MAINLINE CONTRACTING CORP. v. CHOPRA-LEE

109 F. Supp.2d 110 (2000) | Cited 0 times | W.D. New York | June 8, 2000

ORDER

This case was referred to Magistrate Judge Leslie G. Foschio pursuantto 28 U.S.C. § 636(b)(1), on May 19, 1999. Motions for summaryjudgment were filed by defendant Camp Dresser & McKee, Inc. on August24, 1999, and by defendant Chopra-Lee, Inc. on August 26, 1999. On March22, 2000, Magistrate Judge Foschio filed a Report and Recommendation,recommending that the defendants' summary judgment motions be denied.

On March 31, 2000, defendant Camp Dresser & McKee, Inc. filedobjections to the Report and Recommendation, and on April 13, 2000plaintiff filed a response thereto. Oral argument on the objections washeld on May 18, 2000.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novodetermination of those portions of the Report and Recommendation to whichobjections have been made. Upon a de novo review of the Report andRecommendation, and after reviewing the submissions from the parties, theCourt adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Foschio'sReport and Recommendation, defendants' motions for summary judgment aredenied and the case referred back to Magistrate Judge Foschio forsettlement discussions. If the case is not settled, the parties shallappear before this Court on September 18, 2000 at 9:00 a.m. for a statusconference.

IT IS SO ORDERED.

REPORT and RECOMMENDATION

JURISDICTION

This case was referred to the undersigned on May 19, 1999, by HonorableRichard J. Arcara for report and recommendation on all dispositivemotions. The matter is presently before the court on motions for summaryjudgment filed by Defendants Camp Dresser & McKee, Inc., on August24, 1999 (Docket Item No. 20), and Chopra-Lee, Inc. on August 26, 1999(Docket Item No. 23).

BACKGROUND

MAINLINE CONTRACTING CORP. v. CHOPRA-LEE

109 F. Supp.2d 110 (2000) | Cited 0 times | W.D. New York | June 8, 2000

Plaintiff Mainline Contracting Corp. ("Mainline"), commenced thisaction on June 4, 1998, alleging causes of action under the ComprehensiveEnvironmental Response, Compensation and Liability Act of 1980("CERCLA"), 42 U.S.C. § 9601, et seq., and New York common law,incurred in connection with the disposal of transformer oil contaminatedwith polychlorinated biphenyls ("PCBs"). Specifically, the CERCLA causesof action include indemnification under 42 U.S.C. § 9607,contribution under 42 U.S.C. § 9607-13, and a declaration of rightsunder CERCLA. Complaint, Counts I, II and VIII. Mainline also seeksrelief under New York common law grounds for negligence, strictliability, negligence per se, indemnification and common lawcontribution. Complaint,Counts III, IV, V, VI and VII, respectively.

Defendant Chopra-Lee, Inc. ("Chopra-Lee"), filed an answer to theComplaint on July 7, 1998. On July 16, 1998, Chopra-Lee commenced athird-party action against Environmental Controls Corp. ("ECC"), fromwhom Chopra-Lee sought contribution should Mainline be ultimately foundentitled to damages from Chopra-Lee. ECC's answer to the third-partycomplaint, filed September 4, 1998, asserts three counterclaims againstChopra-Lee, including to hold Chopra-Lee jointly and severally liable toECC under 42 U.S.C. § 9607, contribution under 42 U.S.C. § 9607(a),and strict liability.

Camp Dresser & McKee, Inc. ("CDM"), filed an answer to theComplaint on September 28, 1998. Included in CDM's answer is across-claim against Chopra-Lee asserting that Chopra-Lee is required toindemnify CDM for any judgment entered against CDM, including attorneyfees, costs and expenses, and to provide a defense for CDM.

On August 24, 1999, CDM filed the instant motion for summary judgment,accompanied by the Declaration of Hugh M. Russ, III, Esq. (Docket ItemNo. 20) ("Russ Declaration"), a Statement of Material Facts (Docket ItemNo. 21), and a Memorandum of Law (Docket Item No. 22) ("CDMMemorandum"). In opposition to CDM's motion, Mainline filed, on November16, 1999, the Affidavit of Craig A. Slater, Esq. (Docket Item No. 37)("Slater Affidavit I"), and a Memorandum of Law (Docket Item No. 38)("Mainline Memorandum in Opposition to CDM's Motion"). In further supportof its motion, CDM filed, on December 7, 1999, a Reply Memorandum of Law(Docket Item No. 40) ("CDM Reply"), and a Reply Declaration by Hugh M.Russ, III, Esq. (Docket Item No. 41) ("Russ Reply Declaration").

