

FILED
LUCAS COUNTY

2009 FEB 25 P 3: 11

COMMON PLEAS COURT
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IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

STATE OF OHIO

Plaintiff,

vs.

LG DEVELOPMENT CORPORATION, et al.,

Defendants.

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Case No. G-4801-CI-0200606633-000

JUDGMENT ENTRY

JUDGE DENISE ANN DARTT

A civil penalty hearing pursuant to R. C. 3734.17(C) was held on October 31, 2008. The State of Ohio was represented by Assistant Attorney General Amanda Sturm and the defendant was represented by V. Robert Candiello. Witnesses testified, exhibits admitted. Parties filed post trial briefs.

A motion for summary judgment was filed on January 8, 2008, and after the filing of the defendants' response, plaintiff's motion for summary judgment was granted. In the judgment entry the court enumerated fifteen separate violations of Ohio's hazardous waste laws set forth in R. C. Chapter 3734 and the Ohio Administrative Code:

Count One--Illegal Disposal of Hazardous Waste a violation of R. C. 3734.02(E) and (F);

Count Two--Illegal Storage of Hazardous Waste a violation of R. C. 3734.02(E) and (F);

Count Three--Failure to Have a Closure Plan a violation of Ohio Adm. Code 3734-55-11;

Count Four--Failure to Conduct Waste Evaluation a violation of Ohio Adm. Code 3734-52-11;

Count Five--Failure to Develop a Written Inspection Plan, Conduct Weekly Inspections and Record Inspection Results a violation of Ohio Adm. Code 3734-54-15, 3734-55-74;

Count Six--Failure to Keep Written Operating Record a violation of Ohio Adm. Code 3734-54-73;

Count Seven--Failure to Minimize the Risk of Contamination a violation of Ohio Adm. Code 3745-54-31;

Count Eight--Failure to Implement the Contingency Plan Which Minimizes Risk of Fire, Explosion and Contamination a violation of Ohio Adm. Code 3745-54-51;

Count Nine--Failure to Conduct or record Personnel Training a violation of Ohio Adm. Code 3745-65-16;

Count Ten--Failure to Establish Liability Coverage a violation of Ohio Adm. Code 3745-55-47;

Count Eleven--Failure to Obtain Cost Estimate for Facility Closure a violation of Ohio Adm. Code 3745-55-42;

Count Twelve--Failure to Establish Financial assurance for Facility Closure a violation of Ohio Adm. Code 3745-55-43;

Count Thirteen--Failure to Properly Label Used Oil Containers a violation of Ohio Adm. Code 3745-279-22(C);

Count Fourteen--Failure to Properly Manage Used Oil Releases a violation of Ohio Adm. Code 3745-279-22;

Count Fifteen--Failure to Properly Store Used Oil a violation of Ohio Adm. Code 3745-279-22.

The defendants, LG Development Corporation, et al., operate two auto salvage yards in Lucas County, Ohio. The Ohio EPA began conducting investigations at the two sites October 8, 2003. These investigations resulted in the filing of this action and the order for summary judgment in the plaintiff's favor. Pursuant to statute, a civil penalty hearing was held to determine what amount of economic sanctions would deter the violations of environmental law.

The trial court has broad discretion when determining the amount of an economic sanction. Both parties herein cite the case of *State ex rel. Brown v. Dayton Malleable Inc.*, (April 21, 1981), Montgomery App. No. 6722, 1981 Ohio App. LEXIS 12103, affirmed (1982) 1 Ohio St. 3d 151, which sets forth a process by which the trial court can determine the appropriate amount of civil penalty to be assessed against a violator of Ohio law.

[T]he amount of civil penalty should be determined as follows: Step 1: ...Determine and add together the appropriate sums for each of the four factors or elements of this policy namely: the sum appropriate to redress the harm or risk of harm to public health or the environment, the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance, the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public. Step 2: Determine and add together sums appropriate for mitigating factors, of which the most typical are the following: the sum, if any, to reflect any part of non-compliance attributable to the government itself, the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control... Step 3: ...Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty. *Id.* at *8-*9.

Applying the Dayton Malleable factors to the fifteen violations, the court finds the actions of the defendants did harm or created a risk of harm to the public health or environment. The evidence included testimony from Ohio EPA inspector North that the facilities were poorly managed regarding hazardous waste. Ignitable materials were open or improperly stored. Hazardous liquid waste was spilled and pooled on the ground. Numerous containers were not properly labeled. Mr. North testified that he observed 4,000 gallons of bad gas in open containers. He observed a old bus on the premises full of containers of bad gas. Mr. North testified that the defendants' facilities were the worst he had ever inspected.

The defendants' recalcitrance, defiance and indifference to the Ohio EPA laws and regulations was established by the testimony of Mr. North. The inspector visited the defendants' facilities nine times beginning in October of 2003. He warned the defendants by certified mail and

personal service of possible consequences if defendants continued to ignore Ohio law. He offered assistance and guidebooks. Defendants made little progress and for the most part failed to follow through. The defendants even attempted to hide hazardous waste from Mr. North by moving an old school bus full of containers of bad gas from one location to another. Defendants did have some of the waste removed but this was sporadic and well after the plaintiff began inspecting the facilities. Defendants' exhibits A and D show the defendants did not obtain adequate insurance until May 15, 2008 and did not submit a waste management plan to the Ohio EPA until August 21, 2008.

While defendants non-compliance with Ohio law probably did result in economic gain to the defendants, the only tangible amount is \$7,862.00 which the defendants paid as premium for the insurance policy issued on May 15, 2008. Until that date the defendants failed to show proof of liability coverage to the Ohio EPA.

The State of Ohio did not present evidence that any costs incurred by the State for the defendants' non-compliance resulted in unusual or extraordinary enforcement costs.

The defendants did not present evidence of mitigating factors such as any non-compliance attributable to the Ohio EPA, factors beyond the control of the defendants, or the economic status of the violator.

Having analyzed the evidence pursuant to Dayton Malleable, the court must next determine the amount of the civil penalty to be imposed upon the defendants to deter violations of environmental law. R. C. 3734.13(C) states in pertinent part, "the court may impose...a civil penalty of not more than ten thousand dollars for each day of each violation..." In this case, the State calculates the defendants violated each of the fifteen laws and regulations for a total of 1,850 days. The State is not seeking the maximum penalties, and suggests the court assess penalties using a 180 day time frame. The State argues that a penalty of not less than \$211,000 be imposed upon the

defendants by the court. The defendants contend the State did not prove a specific length of time that the defendants were in non-compliance. While the court would agree that no specific time frame was set forth, it is clear to the court that these violations continued for at least 180 days.

The court therefore assesses the civil penalties as follows: 1) \$100 per day for 180 days for the harm or risk of harm to public health or the environment. Total: \$18,000. 2) \$200 per day for 180 days for the defendants degree of recalcitrance, defiance, or delayed compliance. Total: \$36,000. 3) \$7,862 for the economic benefit gained by the defendant for delayed compliance. This reflects one year premium for liability insurance. In sum, the defendants are assessed a total civil penalty of \$51, 862.00. No mitigating factors apply.

It is therefore ORDERED, ADJUDGED and DECREED that the defendants pay to the State of Ohio the civil penalty in the amount of \$51, 862.00 on or before March 27, 2009.

2-25-09
Date

Denise Ann Dartt
JUDGE DENISE ANN DARTT

cc:
DANIEL J MARTIN
V. ROBERT CANDIELLO