

State of Illinois)
) SS
County of Lake)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

GENE E. VOSS, GARY W. VOSS,)
CATHERINE A. MOLENAUR, and)
CHRIS A. MOLENAUR, individually)
and on behalf of all persons similarly)
situated,)

Plaintiffs,)

v.)

WASTE MANAGEMENT OF ILLINOIS,)
INC.,)

Defendant.)

Gen No. 06 L 794

ORDER
RULING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This matter comes before the court on the Motion for Summary Judgment filed by the Defendant, Waste Management of Illinois, Inc. The court having considered the briefs and arguments of the parties and being fully advised in the premises, rules as follows:

INTRODUCTION

The Plaintiffs (and members of a proposed plaintiff class) own land in the vicinity of the Wauconda Sand and Gravel Pit ("Landfill"). Plaintiffs allege that

the groundwater beneath their property has been contaminated by vinyl chloride and other hazardous substances released from the Landfill. According to the Complaint, the Defendant, Waste Management of Illinois, Inc. ("WMI"), is the owner and operator of the Landfill, and has been "for years." (Complaint, para. 36). WMI moves for summary judgment, contending that (1) there are no contaminants in Plaintiffs' groundwater in excess of the applicable maximum contaminant level ("MCL")¹, and (2) WMI had no duty to perform landfill cleanup activities other than those selected and approved by the United States Environmental Protection Agency ("EPA") and the Illinois Environmental Protection Agency ("IEPA").

Citing letters from the Lake County Health Department regarding tests conducted in January 2004, WMI states that it is uncontested that vinyl chloride levels in the wells of the representative plaintiffs (Gene Voss and Cathy Molenaar) were lower (0.57 ppb and 0.49 ppb, respectively) than the applicable MCL (2 ppb). WMI states further that it is uncontested that tests performed at the same time as the aforementioned tests showed those wells were not contaminated with other volatile organic compounds, including benzene, tetrachloroethene and trichloroethene. WMI also cites EPA documents which

¹ Plaintiffs and the Defendant refer to levels of contamination designated as the maximum contaminant level ("MCL") and the maximum contaminant level goal ("MCGL") under the Safe Drinking Water Act. 42 U.S.C. 300f *et. seq.* MCL standards prescribe the maximum amount of a contaminant that may be contained in a public drinking water supply. 42 U.S.C. 300f(3). An MCGL is the level at which a particular contaminant in drinking water causes "no known or anticipated adverse effects on the health of persons * * * and which allows an adequate margin of safety." 42 U.S.C. 300g-1(b)(4)(A).

mandated specific cleanup activities for the landfill and purportedly show completion of the required remedial actions.

On the other hand, Plaintiffs contend that the level of contamination is disputed. Plaintiffs cite tests that showed the presence of vinyl chloride in the wells of the representative plaintiffs at levels that exceed the MCL. Plaintiffs also contend their cause of action would not be barred by a showing that contaminant levels are lower than the MCLs or that WMI complied with EPA and IEPA orders.

DISCUSSION

Applicable Law

Summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Williams v. Manchester*, 228 Ill.2d 404, 417 (2008)(quoting 735 ILCS 5/2-1005(c)). In determining whether there is a genuine issue as to a material fact, the pleadings, depositions, admissions, and affidavits are construed strictly against the movant and liberally in favor of the opponent. *Id.* “A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts.” *Id.* If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper. *Id.* “Summary judgment is a drastic means of disposing of litigation and should be granted only where the right of

the moving party is free and clear of doubt.” *J. Maki Const. Co. v. Chicago Regional Council of Carpenters*, 379 Ill.App.3d 189, 202-03 (2nd Dist. 2008).

There is a Genuine Issue of Material Fact

Summary judgment is precluded in the present case, because there is a genuine issue of material fact regarding the level of contamination, if any, in the plaintiffs' groundwater. WMI contends this issue is not in dispute, because tests of the representative plaintiffs' wells in 2004 showed the presence of vinyl chloride at levels less than the MCL. WMI also contends these same tests show there is no material issue of fact concerning the presence of other contaminants. Plaintiffs refer the court to tests of the same wells in 2005, which showed vinyl chloride at levels in excess of the MCL (5.17 ppb) in one of the wells and at a higher level (1.77 ppb) than was found at the second well in the 2004 test. WMI claims the affidavit placing these findings before the court is insufficient. (Defendant's Reply, p. 2-3).²