On August 26, 1999, Chopra-Lee also filed a motion for summaryjudgment, accompanied by the Affidavit of John J. Giardino, Esq. (DocketItem No. 23) ("Giardino Affidavit"), a Statement of Uncontested Facts(Docket Item No. 24), and a Memorandum of Law in support (Docket ItemNo. 25) ("Chopra-Lee Memorandum"). In opposition to Chopra-Lee's motion,Mainline filed, on October 5, 1999, an affidavit with exhibits by CraigA. Slater, Esq. (Docket Item No. 30) ("Slater Affidavit II"), anaffidavit by Richard Ziegler (Docket Item No. 32) ("Ziegler Affidavit"),an affidavit by Norman N. Neuner (Docket Item No. 34) ("NeunerAffidavit"), a Memorandum of Law (Docket Item No. 31) (MainlineMemorandum in Opposition to Chopra-Lee's Motion), and a Response toChopra-Lee's Statement of Uncontested Facts. (Docket Item No. 33).

MAINLINE CONTRACTING CORP. v. CHOPRA-LEE

109 F. Supp.2d 110 (2000) | Cited 0 times | W.D. New York | June 8, 2000

Limited informal oral argument was conducted by telephone conferencecall on March 15, 2000. Following oral argument, the parties werepermitted to file further submissions with the court. Accordingly, lettersin further support of the summary judgment motions were submitted to thecourt by Chopra-Lee on March 17, 2000 (Docket Item No. 43), and by CDM onMarch 20, 2000 (Docket Item No. 44).

Based on the following, Camp Dresser & McKee, Inc.'s, andChopra-Lee, Inc.'s motions should be DENIED.

FACTS[1]

The claims in this action arise from the demolition and cleanup of theformer Louisville Forge & Gear Works Inc. site ("the LF & G site"or "the site"), located in Louisville, Kentucky. Originally farmland, theLF & G site has been used for heavy industrial manufacturing sincethe 1940s including aircraft manufacturing, tractor manufacturing andforging engine parts. In 1993, the Louisville Regional Airport Authority("the RAA"), acquired the LF & G site with intention of expanding theStandiford Airport ("the airport") located on land adjacent to the site.

In preparation for the airport expansion, on March 29, 1990, aSubcontract Agreement was executed between Howard, Needles, Tamme &Bergendoff ("HNTB"), as consultant to the RAA, and CDM, as subconsultant("the 1990 Subcontract Agreement"). Services to be rendered by CDM to theRAA and HNTB under the 1990 Subcontract Agreement included assisting infinal design activities for the expansion of the airport. Theseactivities included environmental work which CDM, as sub-consultant, wasauthorized to subcontract with other subconsultants to perform at the LF& G site. The 1990 Subcontract Agreement also provided that CDM wasto indemnify the RAA and HNTB for any claims, losses, expenses or damagesto property, unless such liability arose out of the RAA's negligence.

The RAA solicited bid proposals for the demolition and removal of allabove-ground structures and improvements at the LF & G site. Inconnection with the bidding process, on October 25, 1996, the RAA issuedthe Contract Document for Demolition Services for LF & G —Phase II ("the Contract Document"), by which CDM was designated as thedemolition Program Manager at the LF & G site, and vested with theauthority necessary to ensure proper demolition, including stopping workon the project and rejecting any non-conforming work or material. TheContract Document defines the contractor as "[t]he individual,partnership, firm or corporation to which the Award [of the bid] is madeand which is primarily liable for the acceptable performance of the Workin conformance with the Contract Documents." Contract Document, p. GC-3,Russ Declaration Exhibit N. The RAA awarded the contract for thedemolition project to Mainline which became the contractor under theContract Document. The Contract Document also contains an indemnificationagreement that provides

The Contractor [Mainline], and all Subcontractors, agree to indemnify and hold the Authority [the RAA], Camp, Dresser & McKee, the Program Manager and their respective officers, agents and employees, free and harmless from and against any and all claims, suits, loss or damage, or injury to persons or property that might occur during the construction of the Project, unless such acts result from the sole negligence of the Authority, Camp, Dresser & McKee, the Program Manager and their respective officers, agents or employees.

