IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GLIMCHER PROPERTIES LIMITED PARTNERSHIP, CENTURA DEVELOPMENT CO., INC. and CENTURA ECK LIMITED PARTNERSHIP NO. 1,	:	NO. 03-02,135
Plaintiffs	:	
vs.	:	
	:	CIVIL ACTION - LAW
CHEVRON TEXACO CORPORATION, TEXACO, INC. and CHEVRON ENVIRONMENTAL MANAGEMENT CO.,	:	
Defendants	:	Preliminary Objections

OPINION AND ORDER

Before the Court are Defendants' preliminary objections to Plaintiffs' Amended Complaint, filed April 19, 2004. Argument was heard May 26, 2004.

The instant matter arises from the development of certain real estate by Plaintiff Centura Development Co., Inc. and Plaintiff Centura Eck Limited Partnership[1], the discovery during that development of petroleum contamination, and Plaintiffs' remediation efforts. According to the Amended Complaint, once the contamination was discovered, Keith Eck, President of Centura Development Co., orally notified one Justin Polikoff, an environmental project manager at Defendant Texaco, Inc.[2] Plaintiffs allege Mr. Polikoff orally acknowledged Texaco's responsibility for the contamination and orally promised to pay for any costs incurred by Plaintiffs in connection therewith. Plaintiffs claim that in good faith reliance on Mr. Polikoff's promise, $246,495 was spent on remediation and $97,704 incurred in additional construction costs. The instant suit followed a letter from Defendant Chevron Environmental Management Company, which apparently indicated no reimbursement would be forthcoming.

[1] The real estate was owned by Plaintiff Glimcher Properties from 1994 through May 2001.
[2] The property had, from 1964 through 1984, been occupied by a service station owned by Texaco, Inc.

In their three-count complaint, Plaintiffs seek (1) compensatory damages plus interest and costs, as well as a declaratory judgment with respect to any future remediation costs, under the Pennsylvania Storage Tank and Spill Prevention Act[3], (2) compensatory damages and a declaratory judgment under a theory of promissory estoppel, and (3) compensatory damages and a declaratory judgment under a theory of breach of an oral contract. Defendants raise eleven (11) preliminary objections,[4] which will be addressed somewhat out of order, for ease of discussion.

First, Defendants demur to Count 1, contending Plaintiffs fail to state a legally sufficient claim as they attempt "to reach conduct that occurred before the [Tank Act] became effective[5] and the Act cannot be applied retroactively." Defendants cite Two Rivers Terminal, L.P. v. Chevron USA, Inc., 96 F.Supp.2d 432 (M.D. Pa. 2000), which holds the Tank Act cannot be applied retroactively, and that to apply it to a spill which occurred prior to the effective date of the Act would be a retroactive application. Plaintiffs argue there is no retroactive application involved here as it is the contaminated condition which is actionable, rather than the spill itself, and that as long as the condition exists after the effective date of the Act, the Act applies. Plaintiffs cite Delaware Coca-Cola Bottling Co., Inc. v. S & W Petroleum Services, Inc., 894 F.Supp. 862 (M.D. Pa. 1995), which holds it is not the spill itself that gives rise to a cause of action under the Act but the remedial action taken to abate the nuisance, and Shooster v. Amoco Oil Co., No. C.A. 98-1627, 2001 WL 882971 (E.D. Pa. 2001), which rejects the reasoning of Two Rivers in favor of that in Delaware Coca-Cola, and holds that retroactive application would come into play only if a plaintiff attempted to recover clean up costs that were incurred prior to the Act's effective date.

In choosing to follow Delaware Coca-Cola, the Shooster Court noted the lack of appellate authority on the issue, but used as a "guide to construing the statute" the Pennsylvania Supreme Court's holding in Centolanza v. Lehigh Valley Dairies, 658 A.2d 336 (Pa. 1995), that "the Tank Act is a remedial statute that must be construed liberally."[6] Shooster, supra at 9.

[3] 35 Pa.C.S. Section 6021.101 et seq.
[4] Defendants' objection that Plaintiffs failed to attach to the Amended Complaint the letter referred to in Paragraph No. 42 thereof, was withdrawn by way of a statement to that effect contained in Defendants' brief.
[5] The Act went into effect August 6, 1989.
[6] The issue of retroactivity was not raised in Centolanza.

