2020 WL 752154
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford at Hartford.

Robert Klee, Commissioner
v.
Simeone's Service Station, Inc.

Docket Number:HHDCV176080250S
|
File Date:January 22, 2020

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Shapiro, Robert B., J.T.R.

MEMORANDUM OF DECISION

ROBERT B. SHAPIRO JUDGE TRIAL REFEREE

***1** In this environmental compliance matter, evidence was presented to the court at a hearing in damages on November 7, 2019. Thereafter, in lieu of oral argument, pursuant to an agreed briefing schedule, the parties submitted post-trial memoranda, including the plaintiff's reply, dated December 4, 2019. After consideration, the court issues this memorandum of decision.

In a case tried to the court, "[t]he ... judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor v. Commissioner of Correction,* 324 Conn. 631, 637, 153 A.3d 1264 (2017). "[I]t is well established that it is the exclusive province of the trier of fact to make determinations of credibility, crediting some, all, or none of a given witness' testimony." (Internal quotation marks omitted.) *Gonzalez v. State Elections Enforcement Commission,* 145 Conn.App. 458, 475, 77 A.3d 790, cert. denied, 310 Conn. 954, 81 A.3d 1181 (2013).

"It is well settled that the trier of fact can disbelieve any or all of the evidence proffered ... and can construe such evidence in a manner different from the parties' assertions." *State v. DeJesus,* 236 Conn. 189, 201, 672 A.2d 488 (1996).

The trier is not bound by the uncontradicted testimony of any witness. See *Mather v. Griffin Hospital,* 207 Conn. 125, 145, 540 A.2d 666 (1988). "Testimony that goes uncontradicted does not thereby become admitted or undisputed; [citation omitted] nor does the strength of a witness's belief raise it to that level." *Stanton v. Grigley,* 177 Conn. 558, 563, 418 A.2d 923 (1979).

The court finds the following facts and credits the following evidence, except as noted. Prior to the hearing, on October 15, 2018, the parties stipulated to the entry of a judgment on liability. See #110 (Stipulation). Therein, it was stipulated and agreed that the defendant has operated a retail gasoline service station in Berlin, Connecticut (site) and is the owner of underground storage tanks containing gasoline located at the site. Beginning in 1994, a petroleum plume originating at the site was discovered to have impacted the site's groundwater and was migrating off the site and impacting adjacent property. After a remediation system was installed in 1995, which the defendant did not operate until 1999 and then ceased operating within the same year, the Connecticut Department of Energy and Environmental Protection (DEEP) financed and maintained the functionality of the system to prevent further migration of the petroleum plume off the site.

In 2012, DEEP's Commissioner issued an Administrative Order (Order) which found that the defendant is maintaining a condition which has created, and reasonably can be expected to create, a source of pollution to the waters of the state.

The parties also stipulated that the defendant has failed to comply with the Order, by failing to perform approved remedial actions; failing to perform approved monitoring of the effectiveness of remedial actions, and failing to comply with any additional provisions necessitated in the event field work indicates the presence of free product and/or a significant environmental hazard. See Stipulation, ¶13.

***2** On October 16, 2018, the court issued its judgment for injunctive relief (#113), in which it directed the defendant to undertake various compliance actions.

The parties stipulated that, in February 2014, the defendant's environmental consultant submitted a report and a remedial action plan, but failed to perform the actions detailed therein and failed to provide the Commissioner with additional requested information. Since the submission of the remedial action plan in 2014, the defendant has taken no steps to remediate the pollution on the site. See Stipulation, ¶13. Since the treatment system has not been run for almost ten years, there is a risk that the pollution on the site may have or will spread outwards, affecting the nearby area.

The Commissioner seeks a monetary penalty in the amount of $225,000.00 pursuant to General Statutes §§ 22a-226 [1] and 22a-438 (listing factors which the court may consider), [2] for past noncompliance and to deter future violations. See *Keeney v. Town of Old Saybrook,* 237 Conn. 135, 168-69, 676 A.2d 795 (1996) (discussing factors in assessing penalty, including deterrence).

The Supreme Court has listed a set of factors to be considered by the court in exercising its discretion when penalties of this type are sought. "Those factors include, but are not limited to: (1) the size of the business involved; (2) the effect of the penalty or injunctive relief on its ability to continue operation; (3) the gravity of the violation; (4) the good faith efforts made by the business to comply with applicable statutory requirements; (5) any economic benefit gained by the violations; (6) deterrence of future violations; and (7) the fair and equitable treatment of the regulated community." *Carothers v. Capozziello,* 215 Conn. 82, 103-04, 574 A.2d 1268 (1990).

***3** Where, as the evidence here reflects, "flagrant and knowing statutory violations have been shown, the trial court may place the burden of establishing mitigating financial circumstances on the defendants." *Keeney v. L&S Construction,* 226 Conn. 205, 216-17, 626 A.2d 1299 (1993).

The defendant argues that it has acted in good faith and taken all steps possible to address the situation and remediate the site. "Whether the defendant made 'good faith efforts' is a subjective, factual determination ... As such, [t]he trier of fact, using the evidence at its disposal and considering the unique circumstances of each case, is in the best position to make [this] individualized determination ..." (Citation omitted; internal quotation marks omitted.) *Deas v. Diaz,* 132 Conn.App. 146, 150-51, 30 A.3d 23 (2011), cert. denied, 303 Conn. 920, 34 A.3d 392 (2012). "Good faith ... in common usage ... has a well defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation ..." (Internal quotation marks omitted.) *Id.*, 152.

