

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

COMMON PLEAS COURT
ERIE COUNTY, OHIO
2009 JUL -3 PM 12:41
BAGGARA J. JOHNSON
CLERK OF COURTS

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| State of Ohio, ex rel. Richard A. Cordray, Ohio Attorney General | : | CASE NO. 2006-CV-802 |
| Plaintiff(s) | : | Judge Roger E. Binette Magistrate Steven C. Bechtel |
| vs | : | |
| Estate of James Roberts, et al. | : | MAGISTRATE'S DECISION |
| Defendant(s) | : | |
| | ::: | |

This matter is before the undersigned pursuant to his general order of reference and written consent of the parties pursuant to Civ.R. 53 (C). The matter came on for Bench Trial on April 28, 2009.

The Court previously granted Summary Judgment in favor of Defendant Citizens Banking Company and in favor of the State of Ohio on liability against Defendants Ultimate Industries and Thomas Roberts. The State of Ohio voluntarily dismissed the claims against the Estate of James L. Roberts. Therefore, the only matters left to be tried were the scope of injunctive relief to be ordered and an appropriate civil penalty.

This matter is an environmental enforcement action brought by the State by and through the State Attorney General relating to property located at 1702 Campbell Street in the City of Sandusky, Ohio. Ultimate Industries used the property for the manufacture of fabricated rocks and waterfalls used in landscaping. The company was owned by the Roberts family. The company fell upon hard times financially. After closing up, numerous barrels of waste were left at the site and remain there to this date.

The State of Ohio called one witness, Kelly Smith, and offered four (4) exhibits, which were admitted into evidence. Defendants called Tom Roberts and offered several exhibits, which were admitted into evidence. There really was no dispute that injunctive relief in the form of orders relating to environmental compliance, due to unabated conditions, were in order. The real dispute was the extent of the civil penalty which should be imposed.

The Court also notes that there was an Agreed Interim Consent Order, which was entered on or about March 4, 2009, in this matter relating to enforcement of air related environmental provisions. That Agreed Interim Consent Order is made a part hereof and is fully incorporated here.

Kelly Smith, the State's only witness, works for the Ohio Environmental Protection Agency ("OEPA") as an enforcement coordinator in the Hazardous Waste Management Division. She is assigned this case and is the official keeper of the Division's file with respect to this matter. The case file contains, among other things, the Notice of Violation issued by Ed Pulido along with numerous photographs. Ms. Smith testified she visited the site April 22, 2009 and saw similar conditions as those depicted in the photos taken at the time the Notice of Violation was issued based upon a May 2007 inspection.

Ms. Smith matched the photographs with the inventory list. The same drums present as of May 8, 2007 were still present April 22, 2009. The drums were left in the same position; but now there was significant water damage and several drums were sitting in a pond of water on the third floor of the building. This causes concern for the drums rusting out.

Some of the drums had labels or stickers identifying them as containing isocyanate. Thus, they have hazardous waste.

The subject property is in a residential area. On two sides of the structure are public streets. Another side abuts the railroad tracks and the fourth side abuts property containing a residence. A loading dock where drums have been left faces the house. Ms. Smith testified that on the loading dock itself there was a noticeable smell of chemical. This smell could be detected 10-15 yards from the loading dock. She estimated that the abutting residence was approximately 50 yards from the loading dock.

The key to the building she was given did not work as the lock was stripped out. She gained access inside the building through a broken, unsecured window.

The violations noted, based on the May 8, 2007 inspection, have not been abated. None of the drums have been removed, there is no permit to operate, hazardous waste is still being stored and there is no evaluation of hazardous waste. Other continuing violations include the failure to label; failure to provide adequate aisle space; failure to post emergency information; failure to maintain emergency equipment and failure to file a closure plan and to close the facility. The only violation from May 2007, which she was unable to substantiate, was the quantity of waste (there had been minimal initial testing).

As part of a closure plan, "financial assurance" must be demonstrated and a closure plan is to be in place within 90 days after cessation of storing wastes at the site.

Ms. Smith also testified that she calculated the violations lasted 717 days from the date of inspection to the date of trial. At \$10,000 per day per violation, she calculated the maximum penalty could exceed \$14 million.

