CASE LAW UPDATE 2017
Oil Spill Act

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Petroleum Forensics/GOL §15-108

State of New York v. Chevron Corp., 51 Misc. 3d 1228(A), 41 N.Y.S.3d 452 (Sup. Ct. Albany Co. 2016). Summary Judgment was granted holding defendants Dean and Marcia Shepard jointly and severally liable as owners of a site and system during a period when discharges occurred. In 1976, more than 1,000 gallons of petroleum was discharged by Texaco. Texaco then entered into a settlement agreement with the State, and the spill was closed. After the Shepards acquired the property in 1995, a petroleum discharge system operated for the next ten years without any indication of a spill, but in 2006, after the Shepards sold the property, soil and groundwater contamination was encountered. The State's expert opined that the discharges must have occurred during the Shepards' ownership because MTBE was found, but its use was banned in 2004; MTBE is highly soluble and therefore could not have come from a discharge more than five years ago; and benzene is highly volatile and was found in water samples so the spill must have been recent. Even though the Shepards' expert submitted proof that older contamination was detected consistent with the Texaco spill, the State demonstrated that the later contamination commingled with the earlier contamination. However, the court held that the Shepards' liability for damages could be offset by the protections of General Obligations Law ("GOL") §15-108, due to the settlement with Texaco, stating that when a plaintiff obtains a release from one of several tortfeasors its claim must be reduced against the other tortfeasor. The court found that the Shepards did not waive the protections of GOL §15-108 when they entered into a confidential settlement agreement to discontinue cross claims against Chevron/Texaco, but "'[i]t will be the Shepards' burden "to establish the equitable share attributable to [Texaco] so as to reduce the portion of damages for which [the Shepards are] responsible.'"

Statute of Limitations

Coleman v. Atlantic Richfield Co., 6:07-CV-06117 (W.D.N.Y. July 14, 2016, Hon. Elizabeth A. Wolford, U.S.D.J.). Plaintiffs' claims for property damages were barred by the three-year statute

of limitations set forth in CPLR §214-c because Plaintiffs knew or should have known that the property had been contaminated by gasoline discharges when they purchased the site in 1985, and that they would be injured, but did not commence the instant action until 2007. The court rejected Plaintiffs' argument that only soil contamination was known at that time, and that groundwater contamination was a separate injury, arguing that the "two-injury rule" should apply, because it found that groundwater contamination was either a "maturation" of contamination the owner knew about in 1985 or was caused by the Plaintiffs' activities after 1985. The court did, however, find that their claims for response costs were timely because the six-year statute of limitations under CPLR §213(2) applied to the Plaintiffs' claims for remediation costs and attorneys' fees. Further, the court rejected the Plaintiffs' argument that they could not be time-barred from bringing property damage claims because the private suit provision in Navigation Law §181(5) did not exist in 1988, but was enacted in 1991. Finally, the court found that the Plaintiffs were not entitled to summary judgment on their claim that the former station owners were strictly liable as dischargers because the Plaintiffs could not "point to any evidence that affirmatively pinpoints liability as against either of [the former owners] specifically."

Double Recovery/Privilege

State v. Ronnen, Index No. L-00055-14 (Sup. Ct. Albany Co., Jan. 23, 2017 and Mar. 30, 2017, Hon. Michael H. Melkonian, J.). In a cost recovery action for two spills at a former major oil storage facility, the court held that the theory of unjust enrichment by double recovery was inapplicable even though the State received $223,312 from federal ARRA LUST Stimulus Funding for the cleanup. The court did not address the Defendant's claim that Navigation Law §193 (providing that "no person," defined by Navigation Law §172(14) to include the State, "who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under this article") bars recovery by the State.

In a second decision, Judge Melkonian held that the State failed to meet its burden in seeking a protective order for two Investigative Summary Reports ("IRSs") regarding the spills, and a Transmittal Memorandum which transmitted one of the IRSs between employees of NYSDEC. The court rejected the State's argument that the attorney-client privilege applied to any of the documents because the contents were not confidential communications in the context of legal advice, and specifically did not apply to the IRSs because they were not communications with the Attorney General. The court found these documents were simply factual.

Discharges

Zincke v. P. Energy Corp., 146 A.D.3d 923, 45 N.Y.S.3d 510 (2d Dep't 2017). The Second Department affirmed an order that found that a home heating oil provider failed to raise a triable issue of fact on summary judgment, and thus, was liable under the Oil Spill Act when its employee overfilled a homeowner's basement heating oil tank, causing oil to discharge out of a valve at the bottom of one of the tanks onto the cellar floor, which contained several floor drains that emptied directly into the soil. The court held that it was insufficient for the Defendant to "merely

demonstrate that the oil spill . . . did not actually reach the surface or groundwater," rather "[i]t was required to also demonstrate that the oil spill could not have done so."

