

STATE OF VERMONT  
WASHINGTON COUNTY

FILED  
2008 FEB 25 A 11:43

STATE OF VERMONT )  
Plaintiff, )  
v. )  
HOWE CLEANERS, INC., et al., )  
Defendants. )

SUPERIOR COURT  
Washington Superior Court  
Docket No. 27-1-04 Wncv

DECISION

**TD Banknorth's Motion for Summary Judgment, filed June 4, 2007 (#38)**  
**State's Cross Motion for Summary Judgment, filed July 5, 2007 (#42)**  
**Other dependent pending Motions**

In this case as a whole, the State seeks abatement and cleanup costs related to hazardous waste at a property in Barre that was a dry cleaning facility from 1974 to 1996. Defendants include owners before and after 1996. The present motions involve the State's claim against TD Banknorth, successor entity to the bank that acquired the property in foreclosure in 1997 from an owner who operated it as a bakery. The bank owned it for seven months before selling it to Defendant Fiore, who operated it as a pizzeria.

TD Banknorth moves for summary judgment on the grounds that the State cannot prove its claim at trial because it has been precluded by the court from using certain evidence, and without that evidence its claim fails. The State responds with a cross-motion for summary judgment, arguing that it has now provided the discovery it had previously withheld, and it should not be precluded from litigating the merits of the claim.

The court recognizes that preclusion of the use of evidence is a serious sanction for discovery non-compliance and that litigation of claims on their merits is preferred. Nonetheless, in this case, the non-compliance was egregious. It involved ignoring a specific court order and depriving Defendant TD Banknorth (and other defendants) of discovery information the court had ruled they were entitled to for a considerable period of time, causing significant delay in the progress of the case and unnecessary expense to the other litigants. It was only after the court ruled that the State was precluded from using the evidence that the State made it available—and now seeks to use it as the basis for its summary judgment motion. The court cannot condone such conduct or overlook its effects just because the evidence was ultimately provided after the ruling precluding its use. For these reasons, as set forth in more detail below, TD Banknorth's motion is granted, and the State's cross-motion is denied.

This ruling affects other pending motions as described below.

## TD Banknorth's Motion for Summary Judgment

The case was filed in January of 2004. On March 30, 2005, TD Banknorth<sup>1</sup> noticed a Rule 30(b)(6) deposition for a designated representative of the State, but no such deposition took place. The record of a status conference with the court in May of 2005 suggests that TD Banknorth was having difficulty obtaining discovery from the State, and would file a "*Celotex*" summary judgment motion.<sup>2</sup> The bank did so, and the State filed a cross-motion.

This court (Toor, J.) denied both motions in a written decision of March 10, 2006, ruling that there was a dispute of fact, at least on the record as then presented, as to whether or not there was a "release or threat of release" of hazardous material during the period of TD Banknorth's ownership, and ruling that while the State had some such evidence, it was of a general nature and not sufficiently specific to support judgment as a matter of law in its favor. In the ruling, Judge Toor also specifically interpreted the statutory standard "release or threat of release," an issue that TD Banknorth and the State disagreed on, and which affected how each had attempted to frame the evidence for summary judgment purposes. Though both motions were denied, a primary effect of the decision was to clarify that, as between TD Banknorth and the State, "[t]he remaining controversy . . . is the timing of any releases or threats of release." Ruling on Motions for Summary Judgment at 13 (March 10, 2006).<sup>3</sup>

Thus, following this ruling, the strength of the State's case against TD Banknorth depended on the specific evidence the State had to support its claim that there had been a "release or threat of release" during the period of TD Banknorth's ownership under the interpretation set forth by Judge Toor. TD Banknorth accordingly pursued discovery on this issue, and in April of 2006 renewed its prior attempt to depose a designated representative of the State in a Motion to Compel a Rule 30(b)(6) deposition. The State sought a protective order, and objected to discovery on certain issues.

---

<sup>1</sup> In this decision, the use of the name TD Banknorth includes predecessors-in-interest throughout the relevant period, and is used for simplicity.

<sup>2</sup> This is understood as a reference to *Celotex Corp. v. Catrett*, 477 U.S. 323 (1986), in which the Court ruled that after an adequate time for discovery, summary judgment is mandated when a party with a burden of proof on an element fails to make a showing sufficient to establish the existence of that element. It can be used to flush out whether a claimant has a sufficient factual basis to sustain a burden of proof.

<sup>3</sup> Judge Katz's May 19, 2005 entry establishes that TD Banknorth was having difficulty obtaining discovery from the State long before Judge Toor's March 10, 2006 summary judgment ruling. Judge Katz's entry states, "Def's Banknorth + Fiore to file 'Celotex' Summ Jdgmt Mo's agst state to see who signs any affidavits. Ct will permit Def's discov. prior to replying to any State reply memo." That is, TD Banknorth, with the Judge Katz's approval, was using the summary judgment motion itself as a discovery tool. The ensuing summary judgment proceedings revealed the parties' opposing interpretations of the statute. Judge Toor's summary judgment ruling settled that matter, greatly narrowed the issues left to be resolved in this case, and should have prompted the State to begin cooperating with the defendants' discovery needs. The record shows that instead, over the next year, the State continued its pattern of resisting Defendants' attempts to obtain discovery on the critical facts of release and threat of release.

