

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

*Statement of Facts*²

Plaintiff Peoples Heritage Bank ["PEOPLES"] is a Maine banking corporation of which Plaintiff APEX, Inc. ["APEX"] is a subsidiary. On September 28, 1992, Apex purchased at foreclosure sale, on behalf of Peoples, the former Mitchell Trucking Company and attached 4.4 acres, located in Presque Isle, Maine ["THE SITE"]. Defendant Maine Public Service Company ["MPSC"] is the electric utility which supplies electricity to residents of Presque Isle.

The Site was originally developed by Shalek Bag Company in 1956, when it built a facility for the manufacture of potato storage bags. Maine Potato Growers bought the property in 1965 and used the building for storage and as a distribution center for its bags until 1975. From 1975 until 1980, Maine Potato Growers leased the building to Converse Rubber Company. Converse produced vinyl and canvas uppers for sneakers and also performed stitching operations at the Site.

² Plaintiff's Motion to Strike Defendant's "Carden Tr. Ex. 3" is hereby GRANTED. The Court has not considered the material contained in that exhibit for purposes of this Motion for Summary Judgment.

In June, 1984, Maine Potato Growers sold the Site to Mitchell Trucking. Mitchell used the facility as a trucking terminal. Mitchell brought in soils to grade the area near a cesspool as an improvement to the Site. Also in 1984, approximately 1500 gallons of No. 2 fuel oil were spilled on the Site.

The parties' experts disagree regarding whether these prior uses of the site could have contributed to the PCB contamination later discovered there. They further disagree regarding the potential contribution of Defendant's transformers to that contamination. Much of the evidence upon which the experts have based their conclusions does not appear to be in dispute. Virtually all of it is circumstantial.

In October, 1992, one month after purchasing the Site, Peoples hired a contractor to remove two underground storage tanks that were leaking at the Site. Nine hundred twenty-three (923) cubic yards of contaminated soil were removed at that time. When excavating the underground storage tanks, the presence of the cesspool was discovered. The cesspool contained a white starchy substance that tested positive for PCBs at 360 parts per million.

Plaintiffs then sold the property to R.C. Color, after agreeing to complete remediation of the PCBs. In November, 1993, remediation work was begun at the Site.

I. Count I -- Cost Recovery Action.

Defendant argues that Plaintiff may not bring this action under section 107(a) of CERCLA because, as a liable party, Plaintiff is limited to seeking contribution under section 113 (as it is doing in Count II of the Complaint). The parties agree that cost recovery actions are available only to "innocent" parties. *United Technologies v. Browning-Ferris Indus.*, 33 F.3d 96, 100-01 (1st Cir. 1994). They dispute, however, whether Plaintiff is an "innocent" party.

The Court is satisfied that there are disputed issues of fact sufficient to preclude summary judgment on this point. Plaintiffs purchased the Site at a foreclosure sale to protect Peoples' security interest in the property. They then sold the property to R.C. Color, after agreeing to remediate the PCBs. These facts certainly suggest that Plaintiffs may benefit from the "security interest exception," under which they would be "innocent" parties for purposes of CERCLA liability. *Northeast Doran v. Key Bank of Maine*, 15 F.3d 1, 2-3 (1st Cir. 1994) (citing 42 U.S.C. § 9601(20)(A)). Accordingly, they would be entitled to maintain this cost recovery action, thereby seeking reimbursement of the entire cost of remediation. *United Technologies*, 33 F.3d at 101.

II. Count II -- Contribution Action.

Defendant next asserts that it is entitled to judgment as a matter of law on Count II of Plaintiff's Complaint. In Count II, Plaintiffs seek contribution to the costs previously paid, and yet to be paid, by them in remediation of the Site. Defendant argues that Plaintiffs cannot establish three of the four elements necessary to prevail in their contribution action.