Contract Document, p. SC-1, ¶ 1 and p. SCC-1 (Addendum Number 1),Exhibit N to Russ Declaration, and Exhibit C to Slater Affidavits I andII (emphasis added).

On December 18, 1996, CDM submitted a proposal to HNTB to provideservices related to the LF & G site demolition project. On January9, 1997, Mainline and the RAA executed the actual contract for thedemolition work to be performed at the site ("the Demolition Contract").Exhibit C to Russ Reply Declaration. The Demolition Contract incorporatedby reference the Contract Document. Contract Document, p. C-1, Exhibit Cto Russ Reply Declaration.

On January 24, 1997, HNTB and CDM executed Amendment No. 3 to the 1990Subcontract Agreement ("Amendment No. 3"), which provided for CDM toperform certain professional services in connection with the LF & Gdemolition project. Slater Affidavits I and II, Exhibit D. Such servicesincluded an agreement that CDM would continue its work on environmentalmatters involving the site. Id. Among its duties, CDM was required toattend the pre-bid conference for the LF & G site demolitioncontractor procurement to answer bidding contractors' questions regardingpotential chemical hazards associated with the site. Id. CDM was alsoexpected to review shop drawings, samples, test and inspection results,and other data the RAA requested the contractor submit. Id. AmendmentNo. 3 obligated CDM to perform on-site observations and field checks tofurther protect the RAA from defects and deficiencies in thedemolition work. Id. In furtherance of Amendment No. 3, on January 14,1997, the RAA Project Manager, Rich Reidl, authorized CDM's inspectors,to sign as the "Owner Representative" for waste disposal manifestsrequired in connection with the removal of waste material from the site.Slater Affidavit I, Exhibit E; Slater Affidavit II, Exhibit F.

As permitted under the 1990 Subcontract Agreement, CDM, on February 7,1997, entered into a Subcontract Agreement with Chopra-Lee ("Chopra-LeeSubcontract Agreement"), pursuant to which Chopra-Lee assigned Mr. PeterCherenzia as its resident project representative for the LF & G sitedemolition project. Included in the Chopra-Lee Subcontract Agreement wasan indemnification clause by which Chopra-Lee was to indemnify CDM forany cause of action arising out of error, omission or negligence ofChopra-Lee in connection with the LF & G project. Russ Declaration,Exhibit E, p. 5.

In January 1997, Mainline subcontracted with ECC to removeasbestos-containing building materials from structures on the LF & Gsite. Six electrical transformers, discovered at the site in early

1997,were also brought to Mr. Cherenzia's attention by a Mainline employee.Cherenzia advised Mainline employee Norman N. Neuner ("Neuner"), thatsamples of the transformer oils would be required. The Mainlinesubcontract with ECC was then specifically modified to provide for ECC'sremoval of the transformers, including the waste oil contained therein.

On February 26, 1997, Project Manager Reidl asked Cherenzia to assistNeuner in collecting the oil samples from the transformers. On February27, 1997, Cherenzia and Neuner collected oil samples from all sixtransformers. There were four ports on each of the transformers fromwhich samples could be taken, although Cherenzia and Neuner wereconcerned that if, upon wrenching, the drain valves at the bottom of thetransformers snapped, a major spill would result. Therefore, the oilsamples were collected from valves located on the sides of thetransformers.

Mainline then forwarded the samples to Louisville Testing Laboratories("LTL") for analysis. The Chain of Custody form that accompanied thesamples to LTL was largely completed by Cherenzia. The LTL test resultsindicated the samples contained no detectable levels of PCBs andCherenzia and Richard E. Zeigler of ECC decided to have the waste oilpumped out of the transformers for disposal.

On April 11, 1997, 1500 gallons of waste oil were drained out of thetransformers into trucks owned by Kyana Oil ("Kyana"). Cherenzia executeda non-hazardous waste manifest form which authorized the oil to be hauledfrom the site. Slater Affidavits I and II, Exhibit L. An additional 1400gallons of waste oil was drained from the transformers into Kyana truckson April 16, 1997, for which Cherenzia executed another non-hazardouswaste manifest form. Slater Affidavits I and II, Exhibit M. Kyana thentransferred the waste oil from its trucks into a holding tank on propertyit owned in Louisville. Slater Affidavits I and II, ¶ 55; RussDeclaration, ¶ 25.