On June 8, 2006, Judge Toor granted TD Banknorth's Motion to Compel in a written order and denied the State's request for a protective order except as to a particular issue not relevant here, thereby requiring the State to make its designated representative available for deposition. The June 8, 2006 Order is clear that the State would not be permitted to obviate TD Banknorth's discovery rights and simply refuse to disclose the factual basis for its claims. Also on June 8, Judge Toor signed the Revised Discovery and Pretrial Order which, among other things, required the parties to complete mediation by November 1, 2006. After four days of mediation in September, which was unsuccessful, in October of 2006 TD Banknorth re-noticed the Rule 30(b)(6) deposition for November 1, 2006. TD Banknorth also filed a Motion to Compel Responses to Written Discovery. Its discovery was designed to "discover the evidence supporting the State's claim that a release or threatened release occurred at the Property" during its ownership.

On October 27, 2006, the State filed another Motion for a Protective Order and on October 31, 2006 notified the other attorneys that it would not make a witness available for the Rule 30(b)(6) deposition the following day. The Motion was not filed in sufficient time to provide reasonable notice to others, nor to obtain a ruling from the court. The State simply did not produce its witness, although discovery rules required it and Judge Toor had ordered it in her June 6, 2006 ruling. Neither the witness nor counsel for the State attended, although other counsel attended with a court reporter to conduct the deposition.<sup>4</sup> The State's subsequent arguments for not participating in the deposition relate to scope and other details that should have been addressed at the deposition and do not excuse non-attendance, and its preference for a obtaining a ruling on other motions first, which also is not a proper basis for ignoring a discovery obligation and court order.

On November 13, 2006, TD Banknorth filed its Motion for Sanctions against the State, seeking sanctions for the State's refusal to provide evidence through a deponent at a Rule 30(b)(6) deposition after being ordered to do so. Specifically, TD Banknorth sought to preclude the State from using against it evidence that should have been made available through such a deposition. The State filed both an Opposition and a Surreply to Banknorth's Reply. This court granted the motion in an entry order on May 21, 2007, ruling as follows: "The Plaintiff is precluded from using at trial evidence that should have been provided in accordance with Judge Toor's Order of June 8, 2006."

The record shows that after that ruling, the State then provided an affidavit of its designated representative, Steven J. LaRosa, who had also submitted an affidavit in connection with the summary judgment motion filed by the State in the summer of 2005, as well as other discovery responses that had not been provided previously.

TD Banknorth's current Motion for Summary Judgment is based on the premise that without the evidence that the State is now precluded from using at trial, the State cannot meet its burden of proof on the cost and recovery claims against the Bank, as it

---

<sup>4</sup> Defendant Fiore was also seeking the Rule 30(b)(6) deposition and had made parallel attempts to obtain comparable discovery with respect to the State's claim against it, and was also present for the deposition that did not occur.

does not have other evidence of a release or threatened release of hazardous materials during the time that TD Banknorth owned the property.

The State has responded by filing its own Motion for Summary Judgment in which it seeks to rely on an opinion of Stephen LaRosa expressed in a July 3, 2007 affidavit on the elements of release or threatened release during the period of TD Banknorth's ownership. It argues that the May 21, 2007 preclusion ruling "should now be considered in light of the discovery that Banknorth obtained after May 21, 2007." Essentially, it argues that it has now provided the discovery, and should be allowed to pursue its case.

The State has not presented any sound reason for the court to set aside its ruling of May 21, 2007 (the "preclusion ruling"), which it would have to do in order for the State's evidence to be considered. The State had ample opportunity, over a period of two years, to comply with various discovery obligations and a specific court order and did not do so. The fact that it has now complied—only after the preclusion ruling has shown that the court takes its own orders and discovery obligations seriously—is not sufficient reason to vacate the order. Not only was there a prior court order requiring the deposition and compelling other discovery responses, TD Banknorth's Motion for Sanctions, specifically requesting preclusion, was pending for a considerable period of time, during which the State did not comply.

Because the State is precluded from using the opinion of Stephen LaRosa as evidence in support of its burden to show release or threats of release of hazardous material during the period of TD Banknorth's ownership, and because the State has shown no other facts upon which it could sustain its burden of proof, TD Banknorth is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 323 (1986).

### **State's Cross-Motion for Summary Judgment**

For the reasons set forth above, the State cannot prevail on its Motion. Judgment shall be entered for TD Banknorth on the State's claim against TD Banknorth in connection with both summary judgment motions. V.R.C.P. 56(e).

### **Other Pending Motions**

There are several pending motions, and action on many of them is affected by the rulings herein as set forth in the Entry Orders issued this day.

**ORDER**

For the foregoing reasons,

- 1) TD Banknorth's Motion for Summary Judgment, filed June 4, 2007 (#38), is *granted*, and
- 2) The State's Cross-Motion for Summary Judgment, filed July 5, 2007 (#42), is *denied*.

Dated this 20<sup>th</sup> day of February 2008.

Mary Miles Teachout  
Mary Miles Teachout  
Superior Court Judge