

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

STATE OF OHIO, *ex rel.* DEWINE
ATTORNEY GENERAL OF OHIO

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CLERK OF COURTS

Plaintiff,

Case No. 09CVH12-18736 (Cocroft, J.)

v.

INLAND PRODUCTS, INC., ET AL.

Defendants.

DECISION AND ENTRY GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, FILED JANUARY 18, 2011

Rendered this 4th day of May, 2011

COCROFT, J.

This matter is before the Court on the motion for partial summary judgment filed by the plaintiff, State of Ohio, on January 18, 2011. The defendants, Inland Products, Inc. and Gary H. Baas, filed a memorandum contra on April 18, 2011. The plaintiff filed a reply on April 27, 2011. This matter is now ripe for decision.

This case is a re-filing of case no. 07CVH11-15525. The plaintiff contends that the defendant, Inland Products, Inc., operated a corporation that processed organic wastes into materials such as tallow and grease. (Complaint, ¶ 6). The plaintiff contends that the defendants' facility used equipment that emitted 'air contaminants' as defined in R.C. 3704.01. (Id, ¶ 8). The plaintiff further contends that the defendants violated the permits issued by the Ohio EPA, pursuant to R.C. 3704.05(C). (Id, ¶ 15).

In its complaint, the plaintiff alleges ten different claims against the defendants: (1) operating a facility without functional air pollution control systems; (2) failure to operate quad wet scrubber in accordance with the facility's operation and maintenance plan; (3)

failure to operate the quad wet scrubber and the Stord-Bartz wet scrubber; (4) failure to report malfunctions of quad wet scrubber resulting from failure to perform scheduled maintenance; (5) failure to report malfunctions of air pollution control equipment; (6) operation of B006 while COMS recorder was non-operational; (7) failure to maintain building integrity; (8) failure to exercise good housekeeping practices; (9) creation of a public nuisance; and (10) failure to maintain operational records. In its motion for partial summary judgment, the plaintiff contends that no genuine issues of material fact exist as to liability on counts one, two, three, four, five, six, and ten of its complaint. (Motion for summary judgment, p. 2). Counts seven, eight and nine remain.

STANDARD OF REVIEW

Civ. R. 56(C) governs a motion for summary judgment. The Ohio Supreme Court has explained the Rule's requirements:

Civ. R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327.

The party seeking summary judgment bears the burden of proof in showing that no material issues of fact remain to be litigated. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317. All doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 2d 356. However, the nonmoving party is required "to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media* (1991), 59 Ohio St. 108, 111.

Civ. R. 56(E) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts showing there is a genuine issue for trial. Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Bishop v. Waterbeds 'N' Stuff*, (Franklin App.) 2002-Ohio-2422 at ¶8, citing *Welco Industries, Inc. v. Applied Cos.* (1993) 67 Ohio St. 3d 344, 346.

LAW AND ARGUMENT

A. COUNTS ONE THROUGH SIX

The plaintiff contends that the defendants violated the terms of the air permits relating to the operation of the air pollution control system. Specifically, the plaintiff contends that each of the permits require that any scheduled maintenance or malfunction necessitating the shutdown or bypassing of any air pollution control system shall be accompanied by the shutdown of the associated emissions units. (Motion for summary judgment, p. 5). The evidence demonstrates that on February 23, 2000, the State of Ohio and the defendants entered into a Consent Order to abate a public nuisance caused by its operations and to return the facility to compliance with air pollution regulations and its permits. (Fowler Affidavit, ¶ 4). The evidence indicates that 'mark-up' versions of a permit to install and two permits to operate were executed. (Id, ¶ 5). The evidence indicates that, per the Consent Order, the defendants were required to comply with the attachments on the 'mark-up' permits until such time as the director issued the permits as a final action. (Id, ¶ 13).

The evidence presented to this Court indicates that between March 11, 2004 and January 11, 2006, the Ohio EPA conducted multiple inspections of the defendant's facility due to a large number of public complaints of odors and smoke that adversely affected the health, safety and welfare of the public. (Fowler Affidavit, ¶¶ 16-17). The evidence

demonstrates that on June 15, 2005, the Ohio EPA received a complaint from the public of a “horrible” smell coming from the defendants’ facility. (Id, ¶ 19). An investigation concluded that the boiler and the Stord-Bartz wet scrubber were malfunctioning due to a failure of the boiler control settings and a failure to inject hypochlorite solution into the scrubber, which produced smoke and odors. (Id, ¶ 20). The investigator also noted that the quad wet scrubber was not operating. (Id).

A second inspection was completed on July 26, 2005, which indicated that operations were being conducted while the hypochlorite feed pump to the Stord-Bartz wet scrubber was malfunctioning and producing odors. (Id, ¶ 21). The suction line to the sodium hyperchlorite tank was not moving, indicating inoperability. (Id). The evidence indicates that the defendant’s plant manager stated to the investigator that the ground fault relay had triggered, thereby confirming inoperability. (Id). The Ohio EPA received another complaint on August 17, 2005, regarding black smoke from the defendant’s boiler stack. (Id, ¶ 22). Another investigation was completed, where it was found that the defendant’s oil pump to the boiler was malfunctioning and producing black smoke and odors. (Id, ¶ 23). The investigation concluded that the quad wet scrubber was not operating. (Id).