Kyana later reloaded the waste oil from its holding tank into itstrucks and transported it to Payne Trucking ("Payne") in Louisville. Uponaccepting the waste oil, which was transferred into Payne's trucks, Paynetransported a truckload of the oil to Warrior Oil, Inc. ("Warrior"),located in Franklin, Indiana, for recycling. Upon arriving at Warrior'sfacilities, Warrior collected a sample of the waste oil for analysis.However, pumping of the waste oil from Payne's truck into Warrior's tanksbegan before the laboratory results from Warrior's sample were known.Warrior's laboratory results indicated that the waste oil contained PCBsin excess of acceptable regulatory standards. The pumping of the wasteoil into Warrior's tanks was immediately stopped. The Kyana, Payne,Warriorand LF & G sites were thus contaminated with PCBs from the site.

The same six electrical transformers sampled on February 27, 1997, wereresampled on May 20, 1997. Five of the six samples, analyzed this time bySpecialized Assays, Inc., tested positive for PCBs. The first sixsamples, obtained by Cherenzia and Neuner in February 1997, allegedlyyielded false negative results for PCBs either because the ports fromwhich the samples were taken did not have accumulations of circulatedPCBs, or because the samples were taken from the sides of thetransformers, rather than from the drain valve at the bottom where thePCBs settle in waste oil. As

a result, Mainline spent in excess of$600,000 cleaning the Kyana, Payne, Warrior and LF & G sites.

DISCUSSION

1. Summary Judgment

Summary judgment of a claim or defense will be granted when the movingparty demonstrates that there are no genuine issues as to any materialfact and that the moving party is entitled to judgment as a matter oflaw. Fed.R.Civ.P. 56(a) and (b); Celotex Corp. v. Catrett, 477 U.S. 317,331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby,Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Rattner v.Netburn, 930 F.2d 204, 209 (2d Cir. 1991). The moving party for summaryjudgment bears the burden of establishing the nonexistence of any genuineissue of material fact. If there is any evidence in the record based uponany source from which a reasonable inference in the non-moving party'sfavor may be drawn, the moving party cannot obtain a summary judgment.Celotex, supra, at 331, 106 S.Ct. 2548.

Summary judgment shall be granted "if the pleadings, depositions,answers to interrogatories, and admissions on file, together with theaffidavits . . . show that there is no issue as to any material fact, andthe moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). "[T]he mere existence of some alleged factual disputebetween the parties will not defeat an otherwise properly supportedmotion for summary judgment; the requirement is that there be no genuineissue of material fact." Anderson, supra, at 247-48, 106 S.Ct. 2505.

"[W]here the nonmoving party will bear the burden of proof at trial ona dispositive issue, a summary judgment motion may properly be made inreliance solely on the `pleadings, depositions, answers tointerrogatories, and admissions on file.' Such a motion, whether or notaccompanied by affidavits, will be `made and supported as provided inthis rule [FRCP 56],' and Rule 56(e) therefore requires the nonmovingparty to go beyond the pleadings and by her own affidavits, or by the`depositions, answers to interrogatories, and admissions on file,'designate `specific facts showing that there is a genuine issue fortrial.'" Celotex, at 323-24, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 56).Thus, "as to issues on which the non-moving party bears the burden ofproof, the moving party may simply point out the absence of evidence tosupport the non-moving party's case." Nora Beverages, Inc. v. PerrierGroup of America, Inc., 164 F.3d 736, 742 (2d Cir. 1998).

Once a party moving for summary judgment has made a properly supportedshowing as to the absence of any genuine issue as to all material facts,the nonmoving party must, to defeat summary judgment, come forward withevidence that would be sufficient to support a jury verdict in itsfavor. Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18(2d Cir. 1995). In opposing a motion for summary judgment a party "maynot simply rely on conclusory statements or on contentions that theaffidavits supporting the motion are not credible." Goenaga, supra, at 18(citing cases).

