permitted. Defendant's Statement of Uncontroverted Facts, ECF No. 513-24 ("UF") at ¶¶ 1-4.

According to Quemetco, its shipping manifests show shipments of approximately 880 tons of spent lead-acid batteries to the Vernon Plant between May 7, 2001 and June 21, 2001, and that there is no evidence of any additional shipments either before or after those dates. UF ¶¶ 6-7.

Plaintiffs largely do not dispute these facts, except in that they assert that an additional Uniform Hazardous Waste Manifest was identified outside this time period, from 1995, showing a shipment of dross to a facility with the EPA Identification Number for the Vernon Plant. Plaintiffs' Statement of Genuine Issues of Material Fact, ECF No. 544-4, ¶¶ 5-7.

Quemetco made the instant motion for partial summary judgment in January 2023. ECF No. 513. Plaintiffs opposed the motion. ECF No. 577. Quemetco filed its reply on February 27, 2023. ECF No. 554. The Court thereafter took the motion under submission.

III. Legal Standard

a. Summary Judgment

Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of... [the factual record that] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56 ... its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

A material fact for purposes of summary judgment is one that "might affect the outcome of the suit" under applicable law. *Anderson v. Liberty Lobby, Inc., 477* U.S. 242, 248 (1986). A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

IV. The Court Cannot Determine as a Matter of Law Whether Quemetco Made Any Releases that were not Federally Permitted

a. Federally Permitted Releases — An Affirmative Defense to CERCLA Liability

CERCLA Section 107(i) provides an exemption from CERCLA liability for response costs that result from a "federally permitted release." *See* 42 U.S.C. § 9607(j) ("Recovery by any person ... for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."). Federally permitted releases include:

> ***3** any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections ....

42 U.S.C. § 9601(10)(H). The same exemption exists under the HSAA. *See* Cal. Health & Safety Code § 25366(b) (barring recovery for response costs resulting from federally permitted releases); *id.* § 25325 (adopting the definition of "federally permitted release" set forth in 42 U.S.C. § 9601(10)).

Because establishing that a release was federally permitted is an affirmative defense to CERCLA liability, Quemetco here has the burden of establishing that the defense applies. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1540–41 (E.D. Cal. 1992).

b. Discussion

Plaintiffs agree that the aerial releases from the Vernon Plant made between May and June 2021 were federally permitted. Quemetco points to a lack of evidence in the record showing that it made any non-permitted releases during this period. Accordingly, the primary question is whether Plaintiffs have raised a genuine issue of material fact through the 1995 Manifest as to whether Quemetco made any non-permitted releases.

Plaintiffs argue that because the Manifest bears the EPA number belonging to the Vernon Plant, and because the manifest was found at the Vernon Plant, it means that Quemetco was taking the dross to the Vernon Plant. Quemetco argues that the address on the manifest did not list the Vernon Plant's address, but rather another address in Carson, California. Additionally, Quemetco argues that any 1995 shipment that could potentially incur liability was also federally permitted because, at that time, the Vernon Plant had a Facility Permit to Operate issued by the South Coast Air Quality Management District.

Two issues of fact are apparent that therefore preclude summary judgment in Quemetco's favor:

> First, the parties dispute whether the manifest indicated that the dross was headed for the Vernon Plant. The Court cannot determine as a matter of law the significance of the facts that the Vernon Plant's EPA identification number was found on the manifest and that the manifest itself was found at the Vernon Plant. Nor can the Court determine as a matter of law whether the Carson address on the manifest indicated that the dross was headed either to or from the Vernon Plant.
>
> Second, there is a dispute over the meaning of the 1995 permit. Quemetco's moving papers simply state in a conclusory fashion that the existence of the permit means that any shipment was federally permitted. This does not enable it to meet its burden because it does not explain to the Court what the permit actually covers and what is required under CERCLA for a permit to satisfy the affirmative defense at issue here.
>
> But even if Quemetco did meet its initial burden, the Court's own examination of the permit left the Court uncertain as to the permit's effect. [2] And Plaintiffs' Sur-Reply explained that the permit, in its view, would not enable Quemetco to meet its burden here. The information about the permit contained in the Sur-Reply raises a triable issue as to the permit's effect.
>
> Because triable issues remain as to whether (1) the 1995 shipment to the Vernon Plant actually occurred and (2) whether any 1995 shipment was federally permitted, the Court need not address the parties' arguments regarding whether (and how) Quemetco must establish divisibility of the harm.

V. Conclusion

***4** For the foregoing reasons, Quemetco's motion for partial summary judgment is DENIED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 2780361

Footnotes

1 All facts are undisputed unless otherwise stated and are derived from the parties' briefs and supporting materials. Nothing in this section should be construed as a factual finding; rather, this section is merely background information regarding the instant lawsuit. The Court also adopts the naming conventions used in

the Court's October 2022 Scope Trial verdict. “To the extent certain facts or contentions are not mentioned in this Order, the Court has not found it necessary to consider them in reaching its decision.” *Sarieddine v. Vaptio, Inc.*, 2021 WL 4731341, at *1 (C.D. Cal. June 15, 2021).

2 For instance, the mention of Title V, at QUEMETCO-0001868, does say “Yes,” but in a different box than the words Title V. Additionally, on the Title V page, 0001898, it says “To be developed.”