On September 9, 2005, the Ohio EPA received another complaint that strong odors were emanating from the defendant’s facility. (Id, ¶ 24). An investigation of the September 2005 complaint concluded that the hypochlorite feed pump to the Stord-Bartz wet scrubber was malfunctioning and producing odors. (Id, ¶ 25). The quad wet scrubber was also not functioning. (Id).

The permits to operate the quad wet scrubber and the Stord-Bartz wet scrubber required that each be maintained and repaired in accordance with the operational and maintenance plan submitted to the attorney general. (Id, ¶ 26). The February 23, 2000,

Consent Order required the defendants to conduct and submit to the Ohio EPA an odor abatement study and then to revise and update the original operational and maintenance plan. (Id, ¶ 27). A revised plan was submitted on November 22, 2000, to the Ohio EPA, which required the quad scrubber system to be activated and placed online for one 8-hour shift per month to ensure full functionality. (Id, ¶ 29).

The plaintiff contends that, pursuant to the permits to operate, the defendants were required to immediately report malfunctions, including inoperability of the facility's air pollution control equipment, consistent with Ohio Adm. Code 3745-15-06. (Id, ¶ 32). The plaintiff also contends that the defendants failed to notify the Ohio EPA that: (1) the defendants had stopped using the quad wet scrubber; (2) the quad wet scrubber was inoperable; and (3) there were various malfunctions of the emissions units and air pollution control systems. (Id, ¶¶ 35-36).

The defendants contend that the plaintiff has failed to prove that the permits were obtained from the director or the director's authorized representative as required under R.C. 3704. 03(F) and (G). (Memorandum contra, p. 4). Specifically, the defendants contend that the 'mark-up' version of the permits are not the originals, and the plaintiff has not offered evidence that the 'mark-up' versions were approved by the director. (Id).

Upon review of the Consent Order, paragraph 7 expressly states, "Defendant is enjoined and ordered to comply with Attachments A, B, and C attached hereto." (Plaintiff's Exhibit 1, p. 4). Attachments A, B, and C in fact contain 'mark-ups.' Although the defendants contend that the plaintiff has failed to prove that the permits were obtained from the director, the Consent Order was in fact signed and approved by defendants' counsel and the vice president of the defendant, Inland Products. If the defendants were not in agreement with the 'mark-up' permits, they should not have signed and approved

the Consent Order. As such, this Court finds the defendants' contention lacks merit. Moreover, as the plaintiff correctly points out in its reply, the defendants have provided this Court with no evidence to rebut counts one, two, three, four, five or six in the plaintiff's complaint. As such, this Court finds that no genuine issue of material fact exists regarding these claims and, therefore, the plaintiff is entitled to judgment as a matter of law regarding counts one, two, three, four, five and six of the plaintiff's complaint.

B. COUNT TEN

In its complaint, the plaintiff contends that the defendants were required to keep records relating to the operation of emissions units and, during a review of the operational records for the years 2002 through 2005, the defendants failed to maintain operational records as required by the permits. (Complaint, ¶¶ 69-71). Conversely, the defendants contend that daily operational records and/or quarterly reports were appropriately prepared and maintained. (Memorandum contra, pp. 4-5). To rebut the plaintiff's claim that the defendants failed to record No. 4 fuel oil consumption and heat input, the defendants offer evidence that, in fact, it did record this consumption and heat input and supplied it to the Ohio EPA for all relevant dates. (Baas Affidavit, ¶¶ 12-13). In order to rebut the plaintiff's claim that the defendants failed to record No. 2 fuel oil, RCO, natural gas consumption, and heat input, the defendants offer evidence indicating that it did, in fact, record this consumption heat input and supplied that information to the Ohio EPA. (Id, ¶ 14). Additionally, the defendants offer evidence that, contrary to the plaintiff's claims, the defendants have not failed to record the loading and unloading of raw materials and/or any slaughterhouse material. (Id, ¶ 15). Specifically, the defendants contend that the defendants documented this information in its daily operational records, which were maintained in packets. (Id). The plaintiff contends that the defendants failed to record the

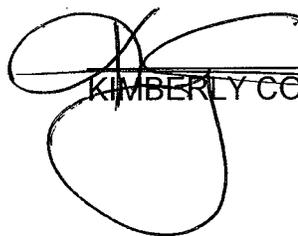
times when the Stord-Bartz and Quad wet scrubbers were operated. However, the defendants offer evidence that there is documentation regarding when the Stord-Bartz and Quad wet scrubbers were operated. (Id, ¶ 16). The plaintiff further contends that the defendants failed to record when the ambient temperature was less than forty degrees. However, the defendants offer evidence that it did, in fact, comply with the recording requirements. (Id, ¶ 17). Additionally, the plaintiff contends that the defendants failed to record the hypochlorite solution feed rate every two hours. However, the defendants offer evidence that it did comply with the recording requirements. (Id, ¶ 18). As such, this Court finds that a genuine issue of material fact exists regarding count ten of the plaintiff's complaint.

CONCLUSION

Accordingly, this Court finds the following:

1. No genuine issue of material fact exists regarding counts one, two, three, four, five and six of the plaintiff's complaint and, therefore, the plaintiff is entitled to judgment as a matter of law.
2. A genuine issue of material fact exists regarding count ten of the plaintiff's complaint and, therefore, this claim remains.
3. The remaining claims include counts seven, eight, nine and ten.

IT IS SO ORDERED.



~~KIMBERLY COCROFT, JUDGE~~

Copies to:

Gary Pasheilich
Thaddeus H. Driscoll
Assistant Attorneys General

Craig Denmead
Counsel for Defendants