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L.B. Corp. v. Schweitzer-Mauduit Int'l, Inc., 121 F. Supp. 2d 147 (D. Mass. 2000)

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demonstrated disputed issues of material fact regarding the impact of fresh water release onto the mortgaged property, thereby leading to a defense of equitable estoppel).

A.J.S., Inc. ("A.J.S.") defaulted on its United States Government ("Government") mortgage payments. The Government claimed no factual dispute regarding A.J.S.'s obligation to pay and filed a summary judgment motion, thus allowing the Government to foreclose on the mortgage. In response, A.J.S. argued that because its inability to pay resulted directly from Government misrepresentation within the loan agreement's Environmental Impact Statement ("EIS"), this fact estopped the Government from mortgage foreclosure.

The EIS stated the release of fresh water from the Caernarvon Fresh Water Diversion Project ("the Project") would neither adversely affect nor impact the mortgaged property. A.J.S. relied on the Government representations and took the proceeds from the loan to develop an oyster habitat, plant oyster seedlings, and construct a reef on the Project leases. However, the fresh water flow was greater than the EIS anticipated and the value of the oyster leases plunged. Accordingly, A.J.S. proffered the affidavits of two witnesses as corroboration of its defense. Furthermore, plans to depose the witnesses were in place at the time the Government filed the summary judgment motion.

The court found A.J.S. demonstrated disputed issues of material fact concerning its defense of equitable estoppel. Therefore, the court held the Government's attempt to dispose of the case prior to the depositions was premature and denied the summary judgment motion.

Kimberley E. Montanaro

L.B. Corp. v. Schweitzer-Mauduit Int'l, Inc., 121 F. Supp. 2d 147 (D. Mass. 2000) (holding, unless the parties were in commercial transaction, Massachusetts General Law chapter 93A was inapplicable to claims arising from: (1) subsurface pumping of a well that caused damage to the adjacent property's building; and (2) unfair or deceptive business practices).

L.B. Corp. ("L.B.") brought a diversity action seeking compensatory damages in the amount of \$400,000 from Schweitzer-Mauduit Corp. ("Schweitzer") and Kimberly-Clark Corp. ("Kimberly"). In 1984, Kimberly sold the Valley Industrial Park, a fifteen-acre parcel, to L.B. Kimberly's subsidiary, Schweitzer, owned the Valley Mill Landfill adjacent to the Valley Industrial Park. L.B. claimed improper pumping of a Kimberly well ("Well No. 5") in 1993 caused its buildings to subside twelve inches and resulted in repeated costly repairs between 1995 and 1998. In 1997, the Massachusetts Department of Environmental Protection informed L.B. that volatile

organic compounds ("VOCs") contaminated its well water. L.B. brought suit in Massachusetts federal district court, and claimed Kimberly and Schweitzer illegally disposed hazardous material into the landfill. Kimberly sought partial summary judgment on L.B.'s first eight complaints.

First, Kimberly argued a three-year statute of limitations barred L.B.'s claims. In 1996, L.B. stated the buildings' worth was zero. Kimberly argued L.B.'s failure to sue for damages prior to 1996 barred the current claim. The court disagreed, and stated that L.B. had a right to sue. The court held the damages incurred in the years prior to 1996 did not bar L.B. claims for damages sustained after 1996.

Second, Kimberly moved for summary judgment on count seven. L.B. claimed the operation of Well No. 5 exceeded the state safe yield requirement. Under Massachusetts General Law chapter 93A, sections 2 and 11 ("Chapter 93A"), a violation will occur if the operation constitutes an unfair or deceptive business practice. The court stated Chapter 93A was a consumer protection law concerning transactions, and not a general protection against unfair business practices. The court found Chapter 93A did not apply because the complaint concerned the illegal pumping of a well, and not unfair or deceptive business practices. Because L.B. and Kimberly were not in a transactional relationship, the court held L.B. failed to state a claim for which the court could grant relief.