In rejecting the reasoning of Delaware Coca-Cola, the Two Rivers Court also noted Centolanza's holding, but indicated that in Centolanza the Court was interpreting remedial language that was ambiguous, whereas the provision with which it was concerned involved no ambiguity. In holding that the Act cannot apply to pre-Act releases, the Court stated: '[w]e cannot ignore the language of the statute[7] under the guise of enforcing its overall purpose." Two Rivers, supra at 443.

Faced with these conflicting holdings, this Court looks to the express statement of the statute's overall purpose, contained in Section 6021.102, entitled "Legislative Findings":

> **(a) Findings enumerated.--** The General Assembly of the Commonwealth finds and declares that:
>
> (1) The lands and waters of this Commonwealth constitute a unique and irreplaceable resource from which the well-being of the public health and economic vitality of this Commonwealth is assured.
>
> (2) These resources have been contaminated by releases and ruptures of regulated substances from both active and abandoned storage tanks.
>
> (3) Once contaminated, the quality of the affected resources may not be completely restored to their original state.
>
> (4) When remedial action is required or undertaken, the cost is extremely high.
>
> (5) Contamination of groundwater supplies caused by releases from storage tanks constitutes a grave threat to the health of affected residents.
>
> (6) Contamination of these resources must be prevented through improved safeguards on the installation and construction of storage tanks.
>
> **(b) Declaration.--** The General Assembly declares these storage tank releases to be a threat to the public health and safety of this Commonwealth and hereby exercises the power of the Commonwealth to prevent the occurrence of these releases through the establishment of a regulatory scheme for the storage of

[7] The Court was referring to the citizen-suit provision which allows a cause of action when a defendant is "in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act." 35 Pa.C.S. Section 6021.1305(c).

> regulated substances in new and existing storage tanks and to provide liability for damages sustained within this Commonwealth as a result of a release and to require prompt cleanup and removal of such pollution and released regulated substance.

35 Pa.C.S. Section 6021.102. It appears clear to this Court from this statement that the Legislature is not attempting to reach pre-Act spills. The legislature refers to prior contamination but rather than indicating an exercise of power to require remediation of such prior contamination, it instead declares that contamination "must be prevented" and exercises its power to "prevent the occurrence of these releases". The Court therefore agrees with the Two Rivers Court that the Act cannot be applied to a spill which occurred prior to the effective date of the Act.[8] Accordingly, Defendants' preliminary objection to Count 1 will be sustained and this Count will be dismissed.[9]

Next, Defendants demur to Count II, arguing the "indefinite oral assurances allegedly made by Mr. Polikoff were insufficient as a matter of law for plaintiffs reasonably to rely on them." Defendants also object to the level of specificity with which Plaintiffs have pled their claims of promissory estoppel and breach of oral contract, contending the alleged "promises" made by Mr. Polikoff have been insufficiently stated, specifically that there are no allegations regarding when the promise was made, how many times it was made, under what circumstances it was made, or what was said. While the Court acknowledges there may be circumstances under which reliance on indefinite oral assurances is unreasonable as a matter of law, see Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 636 A.2d 156 (Pa. 1994), whether reliance is reasonable is not an issue to be decided at the preliminary objection stage. As long as Plaintiffs allege reasonable reliance, and from a fair reading of the Amended Complaint they have so alleged,[10] they have stated a claim upon which relief may be granted. The Court agrees, however, that the specifics of the alleged promises made by Mr. Polikoff are material to Plaintiffs' claims, and, as such, must be pled with more

[8] All courts addressing the retroactivity issue agree the Act is not to be applied retroactively; the disagreement lies only in what constitutes a retroactive application.
[9] In light of this disposition, the objection raising the statute of limitations will not be addressed.
[10] In Paragraph 41, Plaintiffs allege their remediation efforts were made "in good faith reliance upon the promises of Texaco". In Paragraph 71, Plaintiffs allege they undertook remediation "[r]elying on the promises made by

particularity. See Pa.R.C.P. Rule 1019(a): the material facts upon which a cause of action or defense is based shall be stated in a concise and summary form. Plaintiffs will therefore be given the opportunity to amend their Amended Complaint in order to provide more specificity regarding the alleged promises made by Mr. Polikoff.