Even if the Plaintiffs' affidavit is insufficient, WMI has failed to show there is no genuine issue of material fact. Strictly construed against the movant (WMI), the tests on the representative plaintiffs' wells in January 2004 only establish the level of contamination at that time. A non-movant may not rest on pleadings to create a genuine issue of material fact, where the party moving for

² The affidavit concerning the tests was provided by Jennifer A. Wilkie (Ph.D. in Civil and Environmental Engineering) of Environ International Corporation. Wilkie supervised the person who took the samples, stated the test results and certified that attached copies of the test results were true and accurate. Plaintiff's Statement of Facts, Exhibit B. The Defendant contends the affidavit was not on personal knowledge, because Wilkie was not present when the samples were taken, did not conduct the test and did not write the report.

summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law. *Abrams v. City of Chicago*, 211 Ill.2d 251, 257 (2004). However, the court may look to the pleadings to determine the issues in controversy. *Pagano v. Occidental Chemical Corp.*, 257 Ill.App.3d 905, 911 (1st Dist. 1994). "Unsupported allegations in a complaint do not raise a question of fact *where affidavits and depositions in support of a motion for summary judgment contain evidentiary facts to the contrary.*" *Pearson v. Partee*, 218 Ill.App.3d 178, 183 (1st Dist. 1991)(emphasis added).

The letters cited by WMI do not establish contamination levels at all times relevant to the complaint. Taken as a whole, the Amended Class Action Complaint does not allege a single instance of contamination of their property and damage from that single incident. Instead, the Complaint alleges ongoing contamination and resulting damages. Contaminant levels at times other than January 2004 cannot be said to be undisputed, and are material to the case.

WMI Is Not Entitled to Judgment as a Matter of Law

Contamination below applicable MCL

In addition, the presence of sub-MCL levels of vinyl chloride contamination in the representative plaintiffs' wells in January 2004, does not entitle the WMI to judgment as a matter of law. WMI argues that it is entitled to summary judgment because the contaminant levels in plaintiffs' wells are below the MCL for vinyl chloride. As noted above, Defendant's contention is supported only by the January 2004 test results for the representative plaintiffs' wells. Aside from the lack of factual support for its contention with respect to the full

scope of the plaintiffs' claims, WMI's argument regarding the import of the MCL standards finds no direct support in Illinois law.

WMI first states that no action may be maintained for negligence, private nuisance or trespass unless plaintiffs "demonstrate that they have suffered a legally cognizable injury, separate and apart from any allegation of 'damages.'" (Defendant's Memorandum of Law, p. 9). WMI cites *Yu v. IBM*, which upheld the dismissal of claims of consumer fraud, deceptive trade practices and negligence because the plaintiff had failed to allege actual injury or damage. 314 Ill. App. 3d 892, 897 (1st Dist. 2000). *Yu* involved claims based on alleged Y2K software defects. *Id.* *Yu* held that the complaint alleged no actual injury or damage where the plaintiff was merely anticipating that harm would result from software failures on January 1, 2000. *Id.* *Yu* also held that a motion to dismiss the plaintiffs' claims under 735 ILCS 5/2-619 was properly granted because the case was moot following the plaintiffs' acceptance of a free upgrade that eliminated any potential Y2K problems. 314 Ill. App. 3d at 898.

WMI also cites cases dealing with the element of actual injury or damages in private nuisance and trespass cases. In *Sprague Farms v. Providian Corp.*, the federal trial court dismissed nuisance and trespass claims based on hypothetical injury. 929 F.Supp. 1125 (C.D. Ill. 1996). The *Sprague Farms* case involved a land sale that fell through based on concerns that the property may have been contaminated by leaking gasoline storage tanks. 929 F.Supp. at 1127. The plaintiff sued the buyer for contract damages and fraud and attempted to plead nuisance and trespass claims against the neighboring

land owner who was thought to have polluted plaintiff's property. *Id.* The pleadings were phrased in hypothetical terms: if the gasoline leaked on to plaintiff's property, then the defendant should be held liable for nuisance and trespass. 929 F.Supp. at 1129. The court dismissed the nuisance and trespass claims finding that the hypothetical pleadings did not present an actual controversy. 929 F.Supp. at 1132.