The only evidence presented by the defendant was the testimony of Carol Simeone, its vice president and one of defendant's two shareholders; the other is her husband. Simeone vaguely, and without specific reference to dates or documentary evidence, referred to long-ago efforts made by the defendant to address contamination at the site. This testimony is not credited by the court.

In her testimony, Simeone referred to applications for and approval from the Connecticut Underground Storage Tank Fund. No documents were provided to support this testimony. Similarly, no evidence was presented to support her claim that she and her husband cashed out savings and retirement funds to put toward paying for site remediation. The court declines to credit this testimony. Similarly, the court declines to credit her claim that the State somehow caused delay and prevented continuation of work to remediate the site.

In its post-trial memorandum (#128), the defendant presents additional argument concerning the claimed history of steps taken to address the situation and remediate the site, referring, for example, to events in 2001 or 2002 and 2012. No evidence was presented to support these contentions.

As the appellate courts repeatedly have reiterated, "[R]epresentations of counsel are not evidence and are certainly not proof ... Fairly stated, evidence legally is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, proof is the result or the effect of such evidence. Moreover, these representations by counsel were not testimony, which, in turn, when given under oath or stipulated to, is a species of evidence. It is well settled that representations of counsel are not, legally speaking, evidence." (Citation omitted.) *Martin v. Liberty Bank,* 46 Conn.App. 559, 562-63, 699 A.2d 305 (1997). Accordingly, the court declines to consider defense counsel's unsupported

argument in the defendant's memorandum concerning the history of the defendant's efforts at remediation.

*4 Contrary to the defendant's arguments, the evidentiary record does not support its contention that it acted in good faith and took all steps possible to address the situation and remediate the site. Rather, the defendant has ignored the Order's requirements for years. The defendant has engaged in flagrant and knowing statutory violations.

Here, the gravity of the violation is serious and continuing. According to the evidence presented by the plaintiff there is a risk that ongoing pollution at the site will spread into the adjacent groundwater area or into the Mattabassett River, or to neighboring properties. See plaintiff's Exhibits 5-6 (affidavits of Lori Saliby, ¶¶13-14; Philip Wilde, ¶14).

As to other factors, the court notes that the defendant operates a small, single location business. The defendant has gained economic benefit by ignoring the Order's requirements, in that it has not expended funds needed to accomplish compliance. According to the defendant's income tax return for the taxable year ended September 30, 2017 (plaintiff's Exhibit 7), its gross profit was $206,000 on sales of over $2.3 million. Its expenses included rent in the amount of $24,000, paid to the two shareholders. Also the tax return reflects loans to the shareholders in the amount of $27,105.00.

The defendant has not presented current financial information showing that it has continued to operate at a net loss for the ensuing years. Thus, the record does not support the defendant's argument that payment of a civil penalty would put it out of business or that there currently are mitigating financial circumstances. See *Keeney v. L&S Construction, supra*, 226 Conn. 216-17.

The defendant continues to benefit by its noncompliance. A civil penalty is warranted to deter future violations and to show the regulated community that compliance is enforced and to encourage others to comply with environmental requirements. Permitting the defendant avoid a penalty after its history of noncompliance with the Order over several years would be unfair to those who comply with their environmental protection obligations and would send a message that noncompliance is tolerated and rewarded.

Years have elapsed since pollution was discovered at the site and the Order subsequently was issued. At $25,000.00 a day, the maximum penalty would be in the millions of dollars.

A civil penalty is warranted here in view of the seriousness of the contamination and in view of the noncompliance with the Order's requirements. Such a penalty is also required to deter others from future violations.

After considering the circumstances, the court finds that the plaintiff's proposed civil penalty of $225,000.00 is reasonable and appropriate. Accordingly, the court has made such a penalty a part of its Judgment, as follows:

A civil penalty in the amount of Two Hundred and Twenty-Five Thousand Dollars ($225,000.00) is imposed on the defendant. Within thirty (30) business days of the entry of this judgment, the defendant shall deliver to counsel for the Commissioner the sum of Two Hundred and Twenty-Five Thousand Dollars ($225,000.00) in the form of a certified check or cashier's check made payable to "Treasurer, State of Connecticut." It is so ordered.

BY THE COURT

All Citations

Not Reported in Atl. Rptr., 2020 WL 752154

Footnotes

1 Section 22a-226 provides, in relevant part, "(a) Any person who violates any provision of this chapter or any regulation, permit or order adopted or issued under this chapter, or any owner of land who knowingly permits such violations to occur on his land, shall be assessed a civil penalty not to exceed twenty-five thousand

dollars, to be fixed by the court, for each offense. Each violation shall be a separate and distinct offense and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense."

2 Section 22a-438 provides, in relevant part, "(a) Any person who or municipality which violates any provision of this chapter, or section 22a-6 or 22a-7, shall be assessed a civil penalty not to exceed twenty-five thousand dollars, to be fixed by the court, for each offense. Each violation shall be a separate and distinct offense and, in case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense ... In determining the amount of any penalty assessed under this subsection, the court may consider the nature, circumstances, extent and gravity of the violation, the person or municipality's prior history of violations, the economic benefit resulting to the person or municipality from the violation, and such other factors deemed appropriate by the court. The court shall consider the status of a person or municipality as a persistent violator."

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