Next, Defendants move to strike the demand in all three counts for a "declaratory judgment that Defendants are responsible for all additional, future characterizations and remediation expenses caused by the release of petroleum products, which may be necessary to comply with Act 2 and obtain a release of liability thereunder", on the basis that a declaratory judgment action may not be employed "to determine rights in anticipation of events which may never occur", citing and quoting Brown v. Commonwealth, Liquor Control Board, 673 A.2d 21, 22 (Pa. Commw. 1996). While Plaintiffs allege that they "will be required to pay additional, future costs in order to continue the remediation and characterization of the Property, until all requirements of Act 2 have been met and a release from liability is obtained,"[11] thus attempting to remove from their demand the uncertainty which might otherwise render it objectionable under Brown, the Court believes that to properly support their demand for a declaratory judgment Plaintiffs must more specifically plead what additional costs they will be required to pay and why Defendants should be held liable for such.

Next, Defendant Chevron Texaco Corporation and Defendant Chevron Environmental Management Company demur to Counts II and III, arguing Plaintiffs have failed to allege that either of them made any promises to Plaintiffs or that either of them was a party to the alleged oral contract.[12] Plaintiffs contend both defendants are includable in the action based on an assumption of the liabilities of Texaco, Inc., arising from the merger of Texaco, Inc. and Chevron. It appears, however, that Texaco, Inc. still exists, as a subsidiary of Chevron Texaco Corporation and that under the facts of this case, Chevron Texaco Corporation is not liable for the liabilities of its subsidiaries. Chevron Environmental Management Company is also a subsidiary of Chevron Texaco Corporation. Plaintiffs nevertheless seek to impose liability

---

Defendant Texaco". In Paragraph 69, Plaintiffs allege that based on Texaco's employee's representations, "Defendant Texaco reasonably expected Plaintiffs to undertake the remediation".

[11] See Plaintiffs' Amended Complaint, Paragraph 48.

[12] Chevron Environmental Management Company also raises its own objection to all counts but since Count I is being dismissed in any event, this objection is moot.

based on the fact that the letter which indicated no reimbursement would be forthcoming came from Chevron Environmental Management Company, but simply assuming management of another's liability does not impose on the entity assuming such management independent liability therefor. Inasmuch as Plaintiffs have failed to allege facts which impose liability on either of these defendants, their demurrer will be granted.[13]

Finally, Defendants demur to Counts II and III as brought by Plaintiff Glimcher Properties Limited Partnership, contending the Complaint fails to allege any promise made to Glimcher or that Glimcher was a party to the alleged oral contract. As Plaintiffs point out, however, the Complaint does allege, in Paragraph 39, that Mr. Polikoff orally promised to pay "Plaintiffs" for the site characterization and remediation costs, and in Paragraphs 68 through 72 and 74 through 77, Plaintiffs allege a promise to reimburse "Plaintiffs". Considering the Complaint also alleges Plaintiff Glimcher was the owner of the property until 2001, the Court finds Counts II and III sufficient to state a claim on behalf of Glimcher.

Accordingly, Count I will be dismissed, Counts II and II as filed against Chevron Texaco Corporation and Chevron Environmental Management Company will be dismissed, and Plaintiffs will be directed to file a Second Amended Complaint to conform with the pleading requirements outlined herein.

ORDER

AND NOW, this 10th day of June 2004, for the foregoing reasons, Defendants' Preliminary Objections are hereby overruled in part and sustained in part. Count I of the Amended Complaint is hereby dismissed. Counts II and II are also dismissed as against Chevron Texaco Corporation and Chevron Environmental Management Company. Finally, Plaintiffs are directed to file a Second Amended Complaint within twenty (20) days of this date, more specifically pleading in Count II the alleged promises made by Mr. Polikoff, and in Counts II and III the demand for a declaratory judgment, indicating more specifically what

[13] In light of this disposition, Chevron Texaco's objection that the Court lacks personal jurisdiction over it is considered moot.

additional costs they will be required to pay and why Texaco, Inc. should be held liable for such.

BY THE COURT,

Dudley N. Anderson, Judge

cc: David Romine, Esq., 1616 Walnut St., Ste. 1700, Philadelphia, PA 19103-5319
G. Bryan Salzmann, Esq., 455 Phoenix Dr., Ste. A, Chambersburg, PA 17201
Brian Clark, Esq., 213 Market St., 3rd floor, Harrisburg, PA 17101
Gary Weber, Esq.
Hon. Dudley Anderson