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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JAN 05 2004

at 4 o'clock and 54 min. P.M.
WALTER A. Y. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ERIC RODRIGUES, RICHARD
PARANADA, VICTOR MANDRIAL, and
LYMAN CORONIL,

Plaintiffs,

vs.

TANADGUSIX CORPORATION,

Defendant.

) CIVIL NO. 02-000627 HG-LEK
)
)
)
)
) ORDER DENYING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT;
)
) DENYING PLAINTIFFS' CROSS-
) MOTION FOR SUMMARY JUDGMENT;
)
) GRANTING PLAINTIFFS' MOTION TO
) STRIKE DEFENDANT'S MEMORANDUM
) IN OPPOSITION TO PLAINTIFFS'
) MOTION FOR SUMMARY JUDGMENT
) AND REPLY TO DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT;
)
) AND
)
) GRANTING DEFENDANT'S MOTION
) FOR LEAVE TO FILE CORRECTED
) MEMORANDUM IN OPPOSITION TO
) PLAINTIFFS' MOTION FOR SUMMARY
) JUDGMENT AND REPLY RE
) DEFENDANT'S MOTION FOR SUMMARY
) JUDGMENT;

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT
AND

**GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

AND

**GRANTING DEFENDANT'S MOTION FOR LEAVE TO FILE CORRECTED
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND REPLY RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Eric Rodrigues, Richard Paranada, Victor Mandrial, and Lyman Coronil ("Plaintiffs") brought a citizen suit alleging that Defendant Tanadgusix Corporation ("Defendant" or "TDX") has unlawfully discharged industrial pollutants into United States waters without a National Pollutant Discharge Elimination System permit in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq. Defendant responds that it does not need such a permit because the source of the allegedly discharged pollutants is already covered by a permit and the relevant statute does not require two National Pollutant Discharge Elimination System permits.

Defendant moves for summary judgment in its favor and asks the Court to dismiss the instant case with prejudice.

Plaintiffs filed a cross-motion for summary judgment, requesting that the Court find Defendant in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq. and Chapter 342 of the Hawaii Revised Statutes. For the reasons that follow, both Plaintiffs' and Defendant's respective summary judgment motions are DENIED.

PROCEDURAL HISTORY

On October 1, 2002, Plaintiffs filed a Complaint for Injunctive Relief and Civil Penalties ("Complaint").

On October 21, 2002, Defendant filed an Answer asserting certain defenses and a Counterclaim.

On February 18, 2003, this Court issued an Order Granting Plaintiffs' Motion to Dismiss Defendant's Counterclaim.

On May 20, 2003, Defendant filed a Motion for Summary Judgment.

On June 5, 2003 Defendant withdrew its Motion for Summary Judgment and filed an Amended Motion for Summary Judgment. On the same date, Defendant filed its Concise Statement of Facts in Support of its Amended Motion for Summary Judgment.

On August 29, 2003, Plaintiffs filed a Cross-Motion for Summary Judgment. On the same date, Plaintiffs filed their Concise Statement of Facts in Support of their Cross-Motion for Summary Judgment and Response to Defendant's Concise Statement of Facts.

On September 18, 2003, Defendant filed its Response to Plaintiffs' Concise Statement of Facts. Also on that date, Defendant filed a Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply to Defendant's Motion for Summary Judgment.

On September 22, 2003, Plaintiffs filed a Motion to Strike Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Reply to Defendant's Motion for Summary Judgment.

On September 24, 2003, Plaintiffs filed a Reply Memorandum in Support of their Cross-Motion for Summary Judgment.

On September 26, 2003, Defendant filed a Motion for Leave to File Corrected Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Reply Re Defendant's Motion for Summary Judgment, and a Corrected Memorandum.

On September 29, 2003, the Court heard oral argument regarding the parties' respective motions for summary judgment and took the motions under submission.

**I. PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
DEFENDANT'S MOTION FOR LEAVE TO FILE CORRECTED MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY
RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

On September 18, 2003, Defendant, without obtaining leave of Court, filed a Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply to Defendant's Motion for Summary Judgment that exceeded the page limitation set forth in Rule 7.9 of the Local Rules of the United States District Court

for the District of Hawaii. On September 22, 2003, Plaintiffs filed a Motion to Strike Defendant's Opposition Memorandum. On September 26, 2003, Defendant filed a Motion for Leave to File Corrected Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Reply Re Defendant's Motion for Summary Judgment, as well as a Corrected Memorandum. Defendant's Corrected Memorandum is substantively similar to its original opposition memorandum and reply, and complies with the word limit established by Local Rule 7.9.