Injunction

One Flint St. LLC v. ExxonMobil Corp., 145 A.D.3d 1490, 44 N.Y.S.3d 288 (4th Dep't 2016). The Fourth Department modified an order (*One Flint St. LLC v. Exxon Mobil Corp.*, Index No. 2011/4470 (Sup. Ct. Monroe Co., Feb. 25, 2016, Anne Marie Taddeo, J.)), by denying plaintiffs' cross-motion seeking injunctive relief, even though the Fourth Department had previously concluded that the Exxon defendants were strictly liable as dischargers (*One Flint St., LLC v. Exxon Mobil Corp.*, 112 A.D.3d 1353, 977 N.Y.S.2d 531 (4th Dep't 2013), *lv. dis.* 23 N.Y.3d 998, 992 N.Y.S.2d 764 (2014)), because a "'mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under the unusual circumstances where such relief is essential to maintain the status quo pending trial of the action.'" The court did not specifically address whether an injunction is available for a private party under the Oil Spill Act. Further, cross-motions for summary judgment on liability of plaintiffs were denied, and it was not necessary for Exxon to plead alleged spoliation.

Piercing Corporate Veil

Supreme Energy, LLC v. Martens, 145 A.D.3d 1147, 42 N.Y.S.3d 454 (3d Dep't 2016). The Commissioner adopted an ALJ's recommendation after hearing to fine Petitioners $234,900 for operating a facility without a license, $564,817 for failing to pay the required licensing fees, and $469,800 for failing to maintain adequate secondary containment—for a total of $1,269,517. The Third Department rejected an Article 78 petition (transferred from Supreme Court) challenging the fines because the Commissioner's determination was supported by substantial evidence. Further, the Commissioner did not err in piercing the corporate veil and imposing personal liability for the fine of $1,269,517 on the sole member of an LLC. The sole member commingled personal and business finances when he deposited payment he personally received for child support into the corporate account, and used the same monies for house payments and for two businesses. The sole member "failed to observe corporate formalities and abused the corporate form to perpetuate a wrongdoing against DEC. As such, we find no error in respondent's determination to pierce the corporate veil and to hold [sole member] personally responsible for the imposed financial penalties."

Enforcement

Zahav Enterprises, Inc. v. Martens, 2017 N.Y. Slip Op. 03522, 1, 2017 WL 1657221 (2d Dep't May 3, 2017). The Second Department affirmed an order denying a hybrid Article 78 challenge seeking to set aside a stipulation by which the Petitioner agreed to remediate, rejecting allegation of bad faith. Further, the Petitioner illegally discharged petroleum, failed to contain petroleum, and failed to comply with the stipulation, in violation of the Oil Spill Act, so the $60,000 penalty imposed by the Commissioner (reduced from $112,500 sought by NYSDEC) was not excessive,

and was properly assessed even if the Petitioner was an "innocent owner."

In re Able Energy New York, Inc., DEC Case Nos. R5-201403 13-2108, LER5-13-0004958B, PBS No. 5-600665 (Mar. 18, 2016) ($79,500 in penalties imposed by NYSDEC for failing to renew the facility's registration, failing to close tanks, failing to mark fill ports, failing to conduct monthly inspections of tanks, etc., and the respondent was found liable for a petroleum spill caused by its employee at a residence in Lake George).

In re Zenith Management 1 LLC, DEC Case No. R2-20150917-503 (June 17, 2016) ($50,000 in penalties imposed by NYSDEC in connection with a fuel oil spill that occurred in December 2014 where a spill occurred, caused by a breach of a fuel oil line from the fill port to an underground heating oil tank, and oil was discharged to soil beneath the basement floor).

In re Mavino Realty Co., Inc., DEC Case No. 2-2888531B2 (Mar. 3, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 5,000-gallon AST).

In re Sinckler Inc., DEC Case No. 2-605783JB2 (Mar. 7, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 2,000-gallon PBS tank).

In re Trio Bronx Inc., DEC Case No. 2-602093182 (Mar. 16, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 2,000-gallon AST).

In re SDM Realty LLC, DEC Case No. 2-602886NGD (Mar. 18, 2016) ($5,000 in penalties imposed by NYSDEC on the owners of three PBS facilities for failing to renew their facility registrations, which had been expired for at least 10 months).

In re 962-68 Anderson Avenue Housing Development Fund Corp., DEC Case No. 2-607459NYW (Mar. 31, 2016) ($10,000 in penalties imposed by NYSDEC for failing to reregister a PBS tank which an owner acquired 16 years earlier).

In re Charleston Mall of Utica, LLC, DEC Case No. R6-10151116-67 (June 14, 2016) ($35,000 in penalties imposed by NYSDEC for failing to register the facility after acquiring it in 2007 and for failing to properly close the tanks, which were permanently out of service).

In re Empire Construction & Real Estate LLC, DEC Case No. R6-20131231-48 (June 2, 2016) ($30,000 in penalties imposed by NYSDEC for failing to test two 9,000-gallon USTs since 1987 which still contained several thousand gallons of fuel).

