

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO, EX REL.
RICHARD CORDRAY,
OHIO ATTORNEY GENERAL
PLAINTIFF

CASE NO. 08 CV 4297
MAGISTRATE TIMOTHY G. WELSH

VS.
EXCAVATION TECHNOLOGIES,
INC. ET AL
DEFENDANTS

MAGISTRATE'S DECISION
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for bench trial on Thursday, October 28, 2010 before Magistrate Timothy G. Welsh. Present on behalf of Plaintiff were Attorneys Sarah T. Bloom and Thaddeus H. Driscoll; Attorney Charles E. Dunlap appeared on behalf of Defendants, Excavation Technologies, Inc. ("ETI") and Arthur David Sugar, Sr. ("Sugar"). By prior Order of this Court, trial proceeded upon the issue of liability, only. Testimony was received and exhibits introduced on behalf of all parties herein. Based upon the evidence adduced at trial, the Magistrate issues the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about October 28, 2003, Boardman Township awarded the bid for demolition of the structure previously known as the ARCO Gas Station located at 5191 Southern Blvd., Boardman, Ohio to ETI.
2. On or about October 30, 2003, Richard Gresley of Environmental Protection Systems, LLC inspected the ARCO facility at the request of Harry Manganaro, to enable ETI to obtain pre-demolition approval from the Ohio Environmental Protection Agency ("EPA"). Gresley took some samples from the facility that day and sent them to an independent laboratory for testing.
3. On November 3, 2003, Manganaro prepared the "Notification of Demolition and Renovation" regarding the ARCO facility and filed the same with the Mahoning-

Trumbull County Air Pollution Control Agency ("M-TAPCA") which oversees the demolition of structures on behalf of Ohio's EPA to ensure compliance with asbestos remediation regulations.

4. The "Notification of Demolition and Renovation" filed by Manganaro on November 3, 2003 failed to indicate the presence of any asbestos, whatsoever, at the ARCO location and, in fact, affirmatively represented that there was no asbestos present at the site.
5. On or about November 13, 2003, Gresley received the results of the laboratory analysis indicating the presence of asbestos in materials removed from the ARCO site. He immediately forwarded this information to Manganaro.
6. Gresley remediated all asbestos from the ARCO site before ETI commenced demolition in early-December, 2003.
7. Defendant, Sugar is President and sole shareholder of Defendant, ETI. Sugar did not have any knowledge of the defective nature of the "Notification of Demolition and Renovation" prepared and filed by Manganaro on November 3, 2003.

CONCLUSIONS OF LAW

1. Ohio Administrative Code 3745-20-03 (A)(4)(g) provides, in part, that each owner or operator shall provide, within the written notice of intention to demolish a facility, an estimate of the amount of regulated asbestos-containing material to be removed from the facility.
2. The "Notification of Demolition and Renovation" failed to identify the existence of regulated asbestos-containing material in direct contravention and violation of OAC 3745.20-03(A)(4)(g) and R.C. 3704.05(G).
3. OAC 3745-20-03(E) provides, in part, that a written notification of intention to demolish a facility shall include an acknowledgment of the existence of laws

prohibiting the submission of false or misleading statements and shall certify the facts contained in the notice are true, accurate and complete.

4. The "Notification of Demolition and Renovation" submitted November 3, 2003, by failing to identify the existence of regulated asbestos-containing materials at the ARCO site, violated the foregoing provision of the Ohio Administrative Code and R.C.3704.05(G).
5. Throughout the course of these proceedings, Defendants have consistently identified Harry Manganaro as an agent and employee of ETI. Based upon these prior admissions, this Court previously granted summary judgment in favor of Plaintiff and against Defendant ETI on Count One of the Second Amended Complaint. This constitutes the law of the case herein.
6. Furthermore, at all times relevant herein, Manganaro was acting as an agent of Defendant ETI. He provided information to Defendant ETI to enable it to successfully bid the ARCO project; received mail and facsimile transmissions at the principal place of business of Defendant ETI and acted under the authority and at the direction of the Defendant ETI in overseeing the demolition of the ARCO site. Therefore, by his conduct and virtue of his agency relationship with Defendant ETI, Manganaro has bound his principal herein.
7. Defendant Sugar is president and sole shareholder of Defendant ETI. There are no facts before the Magistrate to suggest that Defendant Sugar had any knowledge of the defective nature of the "Notification" prepared and submitted by Manganaro on November 3, 2003. His status as president and sole shareholder of Defendant ETI, like so many corporations, does not automatically suggest that he be held individually liable, or that he exercised his corporate control herein to

such a degree as to commit an illegal act, thus imposing personal liability against him.

8. The Magistrate finds that the Plaintiff has failed to sustain its burden of proof to impose individual liability against the Defendant Sugar in these proceedings.

Based upon the foregoing, judgment on the issue of liability with respect to Counts Two and Three of the Second Amended Complaint is hereby entered in favor of the Plaintiff and against the Defendant, Excavation Technologies, Inc. Furthermore, judgment is hereby entered in favor of the Defendant, Arthur David Sugar, Sr. and against the Plaintiff upon all allegations contained in Counts One, Two and Three of the Second Amended Complaint. This matter is scheduled for a bench trial on the issue of damages against the Defendant Excavation Technologies, Inc. on

_____ at _____ before Magistrate Timothy G.

Welsh.

This is an appealable Order and the Clerk of Court shall serve copies of this decision upon all counsel and unrepresented parties within three (3) days of the filing hereof.

12-8-10
DATE


MAGISTRATE/TIMOTHY G. WELSH

The parties shall have fourteen (14) days from the filing of this decision to file written objections with the Clerk of this Court. Any such objections shall be served upon all parties to this action and a copy must be provided to the Court. A party shall not assign as error on appeal on Court's adoption of any factual finding or legal conclusion of law under Civ. R. 53 (D)(3)(a)(ii), unless the party timely and specifically objects to the factual finding or legal conclusion as required by Civ. R. 53 (D)(3)(b). Any party may request the magistrate to provide written findings of fact and conclusions of law. In accordance with Civ. R. 52, this request must be made within seven (7) days from the date of filing of this decision.

THE CLERK SHALL SERVE NOTICE
OF THIS ORDER UPON ALL PARTIES
WITHIN THREE (3) DAYS PER CIVIL R.5