The Court GRANTS Plaintiffs' Motion to Strike Defendant's Opposition Memorandum and Reply filed September 18, 2003, and also GRANTS Defendant's Motion for Leave to File Corrected Memorandum filed September 26, 2003. The Court considers Defendant's Corrected Memorandum filed September 26, 2003 in ruling on the parties' respective motions for summary judgment.

II. PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

In March 2001, the United States, acting through the General Services Administration ("GSA") donated the Ex-Competent, a 552-foot long and nearly 60-year old floating dry dock, to Defendant TDX, free of charge. The drydock operates by being submerged, having a customer's vessel floated above it, and then rising to

lift the vessel. Due to its age and state of disrepair, the Navy, which had been the original possessor of the drydock, declared the Ex-Competent to be excess property, facilitating its transfer to the GSA. The GSA declared the drydock surplus property, which enabled its donation to a non-federal entity. Defendant was the recipient of the donation and received conditional title to the Ex-Competent.¹ The terms of the donation were set forth in a Vessel Conditional Transfer Document ("Transfer Document") between the United States and Defendant. (Pls. Separate and Concise Statement of Facts, Ex. C-2.) The Transfer Document provides that the drydock "will be used solely in connection with such programs and more specifically for all the following purpose(s) and plan as set forth in the Donee's 'Letter of Intent' dated January 19th, 2001 which Expression of Interest is hereby incorporated herein and made a part hereof"¹ (Id.) The referenced and incorporated letter, authored by Defendant TDX's Chairman and Chief Executive Officer Ron Philemonoff, provides that Defendant "will be fully responsible for bringing the vessel into service . . . and will retain full

¹ In Tanadgusix Corporation, et al. v. Huber, et al., No. A02-0032-CV (D. Alaska Dec. 5, 2002, appeal docketed, No. 02-36142 (9th Cir.) the United States District Court for the District of Alaska issued an order upholding the GSA's exercise of its option to have conditional title to the Ex-Competent revert back to the United States on March 22, 2002. That order has been stayed, pending a decision in an appeal to the Ninth Circuit.

control of the operations and management of the vessel." (Id. (emphasis added).) The Transfer Document provides that the donation is subject to a series of enumerated conditions and restrictions, including the following:

8. . . . Donee shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of the Property, or remove it permanently for use outside the State, without the prior written approval of GSA.
. . . .

(Id. at 2.)

On January 2, 2002, Defendant executed an Interim Agreement with Marisco, Ltd., a marine and industrial services company and owner of the shipyard in Honolulu, Hawaii, where the Ex-Competent was and remains in operation. The Interim Agreement describes the relationship between Defendant and Marisco with respect to the drydock. (See id., Ex. C-3.)

Marisco possesses National Pollutant Discharge Elimination System ("NPDES") permit no. 0021199, which regulates discharge from the Ex-Competent drydock² and, at the very least, from the

² NPDES permit no. 0021199 was originally obtained by Marisco to regulate its drydock called Big Mike. Marisco has sought modification of permit no. 0021199 to cover Big Mike's replacement, the Ex-Competent. Marisco's request for permit modification has not yet been approved, but in a January 17, 2002 letter, a representative of the Hawaii Department of Health represented to Marisco that it could continue to operate the Ex-Competent under permit no. 0021199 during the pendency of its application for permit modification, contingent upon Marisco's compliance with the conditions of permit no. 0021199. (Pls.

adjacent land-based areas.³ Plaintiffs contend that Defendant, as the owner and party responsible for the "full control of the operations and management," of the Ex-Competent, has violated the Clean Water Act, 33 U.S.C. § 1251 et seq., by failing to obtain its own NPDES permit to regulate its operation of the Ex-Competent. Defendant responds that Marisco's permit no. 0021199 regulates the Ex-Competent and as such, it need not have obtained an additional permit. Defendant asks this Court to grant summary judgment in its favor and dismiss the instant case with prejudice. Plaintiffs also ask this Court to grant summary judgment in their favor and grant the relief requested in their Complaint.

Legal Background

A. The federal and state statutory and regulatory provisions

The Clean Water Act prohibits the discharge of pollutants into United States waters "by any person" except as authorized by the Act itself. 33 U.S.C. § 1311(a). Title 33, Section 1342 of

Separate and Concise Statement of Facts, Ex. C-9.)