In re 540 Jackson Realty Corp., DEC Case No. 2-316520JB2 (May 18, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew a 4,000-gallon tank's registration which expired in 2007).

In re 148-158 West 142 Owners LLC, DEC Case No. 2-602800NJB2 (June 2, 2016) ($5,000 in penalties imposed by NYSDEC for failing to reregister the tank within 30 days of acquiring the facility in 2014).

In re Dalton d/b/a Dalton's Deli, DEC Case No. R6-20150312-19 (Aug. 15, 2016) ($28,500 in penalties imposed by NYSDEC failed to renew registration of the facility, failing to take three ASTs that had not been operating since 2010 permanently out of service, failing to conduct monthly inspections, for storing petroleum-contaminated soil for more than 60 days, and for disposing of contaminated soil at the facility).

In re KG Island Realty Corp., DEC File No. R2-20120720-458 (July 29, 2016) ($68,000 in penalties imposed by NYSDEC for failing to register, label, and inspect an AST, and failing to comply with a 2008 order on consent).

In re S & M Realty of New York Inc., DEC Case No. R2-20150518-318 (July 29, 2016) ($34,700 in penalties imposed by NYSDEC for failing to register a closed-in-place 4,000-gallon UST that was the subject of the earlier proceedings, failing to register three newly identified USTs, failing to notify NYSDEC at least 30 days before it permanently closed the 4,000-gallon UST, etc.).

In re Ilion Properties, Inc., DEC Case No. R6-20140806-46 (June 27, 2016) ($60,000 in penalties imposed by NYSDEC for failing to register a 30,000-gallon AST and for failing to permanently close the tank).

In re Blue Label Group, LLC, DEC Case No. PBS.2-154083.4.2016 (Sept. 13, 2016) ($9,500 in penalties imposed by NYSDEC for failing to register a 1,500-gallon AST within 30 days of acquiring ownership).

In re 125 Schenectady Avenue Housing Development Fund Corp., DEC Case No. PBS.2-467189.7.2016 (Aug. 25, 2016) ($7,500 in penalties imposed by NYSDEC for failing to renew the registration of a 3,000-gallon AST).

In re 63 Morningside Avenue Housing Development Fund Corp., DEC Case No. PBS.2-608837.5.2016 (Aug. 15, 2016) ($7,500 in penalties imposed by NYSDEC for failing to renew the registration of a 2,000-gallon AST).

In re Mariam Petroleum, Inc., DEC Case No. R4-2013-0409-53 (Oct. 13, 2016) ($10,000 in penalties imposed by NYSDEC on an owner and operator six PBS tanks for failing to renew, maintain accurate drawings, recordkeeping, etc.).

In re Village KF 2 Associates LLC, DEC Case No. R2-20150901-477 (Sept. 13, 2016) ($22,500 in penalties imposed by NYSDEC on an owner of a 4,000-gallon for failing to register within 30 days of becoming an owner, failing to notify DEC prior to closure, etc. The respondent removed the tank in accordance with the New York City Fire Department Regulations, but the

Commissioner found that it did not comply with NYSDEC's regulations and therefore was in violation).

In re Three Son Petroleum, Inc., DEC Case No. R4-2015-0713-85 (Oct. 25, 2016) ($9,000 imposed in penalties by NYSDEC for failing to renew three USTs and one AST, failing to keep daily water bottom level records, failing to maintain dispenser pumps, and failing to have proper overfill protection).

In re R & L Smith Trucking, Inc., DEC Case No. R9-20150219-13 (Dec. 14, 2016) ($6,900 in penalties imposed by NYSDEC for failing to renew its 10,000-gallon UST which expired in 2012, failing to properly close a tank, failed to record keep, etc.).

In re Brighton House, Inc., DEC Case No. PBS.2-239968.4.2016 (Jan. 20, 2017) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 10,000-gallon UST before 2012).

In re 1001 Jerome Associates a/k/a 1001 Jerome LLC, DEC Case No. PBS.2-219843.4.2016 (Jan. 20, 2017) ($7,500 in penalties imposed by NYSDEC for renew the registration of a 5,000-gallon AST by 2012).

In re Zohov Realty Corp., DEC Case No. PBS.2-205389.10.2016 (Dec. 5, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 3,000-gallon UST by 1997).

In re Rikud Realty, Inc., DEC Case No. PBS.2-270938.10.2016 (Nov. 28, 2016) ($10,000 in penalties imposed by NYSDEC for failing to renew the registration of a 3,000-gallon UST by 1997).

In re RCASCO Properties Inc., DEC Case No. PBS.2-611710.10.2016 (Nov. 28, 2016) ($7,500 in penalties imposed by NYSDEC for failing to register a 1,500-gallon UST within 30 days after it obtained ownership).

In re 976 Simpson Street Housing Development Fund Corp., DEC Case No. 2-601159NJB2 (June 23, 2016) (motion for default judgment denied by an ALJ for alleged violations of registration requirements due to improper service).