United States District Court,
N.D. Texas, Fort Worth Division.
ENVIRONMENTAL CONSERVATION ORGANIZATION, et al.
v.
David BAGWELL, et al.
No. 4:03-CV-807-Y.

Sept. 28, 2005.

David O. Frederick, Frederick Law Office, Austin, TX, Wendel A. Withrow, Withrow Fiscus & Mongogna, Carrollton, TX, for Environmental Conservation Organization, et al.

Christine M. Ruffner, David A. Wright, Davis & Wilkerson, Austin, TX, for David Bagwell, et al.

ORDER PARTIALLY GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

MEANS, J.

Pending before the Court is Plaintiff's Motion for Partial Summary Judgment. After review of the motion, related briefs, admissible evidence, [FN1] and applicable law, the Court concludes that the motion should be partially granted.

> FN1. In this regard, the Court has reviewed Defendants' Objections to Plaintiffs' Summary Judgment Evidence (document number 102) and concludes that Defendants' objections should be overruled. The Court agrees with Plaintiffs' contention, made in their summary-judgment reply brief, that the portion of the report of Defendants' expert witness upon which Plaintiffs rely is not hearsay, as Defendants contend, because it constitutes a party admission under Federal Rule of Evidence 802(d)(2). Furthermore, after review of the declaration of Plaintiffs' expert witness, Robert H. Reeves, the Court concludes, at least at this juncture of these proceedings, that his testimony is based upon sufficient facts and data and is sufficiently reliable to be admissible under Federal Rule of Evidence 702.

I. Facts

Plaintiffs bring this citizens suit under section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a) ("CWA" or "the Act"), seeking a declaratory judgment, injunction, and civil penalties against Defendants, developers of the Broughton subdivision in Colleyville, Texas, a fifty-five acre residential development. Plaintiffs contend that beginning with the commencement of construction of the Broughton subdivision in December 2001 until the present, Defendants have failed to adequately manage storm-water runoff from the subdivision, resulting in the degradation of water and the accumulation of sediment and debris in four ponds in the neighboring Montclair Parc subdivision.

Plaintiffs currently seek a partial summary judgment limited to two issues: (1) that since the commencement of construction, Defendants have allowed sediment to escape the Broughton subdivision in storm-water discharges and accumulate in the Montclair Parc

ponds in violation of the CWA permits under which Defendants operated; and (2) that on twenty-seven specific dates, Defendants discharged storm water from the Broughton subdivision laden with sediment and debris in violation of Texas water quality standards and thus in violation of the CWA permits under which Defendants operated. The Court concludes that summary judgment should be granted in Plaintiffs' favor regarding the first issue, but that material issues of fact preclude the issuance of summary judgment regarding the second issue.

II. Summary-Judgment Standard

Summary judgment is appropriate when the record establishes "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). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party bears the burden of proof on the claim or defense upon which he seeks summary judgment, he must present evidence that establishes "beyond peradventure *all* the essential elements of the claim or defense." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir.1986). Conversely, if the moving party seeks summary judgment on a claim or defense upon which he does not have the burden of proof, he need not produce evidence showing the absence of a genuine issue of material fact with respect to that claim or defense. Rather, in that situation, the moving party need only point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmovant's claim or defense. *See Celotex,* 477 U.S. at 323-25.

When the moving party has carried its summary judgment burden, the nonmovant must go beyond the pleadings and by his own affidavits or by the depositions, answers to interrogatories, or admissions on file set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In making its determination on the motion, the Court must look at the full record in the case. Fed. R. Civ. P. 56(c); *see Williams v. Adams,* 836 F.2d 958, 961 (5th Cir.1988). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915-16 & n. 7 (5th Cir.), *cert. denied,* 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and ... articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.1994).

III. Analysis

A. Liability for Discharges of Storm-Water Containing Sediment

The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress established the National Pollution Discharge Elimination System ("NPDES") permit program as the primary means for enforcing effluent limitations imposed to achieve the Act's objectives. *See Carr v. Alta Verde Indus., Inc.,* 931 F.2d 1055, 1064 (5th Cir.1991). The discharge of pollutants into waters of the United States is unlawful unless one obtains an NPDES permit and complies with its terms. *See id.;* 33 U.S.C. § 1311(a), 1342. These permits are issued by the Environmental Protection Agency unless that authority has been delegated to a state agency. *See* 33 U.S.C. § 1342(a)(1), (b); *see also* 33 U.S.C. § 1251(d).