³ Defendant asserts in its Amended Motion for Summary Judgment that NPDES permit no. 0021199 "covers the entire shipyard facility, and regulates discharges from both land-based operations and the drydock." (Def. Amend. Mot. for Sum. Judg. at 6.) Plaintiffs dispute that permit no. 0021199 regulates Marisco's entire shipyard, asserting that the permit regulates "discharges from the Ex-Competent drydock and the adjacent land-based areas." (Pls. Response to Def. Concise Statement of Facts, at II. ¶ 1.)

the United States Code provides for the issuance of National Pollutant Discharge Elimination System permits for the discharge of any pollutant, provided that such discharges meet the requirements enumerated in sections 1311, 1312, 1316-18 and 1342 of Title 33. Section 1342 further authorizes the individual states to administer their own NPDES permit programs. 33 U.S.C. § 1342(b).

The federal regulations pertaining to the federal NPDES program provide that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." 40 C.F.R. § 122.21(b). The regulations define "owner or operator" as "the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." 40 C.F.R. § 122.2. "Facility or activity" is defined as "any NPDES 'point source' or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." Id. A "point source" includes "any discernible, confined, and discrete conveyance, including but not limited to, any . . . vessel or other floating craft from which pollutants are or may be discharged." Id.

Hawaii's corresponding water pollution statutes are codified in Section 342D of the Hawaii Revised Statutes. Section 11-55-04

of the Hawaii Administrative Rules contains the corresponding state regulations. The Hawaii regulations provide as follows:

(a) Before discharging any pollutant . . . a person shall submit a complete NPDES permit application An NPDES permit application shall be submitted:

(1) At least one hundred eighty days before the discharge . . . begins or before the expiration date of the existing permit. . . .

(b) Application for NPDES permits shall be made by the owner or operator⁴ on an NPDES permit application provided by the director. . . . When a facility or activity⁵ is owned by one person, but is operated by another person, it is the operator's duty to obtain a permit on behalf of the owner. The operator shall provide written evidence that the owner authorizes the operator to apply on behalf of the owner and that the owner agrees to comply with all permit conditions. Only one permit is required for a single facility or activity.

HAR § 11-55-04(a)-(b).

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Genuine"

⁴ The Hawaii Administrative Rules contain the same definition of "owner or operator" as set forth in the federal regulations. Compare HAR § 11-55-01 with 40 C.F.R. § 122.2.

⁵ The Hawaii Administrative Rules contain the same definition of "facility or activity" and "point source" as set forth in the federal regulations. Compare HAR § 11-55-01 with 40 C.F.R. § 122.2.

refers to the quantum of evidence the plaintiff must produce in order to defeat a motion for summary judgment. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996). There must be sufficient evidence such that a reasonable jury could return a verdict for the nonmoving party. Id.

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. Celotex, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. That burden is met simply by pointing out to the district court that there is an absence of evidence to support the nonmovant's case. Id.

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its

legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., 809 F.2d at 630. The opposing party cannot rest on mere allegations or denials. Fed. R. Civ. P. 56(e); Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). Nor can the Plaintiff rest on conclusory statements. National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997).

Summary judgment for the defendant is appropriate when the plaintiff fails to make a sufficient showing to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The court views the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

ANALYSIS

The overarching issue before this Court is whether Defendant has violated the Clean Water Act by failing to obtain an NPDES permit to regulate the operation of the Ex-Competent drydock. As the pertinent regulations require the owner or operator to obtain such a permit, the Court cannot reach this legal issue without

determining the underlying factual issue of whether Marisco Ltd. is the operator of the drydock. The parties remain in dispute as to this underlying, material issue of fact.

Plaintiffs maintain that Defendant, not Marisco, is the operator of the Ex-Competent drydock. (Pls. Cross-Mot. for Sum. Judg. at 14, 18-21.) In support of this assertion, Plaintiffs cite to the Vessel Conditional Transfer Document executed between the Government and Defendant, which provides that the drydock "will be used solely in connection with such programs and more specifically for all the following purpose(s) and plan as set forth in the Donee's 'Letter of Intent' dated January 19th, 2001 which Expression of Interest is hereby incorporated herein and made a part hereof" (Pls. Separat  and Concise Statement of Facts, Ex. C-2 at 1.) The referenced and incorporated letter, authored by Defendant TDX's CEO, provides that Defendant "will be fully responsible for bringing the vessel into service . . . and will retain full control of the operations and management of the vessel." (Id. (emphasis added).)