She examined relatively comparable violations and would recommend a total civil penalty of \$90,000 in this case. With respect to facts for the Courts consideration in assessing the penalty, Ms. Smith testified that: OEPA incurred testing costs of \$803.40; there was a threat to human health (via access through the window), waste on the loading dock could be ignited, the drums on the third floor were rusting, there was potential of ultimate release to the groundwater and storm drains; Defendants did sustain an economic benefit by avoiding a projected cost of \$3,000-\$5,000 to remove the material.¹ Ms. Smith also noted that Tom Roberts was cooperative, seemed to be operating in good faith; but articulated a financial inability to comply. However, he never issued a written response to the Notice of Violation and apparently was not totally cooperative in providing financial information requested at the time so that this could be factored into OEPA's assessment.

On cross, Ms. Smith again acknowledged Tom Roberts was cooperative and even provided an inventory of the drums. She acknowledged the drums in the photos taken in May 2007 in the caged area of the loading dock were no longer in the caged area when she did her April 22, 2009 inspection.

Ms. Smith got the keys from Citizens Banking Company. Ultimate Industries hadn't been operating since 2004. The water pooling under the drums on the third floor was relatively clean and the drums had not yet rusted out. There was no complaint from any neighbor about chemical odors. In calculating the civil penalty, Ms. Smith did not consider the fact Mr. Roberts did not have access to the facility.

Tom Roberts was the only witness called by Defendants. The business, Ultimate Industries, was owned initially by his father, James Roberts. Tom did not have any ownership interest until 1999 or 2000, when he acquired a 5% ownership in

¹ This projection or estimate was never shared with the Roberts who were operating on an estimate of approximately \$10,000 to remediate the site.

shares. The business shut down in 2004. Mr. Roberts testified there were a number of issues with the OEPA in 2002 and they were working with compliance. Thereafter, due to financial problems, they couldn't pay for certain obligations.

Citizens Banking Company ("Citizens") was the sole lender and had a security interest in everything. When they shut down in 2004, they gave the keys to Citizens. Roberts claims the material they left was good, workable stuff. With prospective purchasers and given Citizens' security interest, they couldn't just get rid of the material. Tom Roberts recounted the contacts, who made a purchase offer, which included sale of chemicals. Citizens rejected this purchase offer.

Defendants had an invoice for drum removal from an entity which was considerably higher than the OEPA's file quotation of \$3,000-\$5,000, which Tom Roberts testified he was never apprised of. James Roberts died in 2007 and Tom's mother had to sell the marital home in a short sale. Tom helps his mother with groceries and bills. Tom, his mother, and his father (James) prior to his death, filed bankruptcy. Tom Roberts testified about his annual income, which is currently \$36,000 per year as a Sales Specialist for Lowes. He has two mortgages on his home and essentially no equity.

Roberts pointed out the content of all barrels in May 2007. All barrels were labeled in 2004 when they ceased operating. He claims there was very little waste because, at least at the time, it was usable. He was able to identify what was likely in the barrels in State's Exhibit 1-the composite photograph collection.

Mr. Roberts testified there was a slight odor on the loading docks when he was there with the OEPA. However, there were never any complaints from neighbors. He was last in the building in May 2007. He walked the perimeter and did not see any windows broken out. He first learned about open access through a window at the trial. He has no keys to the building.

While not too concerned about the potential for environmental harm here, Tom Roberts did acknowledge there was "concern for sure, not something to just let go." The two drums of lacquer based paints for sure needed to be removed because they are flammable. Mr. Roberts claimed he never refused OEPA anything and shifted some fault to Citizens who he tried to assist market the property (and goods therein). He simply had no financial means to properly remove the drums. He claimed he made no economic gain and at this point, given the passage of so much time, all the goods in the drums are probably waste and need to be removed. Mr. Roberts testified that in 2004 when they stopped production, there were probably 4-5 barrels of hazardous waste and the rest was an asset as components of potential product. Citizens was aware of the production and the Citizens loan officer was aware what was there when he looked at the property and was there to sell as an asset.

The Court finds both witnesses credible. There is little factual dispute here.