WMI is correct in asserting that the plaintiff must show injury separate and apart from damages, at least with respect to nuisance. For example, in *In re Chicago Flood Litigation*, the Illinois Supreme Court held that the complaint did not state a claim for nuisance where the plaintiffs, whose property was not actually flooded, did not allege any other type of invasion of the use and enjoyment of their property. *In re Chicago Flood*, 176 Ill.2d at 206. Evacuation of the property, which arguably may have amounted to damage from the threat of flooding, was not enough. *Id.*

Yu, Sprague Farms and *In re Chicago Flood* are distinguishable from the present case, because here there has been an invasion of the representative plaintiffs' property. WMI's motion concedes as much by its reliance on the 2004 test results showing the presence of vinyl chloride in their wells. In *Yu* and *Sprague Farms*, the complaints only alleged the possibility of future harm, and in *In re Chicago Flood*, the plaintiffs did not show there was an invasion that caused the alleged damages.³

³ The third case cited by the Defendant, *National Fire and Indem. Exchange v. Ali & Sons Co.*, 346 Ill.App.3d 107 (1st Dist. 2004) is also inapposite. In *National Fire*, the court held that a

WMI argues, however, that the invasion in this case did not constitute an injury because the contaminant levels were below the applicable MCL. The Amended Class Action Complaint alleges three theories of recovery: negligence (Count I), private nuisance (Count II) and trespass (Ct. III). The parties address the theories as a group, but each theory warrants separate consideration.

Looking at Count I (negligence), the plaintiff in a negligence action must establish the existence of a duty of care owed by the defendant, a breach of that duty, an injury that was proximately caused by that breach, and damages. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 270 (2007). WMI claims that sub-MCL levels of contamination do not amount to an injury.

With respect to Count II (nuisance), the law is that a private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land that is either intentional or negligent, and unreasonable. *In re Chicago Flood*, 176 Ill.2d at 204. A nuisance must involve some injury that is "real and not fanciful, and must work some material annoyance, inconvenience or other injury to the person or property of another." *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission*, 34 Ill.2d 544, 547 (1966). In determining whether an invasion is sufficient constitute a nuisance, courts look to the impact of the invasion on "an ordinarily reasonable man, that is, a normal person of ordinary habits and sensibilities." *Id.* As discussed above, the injury

lessee cannot trespass on the leased premises, and that the complaint had not alleged trespass on the property where the contamination allegedly occurred. *National Fire*, 346 Ill.App.3d at 112.

must be the result of an actual invasion of the use and enjoyment of the plaintiff's property. *In re Chicago Flood*.

With reference to Count III (trespass), it is noted that an actionable trespass may occur where the defendant causes a thing or a third person to enter the land of another either through a negligent act or an intentional act. *Dial v. City of O'Fallon*, 81 Ill.2d 548, 556-57 (1980); *Zimmer v. Village of Willowbrook*, 242 Ill.App.3d 437, 447 (2nd Dist. 1993). Intentional trespass requires proof that the defendant "knew to a substantial certainty that * * * [his] actions would result in the entry of the foul matter onto plaintiff's property." *Pineschi v. Rock River Water Reclamation Dist.*, 346 Ill.App.3d 719, 725 (2nd Dist. 2004).

Courts have held that every trespass to real property is considered to result in legal injury, entitling plaintiff to at least nominal damages. *First Nat. Bank of Des Plaines v. Amco Engineering Co.*, 32 Ill.App.3d 451, 455, 335 N.E.2d 591, 593-94 (2nd Dist. 1975)(citing *Falejczyk v. Meo*, 31 Ill.App.2d 372, 377 (1st Dist. 1961). However, in the *Dial* case, the Supreme Court noted that negligent trespass is governed by the general principles of negligence law, thus, "[o]ne is subject to liability for an intentional intrusion on land irrespective of whether he causes harm to a legally protected interest" and "[o]ne is liable for negligent or reckless intrusion on land if he thereby causes harm to a legally protected interest." 81 Ill.2d at 553 (citing Restatement (Second) of Torts, §§ 158 and 165).

In summary, whether construed as a negligence claim or a claim for negligent trespass, Count I requires proof of "harm to a legally protected interest." Count II, private nuisance, requires proof of an injury that would be an annoyance to an ordinary, reasonable person. Thus, WMI's argument that sub-MCL contamination is not actionable because there is no cognizable injury is relevant to Counts I and II. However, because injury is presumed in an intentional trespass, the claim that sub-MCL contamination does not amount to injury is irrelevant to Count III, if it is viewed as a claim for intentional trespass.

