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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT
C.A. NO. 04-01166-B

KIM DELEO & others,¹

Plaintiff,

vs.

BOUCHARD TRANSPORTATION COMPANY, INC. & others,²

Defendants.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Kim DeLeo, Francis Haggerty, and Earl Cornish (collectively, the "plaintiffs") brought this action against the defendants on behalf of themselves and others similarly situated. The defendants, Bouchard Transportation Company, Inc., Tug Evening Tide Corporation, and B. No. 120 Corporation (collectively, the "defendants") move for summary judgment in their favor. For the reasons set forth below, the defendants' motion is **DENIED**.

BACKGROUND

The summary judgment record, read in a light most favorable to the plaintiffs, reveals the following undisputed facts.

Defendant Tug Evening Tide Corporation owns the Tug Evening Tide. Defendant Barge B. No. 120 Corporation owns Barge B. No. 120. Both Tug Evening Tide Corporation and Barge B. No. 120 Corporation are operated by defendant Bouchard Transportation Company, Inc. On

¹ Francis Haggerty and Earl Cornish, on behalf of themselves and all others similarly situated.

² Tug Evening Tide Corporation and B. No. 120 Corporation.

April 27, 2003, Tug Evening Tide was towing Barge B. No. 120 (“the barge”) through Buzzards Bay when the barge struck a rock, spilling up to 98,000 gallons of oil into the bay’s tidal waters and onto certain shore locations.

After the spill, various federal and state agencies coordinated efforts to clean up the oil and assess the damage. These efforts included a Natural Resource Damage Assessment (“NRDA”), which is mandated by the Oil Pollution Act of 1990, 33 U. S. C. 2701 *et seq.* (“OPA”). Under the NRDA process, representatives from state and federal governments and Indian tribes (“NRDA trustees”) work with the responsible party to assess and repair damages caused by the oil spill. At the present time, the NRDA trustees continue to work on repairing damage caused by the Buzzards Bay oil spill.

The plaintiffs are present and former owners³ of real property in Mattapoisett. Their property interests include deeded rights to private beaches which were contaminated by the oil spill. The plaintiffs allege that the contamination interfered with their rights to use and enjoy their private beach properties. They seek damages from the defendants based on common-law negligence and public nuisance, and under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G. L. c. 21E (“chapter 21E”).

The defendants seek summary judgment in their favor on the basis that the provisions of federal statutes and Massachusetts statutes bar both the statutory and common-law claims.

DISCUSSION

Summary Judgment Standard

This court shall grant summary judgment when the material facts are undisputed and the movant is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Casseo v. Comm’r of*

³ Plaintiff Earl Cornish conveyed the interest in his property to his brother in August 2005.

Correction, 390 Mass. 419, 422 (1983); *Comm. Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourovacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991).

The plaintiffs may bring the present action under chapter 21E

The defendants argue that because chapter 21E provides comprehensive procedures for governmental cleanup of hazardous materials, it therefore precludes the plaintiffs from bringing their private suit. They base their argument on the fact that chapter 21E was modeled after the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). See *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1156 (1st Cir. 1989) (Chapter 21E "is patterned after the federal CERCLA statute"). In *Dedham Water*, the plaintiff sought compensation under CERCLA for corrective actions it took to eliminate contamination that it believed had originated from the defendant's property. 889 F.2d at 1149. It was later determined that although the defendant had contaminated its own property, it was not the source of the plaintiff's contamination. *Id.* The district court ruled for the defendants on the basis that the defendant could not be liable because it did not actually pollute the plaintiff's property. *Id.* The circuit court reversed, emphasizing that CERCLA "imposes liability if releases or threatened releases from defendant's facility cause the plaintiff to incur response costs." *Id.* at 1152. Therefore, under *Dedham Water*, the fact that chapter 21E was modeled after CERCLA is some

support that the plaintiffs may prosecute these claims.

Under Chapter 21E, § 5, a party responsible for “a release or threat of release of oil or hazardous material from a vessel or site, shall be liable, without regard to fault... (iii) to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release.” G. L. c. 21E § 5. “By explicitly creating a private right of action for damage to real or personal property, the Legislature indicated that another purpose in enacting G. L. c. 21E was to enable private individuals to obtain certain measure of compensation for loss resulting from environmental damage.” *Guaranty-First Trust Co. v. Textron*, 416 Mass. 332, 335 (1993). It should be noted that the decision identifies property damage resulting from environmental damages. Thus, under the plain language of the statute and the case law interpreting it, it is clear that chapter 21E does not preclude private actions such as the plaintiffs’.