Plaintiffs also cite as support for their argument that TDX controls the drydock, the Interim Agreement executed between Defendant TDX and Marisco, which provides, inter alia, that the Agreement "conveys no interest or title whatsoever in any real or personal property held by either TDX or Marisco, including in

TDX's *Ex-Competent*" (Id., Ex. C-3 at 1.) Plaintiffs further cite the sworn declaration of Defendant's Chairman and CEO Ron Philemonoff, in which he stated that "TDX controls the operation of the drydock" (Id., Ex. C-4 at 3.)

Defendant TDX, in contrast to Plaintiffs, maintains that "Marisco can also be an NPDES 'operator' of the *Ex-Competent* because Marisco has sufficient 'day-to-day supervision and control of activities occurring on' the *Ex-Competent*." (Def. Corrected Mem. in Op. to Pls. Cross-Mot. for Sum. Judg. at 9.) In support of its argument, Defendant TDX points to the following facts. The Interim Agreement between TDX and Marisco provides that TDX and Marisco "shall make their best respective efforts to solicit customer vessels for use of the *Ex-Competent's* services." (Def. Concise Statement of Facts, Ex. 3, ¶ 5). Defendant TDX asserts, and Plaintiffs neither admit nor deny, that Marisco employees train TDX's employees in the drydock's operation (Def. Concise Statement of Facts at 3, ¶ 9); Marisco employees work on customers' ships on the drydock (e.g., painting and sandblasting), and bring ship parts off the drydock to the shipyard's various shops for repairs (Id. at 4, ¶ 14); and Marisco controls which ship parts are taken to which shops, and when (Id., ¶ 15). Defendant TDX asserts, and Plaintiffs admit, that Marisco receives revenues related to ship repair work (Id.,

¶ 16). Defendant TDX asserts, and Plaintiffs deny, that Marisco and Defendant together decide which vessel repair contracts to bid upon, when to lift vessels, and how to lift them. (Compare Id., ¶ 17, with Pls. Concise Statement of Facts at 6, ¶ 17.)

In addition to Defendant TDX's own contentions, the United States District Court for the District of Alaska, in the case regarding the status of Defendant's title to the Ex-Competent drydock, currently on appeal to the Ninth Circuit, issued an Order in which it made the following relevant findings: "TDX failed to maintain full control of the operations and management of the [Ex-Competent]" and "Marisco Limited obtained some, if not full, control of the operations and management of the Ex-Competent" Tanadgusix Corporation, et al. v. Huber, et al., No. A02-0032-CV (D. Alaska Dec. 5, 2002), at 15-16, appeal docketed, No. 02-36142 (9th Cir.) in (Def. Corrected Op. Mem., Ex. 43 at 15-16.)

In light of the above, it is clear to this Court that there remains between the parties a dispute as to whether Marisco properly may be deemed the operator of the drydock for purposes of the Clean Water Act and corresponding regulations. Without a resolution of this factual dispute, the Court cannot reach a conclusion as to the legal issues raised in this case.

As material issues of fact remain, the Court cannot conclude at this point that either party is entitled to judgment as a matter of law. Accordingly, both Plaintiffs' and Defendant's motions for summary judgment are DENIED.

CONCLUSION

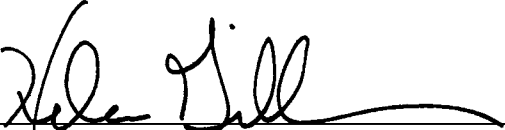
For the foregoing reasons,

it is HEREBY ORDERED:

1. Plaintiff's Motion to Strike Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, and Reply Re Defendant's Motion for Summary Judgment is GRANTED;
2. Defendant's Motion for Leave to File Corrected Memorandum is GRANTED;
3. Defendant's Motion for Summary Judgment is DENIED;
and
4. Plaintiffs' Cross-Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 5, 2004.


HELEN GILLMOR
United States District Judge

Rodrigues, et al. v. Tanadgusix Corporation, Civ. No. 02-00627
HG-LEK; Order Denying Defendant's Motion for Summary Judgment;
Denying Plaintiffs' Cross-Motion for Summary Judgment; Granting
Plaintiff's Motion to Strike Defendant's Memorandum in Opposition
to Plaintiffs' Motion for Summary Judgment, and Reply Re
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