A. Arranger Status

Congress enacted CERCLA as "a broad remedial statute designed toenhance the authority of the EPA to respond effectively and promptly totoxic pollutant spills that threaten the environment and human health."B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992). CERCLAensures "`that those responsible for any damage, environmental harm, orinjury from chemical poisons bear the costs of their actions.'" GeneralElectric Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir.1992) (quoting S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), U.S.CodeCong. & Admin, News 1980, 6119, reprinted in 1 CERCLA LegislativeHistory at 320). As a remedial statute, CERCLA is to be liberallyconstrued to give effect to its purposes. Schiavone v. Pearce, 79 F.3d 248,253 (2d Cir. 1996).

"CERCLA addresses in particular the costs of responding to the releaseor threatened release of `hazardous substances,' as that term is definedby CERCLA § 101 (14)(42 U.S.C. § 9601(14))." Prisco v. A. &D. Carting Corp., 168 F.3d 593, 603 (2d Cir. 1999). Toward that end,CERCLA provides that a private right of action may be brought to recoversuch costs from anyone who falls within one of four specific categoriesof potentially responsible parties set forth under § 107. Prisco,supra, at 602 (citing 42 U.S.C. § 9607).

To establish a prima facie cause of action under CERCLA, the plaintiffmust demonstrate: (1) the defendant is a responsible party as definedunder § 9607(a); (2) the site is a facility as defined in §9601(9); (3) the release or threatened release of hazardous substances atthe facility; (4) the plaintiff incurred response costs in connectionwith the release; and (5) the cost incurred and response actions takenconform to the National Contingency Plan ("NCP") established under theCERCLA and administered by the EPA. AAMCO, supra, at 285; Murtha, supra,at 1197. Upon establishing these four elements, the defendant is thenstrictly liable for the release or threatened release of hazardoussubstances unless it successfully invokes one of the statutory defensesset forth under 42 U.S.C. § 9607(b). Prisco, supra, at 603.

Here, the parties do not dispute that Mainline incurred responsecosts, that the LF & G site is a facility, or that costs incurredwere in conformity to the NCP. Rather, at issue is whether Defendantsqualify as responsible parties as defined under 42 U.S.C. § 9607(a).CERCLA establishes four classes of parties who may be held responsiblefor costs incurred in responding to releases or threatened releases ofhazardous substances: (i) generators of hazardous substances, (ii)present or past owners or operators of facilities, (iii) transporters ofhazardous substances, and (iv) those who arrange for the disposal ortreatment of hazardous substances. AAMCO, supra, at 285 (citing42 U.S.C. § 9607(a)); Murtha, supra, at 1198 (same). The issue raisedby the motions before the court is whether CDM and Chopra-Lee may beliable as parties which arranged for the transportation of a hazardoussubstance.

Whether arranger liability may be imposed on a party is generally afact dependent question. See United States v. Vertac Chemical Corp.,966 F. Supp. 1491, 1500 (E.D.Ark. 1997) (discussing

correctness of juryinstructions in action where jury decided issue whether defendant subjectto CERCLA liability as arranger); Chem-Nuclear Systems, Inc. v. ArivecChemicals, Inc., 978 F. Supp. 1105, 1111 (N.D.Ga. 1997) (denying summaryjudgment under CERCLA where reasonable jury could find defendant arrangedfor disposal of hazardous waste); Saco Steel Co. v. Saco Defense, Inc.,910 F. Supp. 803, 810 (D.Me. 1995) (same). In this case, whether eitherCDM or Chopra-Lee can be held liable as an arranger under CERCLApresents an issue of fact which must be resolved by the fact-finder attrial.

Under 42 U.S.C. § 9607(a)(3)

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances [is a responsible party liable for necessary response costs].

42 U.S.C. § 9607(a)(3).

Accordingly, there are three elements that must be met before adefendant can be liable under CERCLA as an arranger. First, the defendantmust be a "person" as defined under CERCLA; second, the defendant must"own" or "possess" the hazardous substance at issue; and third, thedefendant must, by contract, agreement or otherwise, arrange for thetransport or disposal of such hazardous substances. See CP Systems, Inc.v. Recovery Corp. of Illinois, 1994 WL 174162, *3 (N.D.Ill. 1994) (citingC. Greene Equipment Corp. v. Electron Corp., 697 F. Supp. 983, 986(N.D.Ill. 1988), and United States v. Ward, 618 F. Supp. 884, 893-94(E.D.N.C. 1985)). The term "person" is broadly defined under CERCLA toinclude a corporation, 42 U.S.C. § 9601(21), thereby encompassingDefendants which are both corporations. Defendants do not dispute thatthey are "persons" within the meaning of CERCLA. Whether Defendantssatisfy the remaining two elements, i.e., ownership or possession ofhazardous waste and arranging for its transport and disposal, is,however, contested.