Plaintiffs concede that they must establish the following elements in order to impose liability on Defendant pursuant to section 113:

- (1) Defendant is a "covered person" within the meaning of 42 U.S.C. § 9607(a)(1)-(4);
- (2) there was a release or threatened release of hazardous substances from Defendant's "facility." 42 U.S.C. § 9607(a)(4);
- (3) the release or threatened release caused Plaintiff to incur response costs. 42 U.S.C. §§ 9607(a)(4)(B), 9601(23)-(25);
- (4) the costs incurred by Plaintiff were "necessary costs or response . . . consistent with the national contingency plan." 42 U.S.C. §§ 9607(a)(4)(B), 9601(23)-(25).

Dedham Water Co. v. Cumberland Farms Dairy, 889 F.2d 1146, 1150 (1st Cir. 1989) (citations omitted). Defendant argues that it is entitled to judgment as a matter of law on the first three of these four elements. Its argument is based on two premises: first, that its transformers are not “facilities” within the meaning of CERCLA; and second, that there was no release of hazardous substances from the transformers.

a. Whether the transformers are “facilities.”

Defendant’s argument that Plaintiff has insufficient evidence with respect to the first and second elements of its cause of action under section 113 both turn on whether its transformers are “facilities” under CERCLA. Specifically, as to the first element, Defendant asserts that it is not a covered person within the meaning of CERCLA because it never owned the *site* in question. However, a covered person is defined in the statute as, among other things, the “owner or operator of a vessel or a facility” or a person who owned or operated a facility at the time of disposal of any hazardous substances. 42 U.S.C. § 9607. Defendant’s assertion to the contrary notwithstanding, the Court concludes that the transformers are “facilities” under CERCLA.

Defendant relies for the most part on a decision from the Eastern District of Tennessee which found that electrical transformers fell into the “consumer products” exception to CERCLA’s definition of facility. This Court is most persuaded, however, by a more recent decision of the District of New Hampshire. *CP Holdings, Inc. v. Goldberg-Zoino & Assoc.*, 769 F. Supp. 432, 438-39 (D.N.H. 1991).

In *CP Holdings*, the court noted that Congress intentionally defined “facility” broadly. *Id.* at 438. Against this backdrop, the court found assistance in the legislative history of CERCLA for its interpretation of the “consumer products” exception. On the basis of this legislative history, the

court concluded that the exception was intended to exempt consumer products “such as those that might be found in a retail store, where such products do not present a threat or release from a facility.” *Id.* (quoting Senate Report (Environment and Public Works Committee) No. 11, 99th Cong., 1st Sess. 11 (Mar. 15, 1985)). In addition, “the consumer products limitation was likely a result of fears that without such a limitation, businesses that routinely use hazardous substances in everyday operations could be held liable under CERCLA for injuries to workers or those exposed to the substances within the confines of the building.” *Id.* at 439.

Nowhere in this analysis is there support for the proposition that electrical transformers qualify as consumer products such that they are not facilities subject to CERCLA liability. The site was not a retail or wholesale space in which Defendant’s transformers were on display for potential purchase. Nor is the alleged exposure in this case limited to employees who routinely used PCBs. Defendant is not entitled to judgment as a matter of law on the question whether the transformers are facilities.

b. Whether there was a “release or threatened release.”

The Court finds factual disputes exist precluding summary judgment on the question whether there was a release or threatened release of PCBs from Defendant’s transformers. The parties’ experts clearly disagree about the potential for the transformers to have been the cause of the contamination, and they further disagree about the potential for release from prior uses of the site. Plaintiff need not have “smoking gun” evidence, nor need it prove that the transformers were the source of one hundred percent of the contamination. Summary judgment is inappropriate on Count II of Plaintiff’s Complaint.

III. Counts VI - VIII -- State Law Claims.³

Defendant seeks judgment on Plaintiff's state law claims on the basis of its assertion that Plaintiff has presented insufficient evidence that Defendant's transformers were the source of PCB contamination at the site. For the reasons noted in connection with Count II, the Court finds judgment on these claims to be precluded by genuine issues of material fact.

Conclusion

For the foregoing reasons, the Motion for Summary Judgment is hereby DENIED in its entirety.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on July 10, 1996.

³ Defendant does not seek judgment on Plaintiff's declaratory judgment claim independent of its arguments on Counts I and II.