In count eight, L.B. asserted two claims under Chapter 93A. First, L.B. asserted Kimberly's failure to disclose the possible groundwater contamination violated Chapter 93A. L.B. produced an Environmental Protection Agency preliminary assessment, a former Kimberly employee's statement, and an inter-office memorandum as evidence that, at the time of the sale of Valley Industrial Park, Kimberly knew VOC's might have contaminated the groundwater. Kimberly argued the non-disclosure did not harm L.B. Additionally, Kimberly argued the harm was not foreseeable because it had not drilled any wells until after the sale. The court ruled a violation of Chapter 93A would occur if Kimberly knew of actual contamination, and its disclosure of the contamination would have led L.B. not to buy the property. The court concluded L.B.'s evidence did not amount to actual contamination of the parcel. The court also determined Kimberly knew of, at most, a potential contamination. However, without evidence of actual and present contamination, Kimberly was not subject to a Chapter 93A violation. As a result, the court granted Kimberly's motion for partial summary judgment on this claim.

L.B.'s second claim of count eight stated that Kimberly caused the contamination of L.B.'s groundwater in violation of Chapter 93A. The court also granted Kimberly's motion for partial summary judgment because no commercial transaction regarding the contamination existed. The court found Kimberly had no actual knowledge that the land was contaminated at the time of the sale. Therefore, Kimberly had not sold L.B. contaminated land. The evidence showed the contamination occurred after Kimberly purchased the land and drilled

the wells. The court determined the action did not trigger Chapter 93A because contamination occurred subsequent to the commercial transaction.

Finally, L.B. sought to impose strict liability against Kimberly for the subsidence of its buildings that resulted from the overpumping of Well No. 5. Kimberly contended the subsurface pumping could not result in strict liability. The court agreed and granted summary judgment in favor of Kimberly. The court explained that removal of lateral support by excavation might trigger strict liability, but in this case, the act was subsurface pumping and not excavation. In cases of subsurface pumping, the court stated negligence is the appropriate legal standard.

In conclusion, the court held the statute of limitations precluded two of the counts, decided three of the Chapter 93A counts in favor of Kimberly, and denied all others motions for partial summary judgment.

Jon Hyman

United States v. Michigan, 122 F. Supp. 2d 785 (E.D. Mich. 2000)

(ordering the Army Corps of Engineers to accept dredged materials from Conner Creek at its Pointe Mouillee Confined Disposal facility at Lake Erie).

The State of Michigan instigated an action after the Army Corps of Engineers ("Corps") refused to accept Conner Creek dredged material at the Corps' Pointe Mouillee Confined Disposal Facility ("Point Mouillee"). The court issued an order compelling the Corps to accept Conner Creek's dredged materials.

Pursuant to a 1974 agreement with the United States, Michigan constructed a confined disposal facility at Point Mouillee, Lake Erie. The disposal facility contained dredged materials from the Detroit and Rouge Rivers. In 1977, the United States Environmental Protection Agency ("EPA") sued Michigan, the Detroit Water and Sewerage Department ("DWSD"), and all communities and agencies under contract with DWSD for violating the Clean Water Act ("CWA"). The parties submitted and the court approved a Consent Judgment. Later, in 1997, DWSD reported violations of its National Pollutant Discharge Elimination System permit to the Michigan Department of Environmental Quality ("MDEQ"). As a result of the violation, MDEQ, DWSD, and other parties to the original Consent Judgment entered into a Second Amended Consent Judgment again approved by this court. The Second Amended Consent Judgment required DWSD to dredge sediment from Conner Creek. Point Mouillee was the only reasonable option for disposal of the dredged material. MDEQ, DWSD, and the Corps attempted negotiations concerning the deposition of the dredged materials into Point Mouillee, but were unable to agree. The issue were: (1) whether the disposal facility's acceptance of Conner Creek dredged material was a new use of Point