Vermont Superior Court
Chittenden Civil Division
175 Main Street, PO Box 187
Burlington, Vermont 05401
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ENTRY REGARDING MOTION

State of Vermont vs. Rhoades et al 932-10-19 Cncv

Title:

Motion for Default Judgment,

No. 1

Filed on: May 15, 2020

Filed By: Kolber, Justin E., Attorney for:
Plaintiff State of Vermont

VERMONT SUPERIOR COURT
FILED
AUG - 5 2020
CHITTENDEN UNIT

Response: NONE

✓ Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____;Time Allotted _____

___ Other

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Judge 8/5/20 Date

Date copies sent to: 8/5/20 Clerk's Initials AN

Copies sent to:
Attorney Justin E. Kolber for Plaintiff State of Vermont

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 932-10-19 Cncv

STATE OF VERMONT,
Plaintiff,

v.

GILBERT A. RHOADES, SR. and
BLANCHE E. RHOADES,
Defendants.

JUDGMENT ORDER

Plaintiff State of Vermont has moved this Court to enter a default judgment against Defendants Gilbert A. Rhoades, Sr. and Blanche E. Rhoades (collectively "Defendants"). Based on the pleadings on file in this case and the declaration supporting Plaintiff's motion, the Court finds as follows:

1. Plaintiff filed a complaint in this action on October 11, 2019, which was within eight years of the last judgment order filed in the matter underlying this case.

2. Returns of Service showing that service of the summons and complaint was made upon Defendants, on October 16, 2019.

3. Defendants have failed to plead, appear, or otherwise defend himself, either personally or through counsel, within 20 days of service of the summons and complaint upon them, as required by Vermont Rule of Civil Procedure 12(a).

4. Plaintiff filed and served a Motion for Default Judgment in this matter on or about May 15, 2020.

5. Plaintiff's Motion for Default Judgment is hereby granted by the issuance of this Judgment Order.

It is therefore ORDERED, adjudged, and decreed that Plaintiff State of Vermont shall have judgment against Defendants Gilbert A. Rhoades, Sr. and Blanche E. Rhoades as follows:

A. Plaintiff State of Vermont's Judgment Order dated October 11, 2011, in Docket Numbers S0569-07 CnC (which order is attached to this Judgment Order), are hereby renewed as of the date of this Judgment Order.

B. As of the date of this Judgment Order, Defendants Gilbert A. Rhoades, Sr. and Blanche E. Rhoades owes Plaintiff State of Vermont under the previous judgment orders a principal balance of $44,857.58, plus interest that has been accruing and continues to accrue at 12% per annum on the unpaid balance of the judgment.

C. Plaintiff State of Vermont is entitled to continuing post-judgment interest from the date of entry of judgment to the date of satisfaction.

8/5/20
Date

The Honorable Helen M. Toor
Superior Court, Civil Division

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

STATE OF VERMONT on behalf of the AGENCY OF TRANSPORTATION and AGENCY OF NATURAL RESOURCES, Plaintiff v. GILBERT A. RHOADES, SR. and BLANCHE E. RHOADES, Defendants	Docket No. S0569-07 CnC

RULING ON DAMAGES

This case involves a junkyard in Milton. Some claims were resolved on summary judgment, some after a court trial. A hearing on damages was held on May 11. Post-trial memos were complete June 1. Plaintiff is represented by Robert F. McDougall, Esq.; Defendants, although previously represented by Thomas G. Walsh, Esq., were represented at the damages hearing by Michael Gadue, Esq.

Findings of Fact

The court will not repeat here its earlier findings of fact; familiarity with the court's earlier rulings is presumed. Additional facts established at the damages hearing by a preponderance of the evidence are set forth below. References to "Rhoades" refer to Gilbert A. Rhoades, Sr.; references to "the Site" refer to the five-acre property at 15 Shirley Avenue in Milton.

It is undisputed that Rhoades lacks a permit for a junkyard, a solid waste facility, or a hazardous waste facility. The Site is currently neatly kept and well-organized, but it still contains a large tire pile. The parties disagree over the likely number of tires there,

and thus how long removal may take and what it would cost is disputed. However, the court finds that the exact amount and cost are not the key factors here. The evidence established that the tires create a danger of fire, which could be significant and dangerous to the community. It is undisputed that the tires constitute solid waste. They must be removed to protect the safety of the community. The question of cost, and whether Rhoades or the State will ultimately bear it, is not a reason for the court to decline to order the cleanup. While the court is sympathetic to Rhoades' concerns about the cost involved and his current lack of income due to the closure of the bulk of his business, questions about his ability to pay do not outweigh the need for injunctive relief for the safety of the community.

Although there was testimony that a limited amount of other "solid waste" at the Site needs to be removed, the evidence was unclear as to what materials that included.

As noted in the court's prior opinion, there have been a number of tests done of soil and water at the Site in connection with the presence of lead. The EPA testing, done in 2008, showed elevated lead levels in the soils in two locations, identified as SS-11 and SS-12. EPA also did testing of Hobbs Pond as well as residential properties nearby. The tests analyzed fish, water and sediment in the pond. No lead was found, and no other health risks were established as a result of those water tests. Rhoades hired a consultant to do further water tests, which also showed no lead or other contaminants in the water.

The State has spent $36,007.32 in investigative costs in connection with the Site, including soil and water testing. The State asserts that these costs were expended because of a release of lead and the threat of future release of lead or other potentially hazardous materials. Although Rhoades argues that certain testing did not show any negative results,

or results that were tied to the Site, that does not mean the State was unreasonable in doing the tests to find out what the results might be. The court finds that the investigative actions were reasonable and were done in connection with a release or threatened release of hazardous materials.