Plaintiffs contend, and Defendants do not dispute, that while constructing the Broughton subdivision, Defendants were covered by a storm water construction general permit issued by the state of Texas. *See* Pls.' Mem. of P. & A. in Supp. of Pls.' Mot. for Partial Summ. J. at 4. This permit provides that "[i]f sediment escapes the site, accumulations must be removed at a frequency to minimize further negative effects, and whenever feasible, prior to the next rain event." [FN2] (Pls.' App. at 23.) Plaintiffs have presented evidence, including the report of Defendants' own expert, demonstrating that sediment and silt was transported in storm-water runoff from the Broughton subdivision to one or more of the Montclair Parc ponds.

> FN2. Defendants were initially covered by an EPA-issued construction general permit for Texas, but subsequently became covered by the Texas permit in June 2003. *See* Pls.' Mem. of P. & A. in Supp. of Pls.' Mot. for Partial Summ. J. at 4; *see also* Defs.' App. at 4 ("Broughton was covered, at all times, either by an EPA or a permit issued by the state of Texas."). The language of the EPA-issued permit under which Defendants initially operated was substantially similar to the language contained in the state-issued permit. *See* Pls.' Mem. at 5 (citing 63 Fed.Reg. 36490, 36503, at 2(a)(1)(c) (requiring "remov[a] of sediment accumulations] at a frequency sufficient to minimize offsite impacts")).

Defendants' only response to this portion of Plaintiffs' summary-judgment motion is that they offered, on July 18, 2003, "to remove the sediment that appears like sandbars in approximately the northernmost one hundred fifty (150) feet of the pond." (Defs.' App. at 56.) Because the Montclair Parc subdivision is gated and Defendants were not granted access to the subdivision, however, they could not remove this sediment. Defendants apparently believe that this offer to remove sediment from a portion of the first pond relieves them of liability.

The permit under which Defendants operated required that the sediment be removed "at a frequency to minimize further negative effects, and whenever feasible, prior to the next rain event." (Pls.' App. at 23.) Construction on the Broughton subdivision began in December 2001, and Plaintiffs' evidence demonstrates that sedimentladen discharges commenced almost immediately thereafter. The evidence further demonstrates that, at least by mid-2002, Plaintiffs were complaining to Defendants about the problem.

Nevertheless, Defendants' unconditional offer to remove sediment from a portion of the first pond was not made until approximately one year later. As a matter of law, even assuming Defendants had been permitted to implement their remediation offer and that this offer would have remedied the entirety of their discharges of sediment, this simply would not have constituted removing the sediment "at a frequency to minimize further negative effects," as required by the permit. [FN3] Consequently, the Court concludes that Plaintiffs are entitled to summary judgment on the issue of liability, inasmuch as Defendants violated the terms of their permit by failing to remove, in a timely manner, the accumulations of sediment in one or more of the Montclair Parc ponds that escaped from the Broughton subdivision.

> FN3. Nevertheless, although this offer does not help Defendants escape liability, it will be relevant in determining the extent of penalties to be imposed against Defendants under the CWA.

B. Liability for Specific Dates of Discharge

Plaintiffs also seek summary judgment that Defendants discharged sediment and silt from the Broughton subdivision on twenty-seven particular dates between 2001 and 2003. After review of the evidence submitted by the parties, however, the Court is not inclined to grant this portion of Plaintiffs' motion. The Court concludes that material questions of fact remain regarding this issue. Particularly, the Court is troubled by the fact that Plaintiffs' expert witness regarding this issue, Robert H. Reeves, was only on the site one time and assumed the erosion-control features he saw at that time remained constant throughout. The affidavits of David Bagwell and Justin Stratton, contradict that assumption, however. *See* Defs.' App. at 6-7, 127. Furthermore, Stratton personally inspected Defendants' erosion-control features at the Broughton subdivisions after the rain events on the dates enumerated by Plaintiffs and generally found those features to be working properly. As a result, the Court concludes that material issues of fact preclude the issuance of summary judgment regarding this issue.

IV. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment [document number 91] is hereby PARTIALLY GRANTED, in that summary judgment is granted in Plaintiffs' favor regarding whether Defendants allowed sediment to escape the Broughton subdivision in storm-water discharges and accumulate in one or more of the Montclair Parc ponds in violation of the CWA permits under which Defendants operated.