Addressing the last count (Count III trespass) first, the court finds that it should be viewed as an intentional trespass count, because it can be inferred from the complaint that the plaintiffs are alleging WMI "knew to a substantial certainty that * * * [its] actions would result in the entry of the foul matter onto plaintiff's property." *Pineschi*. Therefore, proof of actual injury is not required and WMI has not established its right to judgment on Count III as a matter of law.

Turning to the remaining two counts, the court notes that WMI cites a number of federal and sister state decisions in support of the argument that sub-MCL contamination is not actionable, including: *In re Wildewood Litigation*, 52 F.3d 499 (4th Cir. 1995)(upholding jury verdict for defendants on trespass and negligence claims; upholding directed verdict on nuisance claim because contamination "did not rise to level of toxicological concern"); *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc.*, 45 F.Supp.2d 934 (S.D. Ala. 1999)(plaintiffs, local water systems, could not claim current injury where their precautionary testing for Atrazine in raw water was not required by law, and

their delivered water had never failed to meet the applicable MCL); *Rose v. Union Oil Co. of Ca.*, 1999 WL 51819 (N.D.Cal. 1999)(unreported)(nuisance and negligence claims for sub-MCL levels of contamination properly dismissed where plaintiffs submitted no evidence contamination was a risk to health, nor any evidence of other substantial and unreasonable interference with the use of their land, and to the contrary, the only evidence on summary judgment showed no threat to public health or the environment and no requirement for remediation); *Brooks v. E.I. DuPont de Nemours and Co, Inc.*, 944 F.Supp. 448 (E.D.N.C 1996)(granting summary judgment for defendants where plaintiffs claimed it was not necessary to show contamination in excess of state groundwater standards); *Cereghino v. Boeing Co.*, 873 F.Supp. 398 (D. Ore. 1994)(case involving sub-MCL contamination where plaintiffs admitted they had not been damaged by the contamination, decision was "premised solely on plaintiffs' own uncontroverted admission" that they suffered no injury; defendant supplied plaintiff with water); *Lamb v. Martin Marietta Energy Systems, Inc.*, 835 F.Supp. 959 (W.D.Ky. 1993)(summary judgment properly granted for defendants on nuisance claim on basis of court's "de minimus contamination" theory, where there was no evidence contaminated plume had or was likely to reach plaintiff's property, traces of radionuclide found in creek and on turnip greens in plaintiff's garden were below federal dosage limits, water samples in which plutonium levels exceeded the applicable MCL were not taken from plaintiff's property and PCB levels in fish did not indicate improper levels of PCBs in water); *Bradley v. American Smelting & Refining Co.*, 635 F.Supp. 1154 (W.D.Wa. 1986)(arsenic and cadmium airborne

fallout from smelter's operations not actionable where state supreme court certified that trespass by airborne pollutants required injury that actually interferes with right to possession and it was undisputed that arsenic or cadmium on plaintiffs' land was imperceptible to human senses and the presence of these materials had no demonstrable effect on plaintiffs' property; plaintiffs offered no evidence to counter expert testimony that level of contamination presented no danger); *Gleason v. Town of Bolton*, 2002 WL 1555320 (Mass. Super. Ct. 2002)(unreported)(negligence, nuisance and trespass claims were dismissed because sub-MCL contamination was not injury and defendant supplied plaintiff with water); *Adams v. A.J. Ballard, Jr. Tire & Oil Co., Inc.*, 2006 WL 1875965 (N.C.Super. 2006)(unreported)(oil refiners could not be held liable on negligence theory for MTBE contamination at levels lower than the MCL; trespass and nuisance claims against parties that may have been involved in spills or leaking tanks allowed to go forward; plaintiffs allowed to proceed included some for whom highest level of MTBE was less than MCL); *Taco Cabana, Inc. v. Exxon Corporation*, 5 S.W.3d 773 (Tx. Ct. App. 1999)(trial court's take nothing judgment after jury verdict for plaintiff on negligence and trespass claims affirmed where buyer of property who sought to recover increased costs of construction and lost profits based on petroleum contamination of property could not show that remediation of contamination below state "action levels" was required by law; absence of duty to remediate negated proximate cause for negligence claim and defeated duty to remove theory of trespass).