The court does find, however, that certain of the expenses are not adequately documented. Specifically, Exhibit R-3 in the amount of $480 shows no connection to the Site; Exhibits R-5 and R-6 in the amounts of $665.98 and $543.76 involve a well that the State's witness acknowledged was tested merely because the neighbor asked, not because of any scientific basis for doing so; and R-9 shows nothing on the $9,460 invoice from Alpha Analytical to confirm that the testing was related to this case at all. Thus, the court finds these amounts (totaling $11,149.74) inadequately documented.

Conclusions of Law

The State seeks injunctive relief, recovery of investigation costs, and financial penalties. The court will address each in turn.

1. Injunctive Relief

With regard to injunctive relief, the State first seeks a permanent injunction barring the use of the Site as a junkyard or solid waste facility unless Rhoades obtains appropriate permits and licenses. The court will grant that request.

Next the State seeks an order requiring Rhoades to remove to a certified solid waste facility all the tires and other solid waste that are currently located on the Site, and barring him from accepting or storing any other solid waste at the Site in the future. The court grants the request as to the tires, but as to the "other solid waste" the court finds the term too undefined to be the subject of injunctive relief.

The State also seeks an order that Rhoades comply with all applicable laws and regulations regarding the handling of hazardous waste at the Site in the future. Rhoades can hardly object to an order to comply with the law; the court will grant this request.

Finally, the State seeks an order requiring Rhoades to hire an environmental consultant to develop a plan to do additional sampling of soil and water, as well as removal of contaminated soil. The court concludes that the State has failed to show the need for further testing of the water. Multiple tests have already been done, by the State, by EPA and by Rhoades' consultant. All tests done so far have shown no lead contamination of water. While one could go on testing forever to be absolutely certain there is no problem anywhere, the court concludes that there is no evidence of any danger to water outside the Site, and the State has not shown by a preponderance of the evidence that such testing is necessary to assure public health or safety.

However, even Rhoades' expert testified at the prior hearing that the lead in the soil poses a potential threat if disturbed in the future, and the court therefore concludes that it must be cleaned up. Rhoades is liable for doing so. Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124,¶ 28,177 Vt. 421 (liability for abatement of threatened release). The court will mandate the approach offered by Rhoades' expert at the prior hearing – the Triad approach[1] – to clean up the area of soil contaminated by lead.

Rhoades asks the court to permit him to continue his business of selling new and used car radiators and batteries at the site. Based upon the record before the court, the

[1] This is to start at the known area of impact (here SS-11) and work out in a radial direction, both in depth and distance. There are hand-held tests that can be done to delineate the impacted area of soils. Then all those soils can be removed and shipped to a permitted facility.

court is not able to address whether such activities would require any permits or licenses. The court is not, however, ordering removal of such materials from the Site as part of this case.

2. Investigative Costs

A landowner who is found legally responsible for "releases or threatened releases" of hazardous materials is liable for the costs of investigation by the State if the investigation was "necessary to protect the public health or the environment." Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124,¶ 28,177 Vt. 421; 10 V.S.A. § 6615(a)(1)-(4)(A)-(B). The court has already found there has been a "release" of lead, and that there is an ongoing threat of release of lead because it remains in the soil.

The State seeks recovery of investigative costs in the amount of $36,007. Because most of those costs were reasonably incurred in investigating releases and/or threatened releases of hazardous materials at the Site, the State is entitled to recover those costs. 10 V.S.A. § 6616(a)(2)(B).With the exception of $11,149.74 that the court has found inadequately documented or tied to the Site, the court will award the investigative costs, in the total amount of $24,857.58. As noted in the court's prior ruling, Blanche Rhoades is also liable for these costs.

3. Penalties

With regard to the penalties, the State seeks a total of $78,000, broken down as follows: $15,250 for unlicensed operation of a junkyard; $25,000 for operation of an uncertified waste facility; $5,250 for violations of hazardous waste management regulations concerning antifreeze and oil; $17,500 for hazardous waste violations concerning leaks and spills; and $15,000 for the release of lead. The State explained how

staff came up with these proposed amounts, all of which demonstrated a measured and fair approach. However, although it is clear that Rhoades violated various laws and regulations over the years, he has also made significant attempts to clean up the Site and get into compliance, and some of his inability to gain compliance was the result of actions by the Town of Milton beyond his control. Moreover, the court concludes that given Rhoades' limited sources of income as a result of the closure of most of his business pursuant to court order, his funds should primarily be directed to cleanup of the Site rather than penalty payments to the State. The court will therefore impose lower penalties, in the following amounts: $5,000 for unlicensed operation of a junkyard; $5,000 for operation of an uncertified waste facility; $2,500 for violations of hazardous waste management regulations concerning antifreeze and oil; $2,500 for hazardous waste violations concerning leaks and spills; and $5,000 for the release of lead.

Order

1. Rhoades is permanently enjoined from operating a junkyard or salvage yard at the Site unless he obtains all necessary permits and licenses.
2. Rhoades is ordered to remove all the tires at the Site within 90 days, in a manner approved in advance by the State.
3. Rhoades is ordered to comply with all statutes and regulations governing the handling of hazardous wastes.
4. Rhoades is ordered to do additional soil sampling and removal of lead-contaminated soil using the Triad Approach.
5. Rhoades and his wife are ordered to reimburse the State $24,857.58 in past investigative costs.

6. Rhoades is ordered to pay the State $20,000 in penalties.

Dated at Burlington this 11th day of October, 2011.

Helen M. Toor
Superior Court Judge