The plaintiffs seek to recover for damages to private property, not natural resources

The defendants have cited case law supporting the proposition that private citizens may not sue for damage to natural resources. They cite *In re Burbank Environmental Litigation (Hook v. Lockheed Martin Corp.)*, 42 F. Supp.2d 976 (C.D. Cal. 1998), in which the court held that private citizens lack standing to recover under CERCLA for natural resource damages (groundwater contamination). They also refer to *Town of Bedford v. Raytheon*, 755 F.Supp. 469, 470 (D. Mass. 1991), in which the court held that a municipality may not bring an action for natural resource (water supply) damages under CERCLA. What that analysis does not consider, however, is that the plaintiffs here are not seeking compensation for natural resource damages. Rather, they bring claims for private property damage.

CERCLA defines “natural resources” as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust

by, appertaining to, or otherwise controlled by the United States..., any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.” 42 U.S.C. § 9601 (16). The defendants argue that because the Commonwealth holds land between the high and low water mark (the tidal flats) in trust for the public, it follows that the plaintiffs’ private beach interests are natural resources for which they may not recover. This is not the case, however.

Under the public trust doctrine, a private individual may own littoral land up to the low water mark, and the water beyond the low tide mark is held by the Commonwealth in trust for the public. *Fafard v. Conservation Commission of Barnstable*, 432 Mass., 194, 198-199 (2000). The purpose of the public trust doctrine is to keep waterways available to the public for navigation, fishing, and fowling. *Rauseo v. Commonwealth*, 65 Mass. App. Ct. 219, 222 (2005). The state thus holds an easement, for the public’s use, on property situated between the high and low water marks. *Fafard*, 432 Mass. at 198. It does not prohibit private ownership of beaches, however. *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 644-645 (1979). Rather, it means that such private interests are limited by an easement reserved for the public. *Id.* at 645. Therefore, as the public trust doctrine does not prohibit private property interests in beaches, it does not preclude the plaintiffs’ suit for private property damages.

Neither chapter 21E nor OPA preclude the plaintiffs’ common-law claims

Nothing in chapter 21E precludes the plaintiffs’ common-law claims. “A statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.” *Taygeta Corp. v. Varian Assoc., Inc.*, 436 Mass. 217, 226 (2002), quoting *Riley v. Davison Constr. Co.*, 381 Mass. 432, 438 (1980). No such intent is expressed in chapter 21E. In *Taygeta*, the plaintiffs’ complaints were based on chapter 21E, negligence, and

nuisance. 436 Mass. at 220. Although the court ultimately dismissed the plaintiff's negligence and nuisance claims as barred by the statute of limitations, it is clear that the court recognized these claims in the context of oil spills. See *Id.* at 229-230 (discussing when the plaintiff should have been aware of the contamination for discovery rule purposes); and *Id.* at 232 (discussing the gasoline seepage as a continuing nuisance).

Nor does the Oil Pollution Act preclude the plaintiffs' private suit. The defendants argue that because OPA provides government-organized beach cleanup through the NRDA process, private citizens lack standing to bring complaints for beach damage. This argument, however, omits the fact that OPA specifically preserves state authority to impose liability for oil spills. 33 U.S.C. § 2718.⁴ See also *U.S. v. Locke*, 529 U. S. 89, 105 (2000) ("The evident purpose of (OPA's) savings clause is to preserve state laws which. . . establish liability rules and financial requirements relating to oil spills").

The plaintiffs may bring a public nuisance claim

The plaintiffs claim that the oil spill constituted a public nuisance which caused special harm to their interests. "A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Connerty v. Metro. Dist. Comm'n*, 398 Mass. 140, 148 (1986). "[A] private plaintiff may maintain a public nuisance action if the public nuisance has caused the plaintiff some special injury of a direct and substantial character other than that borne by the general public." *Planned Parenthood League*

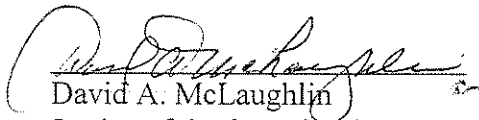
⁴ "(a) Preservation of State Authorities; Solid Waste Disposal Act. Nothing in this Act . . . shall— (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in collection with such a discharge. . . (c) Nothing in this Act shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—(1) to impose additional liability or additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of discharge, of oil."

of *Mass. v. Bell*, 424 Mass. 573, 577 (1997). The damage must be “different in kind, and not merely in degree.” *Stop and Shop Cos., Inc. v. Fisher*, 387 Mass. 889, 894 (1983).

Here, the plaintiffs have alleged a special injury different in kind than that caused to the general public. While the Buzzards Bay oil spill allegedly caused a common injury to the general public, the plaintiffs maintain that a special harm was caused to them, namely, that the oil spill harmed their private property. Therefore, because the plaintiffs have alleged an injury different from the public at large, they may move forward with this public nuisance claim.

ORDER

For the foregoing reasons, the defendants’ Motion for Summary Judgment is **DENIED**.


David A. McLaughlin
Justice of the Superior Court

Dated: November ¹³ __, 2006