The undersigned concludes there are continuing violations which must be abated. Therefore, the following injunctive relief should be ordered:

1. Defendants Ultimate Industries and Thomas Roberts must comply with R.C. Chapter 3734 and the rules promulgated thereunder. Chiefly, they must:
 - a. Evaluate the wastes present;
 - b. Designate by labeling which drums contain hazardous waste;
 - c. All hazardous wastes are to be properly removed, transported, and disposed of at a proper facility designated for the type of waste involved, with documentation of same provided to the Ohio EPA;

- d. The property must be fully secured within 10 days of this order, if not already done;
- e. No later than sixty (60) days after completing removal of all waste from the property, a closure plan acceptable to OEPA must be submitted to them for approval.

With respect to the appropriate civil penalty to be imposed, this Court's primary focus is on getting this property cleaned up. While this Court appreciates the civil penalty component of this matter, imposing a hefty penalty will diminish the funds necessary and scarce which can and should be devoted to the clean up.

This Court has considered the *Dayton Malleable* factors from *State ex re. Brown v. Dayton Malleable* (April 21, 1981) Montgomery App. No. 6722. Those factors are: 1) the harm or threat of harm posed to the environment; 2) the level of recalcitrance, defiance or indifference demonstrated by the violator (defendant's good or bad faith); 3) the economic benefit gained, and 4) the extraordinary costs incurred in enforcement.

This Court finds that there is harm or threat of harm posed to the environment by the violations, which is not insubstantial. These drums are in a residential area. The odors of chemical are detectible 10-15 yards from the loading dock. The adjoining residence is 50 yards away. There is a danger with flammability and some drums are in a pool of water and are rusting, which is the first step in leakage. Any such leakage ultimately means waste would find its way into storm drains, etc. and into the groundwater. It is also not lost upon the Court that this property abuts a railroad track- a main line through town. While a not insubstantial risk of harm exists, this Court finds that risk slight to moderate.

Defendants have exhibited good faith. Mr. Roberts did not appear indifferent to the problem posed. The chief impediment here was Defendant's financial picture and the fact Citizens held the trump card. Citizens, even at one point, foreclosed on this property and then successfully convinced a sister court to vacate the foreclosure order. One can only surmise this was, at least in part, to avoid any financial responsibility for cleaning up the environmental hazards posed. While not a defense here, at least Defendants have shown that Citizens was a hindrance by blocking a sale, which included the products. In addition, Citizens appears to control access. This should be factored in.

With respect to economic benefit, there has been some cost avoidance, and thus, economic benefit to Defendants by not properly storing, handling and disposing of this waste. The economic benefit is on the order of between \$3,000-\$5,000 (if you believe OEPA's file invoice) or \$10,000 (if you believe the estimate Roberts obtained.)

The only evidence of costs of enforcement incurred is \$803.40. In the big picture, this sum is rather miniscule.

This Court concludes that the appropriate civil penalty is \$50,000. However, in order to provide incentive for the real essential goal here, this Court is going to hold a substantial portion of that penalty, \$47,500, in abeyance, on the condition that Defendants fully comply with the injunctive relief ordered above within one hundred, twenty (120) days of this Decision. If full compliance is not made within one hundred twenty (120) days of this Decision, the injunctive relief not only remains in effect but the \$50,000 civil penalty also attaches. Conversely, if Defendants fully comply with the injunctive relief set forth above within one hundred twenty (120) days, the civil penalty will be \$2,500.

Steven C. Bechtel 6-2-09

Magistrate

Gary L. Pasherlich
Daniel J. Martin
Kevin J. Zeiher

NOTICE

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSIONS WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV. R. 53(D) (3) (2) (ii) UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV. R. 53(D) (3) (b).

A WRITTEN OBJECTION MUST BE FILED WITHIN FOURTEEN (14) DAYS OF THE FILING OF THE DECISION.

PRAECIPE

To The Clerk:

Please serve the individuals listed below with a copy of the foregoing Magistrate's Decision by First Class United States Mail. Certificate of Mailing:

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Steven C. Bechtel 6-2-09
MAGISTRATE STEVEN C. BECHTEL