The cases cited by WMI are not persuasive for the purpose of the motion for summary judgment in the present case. First, some of the cases involved plaintiffs who could not have had claims for sub-MCL contamination (e.g., the water systems in *Iberville* that were required to comply with the MCL, but not required to produce water with lower contamination levels) or did not pursue such claims (e.g., *Taco Cabana*, where the damages sought were the costs of remediation voluntarily undertaken, without reference to the contamination level). Others turned on plaintiffs' admissions regarding the lack of injury or their failure to provide evidence of injury (e.g., *Rose*, *Cereghino*, *Lamb*, *Bradley*).

Additionally, the decision in *Lamb* was not followed by the 6th Circuit Court of Appeals in *Smith v. Carbide and Chemicals Corp.*, 507 F.3d 372 (6th Cir. (Ky.) 2007). The *Smith* court distinguished *Lamb*, in part, because the plaintiffs in *Lamb* owned land outside the area of the plume of contamination. *Smith* is also significant, because not only did it involve the same defendant as in *Lamb*, but also because the federal appellate court's decision was premised on Kentucky law, as determined by the Kentucky Supreme Court on certified questions posed by the federal court (see *Smith and Carbide Chemicals Corp.*, 226 S.W.3d 52 (Ky. 2007)).

Plaintiffs cite *NutraSweet Co. v. X-L Engineering Corp.*, 933 F.Supp. 1409 (N.D.Ill. 1996), which held that groundwater contamination could provide a basis for negligence, nuisance and trespass claims under Illinois law. Defendant correctly notes that the contamination levels at issue in *NutraSweet*

were very high. Accordingly, the *NutraSweet* case did not address the issue of sub-MCL contamination.

Illinois courts have not determined whether sub-MCL contamination of groundwater is actionable. Illinois cases on negligent trespass require harm to a legally protected interest. Illinois cases on nuisance require an invasion of the use and enjoyment of the land that an ordinary, reasonable person would find to be a material annoyance, inconvenience or other injury to the property (or persons or things on the property). For the purpose of the motion an invasion of the property (i.e., the presence of vinyl chloride in the groundwater) is not controverted, and the fact issue is one of degree. In the absence of a definite answer from Illinois reviewing courts, the question of whether there is "harm" or "material annoyance, inconvenience or other injury" should be left to the jury.

WMI seeks to use the MCL standards to establish what would be, in effect, immunity for sub-MCL contamination. The statutes and regulations cited by WMI do not expressly create immunities or indicate that there was any intent that MCLs may be used as a safe harbor for a party that contaminates groundwater. As Plaintiff notes, the Safe Drinking Water Act preserves the right to file private actions 42 U.S.C.A. § 300j-8(e) ("Nothing in this section [providing for citizen enforcement of the SWDA] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief.") (emphasis added). The court finds that WMI would not be

entitled to summary judgment, even if it could be assumed the plaintiffs' property was contaminated at sub-MCL levels for the entire relevant period.

Compliance with EPA and IEPA Directives

WMI cites a number of EPA orders as evidence of the scope of the remediation it was required to perform. WMI contends that compliance with these orders was mandatory, and that compliance with the orders is all that may be required. WMI seeks summary judgment, denying that it may be required to perform remedial activities other than those required by the EPA or the IEPA, or that it may be liable for damages after having complied with the directives.

WMI's argument is undercut by the documents it cites. A 1986 Administrative Order by Consent provides:

Nothing in this Consent Order is intended by the parties to be, nor shall it be, a release or settlement of any private claims for injuries to persons or entities or property known or unknown, of any private persons or entities.

Defendant's Statement of Uncontested Facts, Exhibit 2, p.22. Similarly, a 2007 Consent Decree provides:

Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. *The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law.*

Defendant's Statement of Uncontested Facts, Exhibit 6; p. 63. The other documents submitted by WMI do not address the issue of WMI's liability to third parties. See Defendant's Statement of Uncontested Facts, Exhibit 3 (EPA Third

Five Year Review Report, 2007); Exhibit 4 (EPA 1989 Unilateral Administrative Order). WMI is not entitled to judgment as a matter of law on the ground that it complied with EPA and IEPA directives.

CONCLUSION

For the reasons stated above, WMI's motion for summary judgment is denied.

Margaret J. Mullen
Circuit Judge

Dated at Waukegan, Illinois

This 4th day of September, 2008