With regard to the second element, CDM maintains that it neither ownednor possessed the RAA's transformers at the site in which thePCB-contaminated waste oil was found.[2] CDM's Memorandum at 10-11. Infurtherance of CERCLA's stated remedial purpose, courts have broadlyconstrued the term "ownership" to mean more than mere physicalpossession. In United States v. Northeastern Pharmaceutical & ChemicalCo., 810 F.2d 726 (8th Cir. 1986), the court stated that "[i]t is theauthority to control the handling and disposal of hazardous substancesthat is critical under the statutory scheme" in determining whether analleged arranger owned or possessed the subject hazardous substance, as"requiring proof of personal ownership or actual physical possession ofhazardous substances as a precondition for liability under CERCLA §107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with thebroad remedial purposes of CERCLA." Northeastern Pharmaceutical, supra,at 743-44 (citing United States v. Mottolo, 629 F. Supp. 56, 60 (D.N.H.1984) (holding person who

arranges for disposal or transportation fordisposal need not own or possess the hazardous waste)), cert. denied,484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); see also UnitedStates v. Bliss, 667 F. Supp. 1298, 1306-1307 (W.D.Mo. 1987) (holdingthat "arranger" liability may attach without actual ownership providedthe defendant had authority and control over the place and manner ofdisposal). See also Sutera v. Go Jokir, Inc., 86 F.3d 298, 302 (2d Cir.1996) (discussing liability for injuries arising from property based onduty as dependent on "occupancy, ownership, control or special use ofproperty" and citing RESTATEMENT (SECOND) OF TORTS § 328E (1964)(defining "possessor of land" generally as a person in occupation withintent to control land) and § 343 (possessors subject to liabilityfor certain conditions on land)). Accordingly, that CDM was not, in thetraditional sense, the "owner" of the transformers and their contents, isirrelevant to whether CDM may be found to have owned orpossessed them for the purpose of casting CDM in liability as an arrangerunder CERCLA § 107(a)(3).

Further, in this case, there are ample facts in the record on which thetrier of fact could determine that either CDM or Chopra-Lee, or both, hadcontrol over the disposal of the waste oil. Specifically, Mainline pointsto evidence establishing that with regard to the demolition project atthe LF & G site, CDM, as Program Manager, was contractually obligatedto review and manage all environmental issues, assure environmentalcompliance, assure that all hazardous substances at the site wereproperly handled, advise of potential chemical hazards associated, reviewand monitor daily and weekly job logs, review and approve all samplingtest results, review all paperwork for wastes shipped from the site andreview, and approve all sampling test results. Slater Affidavit I,¶ 5. Mainline further maintains that CDM was authorized to establishhow environmental media (e.g., soil and water), were to be tested, issuecease work orders if applicable regulations were violated during projectcompletion, and to authorize off-site shipment of waste and execute wastemanifests related to waste transportation and disposal. Id.

CDM does not dispute these assertions and, significantly, the ContractDocument indicates that CDM, as the project Engineer, is responsible forsuch duties and vested with such authority. Russ Declaration, Exhibit N;Slate Affidavit I, Exhibit C.[3] Rather, CDM asserts that Mainline hasfailed to point to any evidence establishing that CDM was contractuallyobligated to exercise control over the disposal of hazardous waste. RussReply Declaration, ¶¶ 4-7.

Additionally, Mainline contends that, as CDM's subcontractor,Chopra-Lee was obligated to oversee all activities at the LF & Gsite, assure full compliance with all applicable laws and regulations,assure all materials were properly handled, review all paperwork for allwaste materials transported and deposited off-site, and verify thatinformation in any waste manifest was correct. Slater Affidavit II,¶ 34. Mainline further points to evidence that Chopra-Lee wasauthorized to execute waste manifests on behalf of the RAA therebypermitting waste materials to be transported off-site, and issuecease-work orders in the event of a deficiency during projectcompletion. Id. Chopra-Lee employee Cherenzia's deposition testimonysupports these assertions, see Exhibit G to Slatem' Affidavits I and II,and neither CDM nor Chopra-Lee argues otherwise.

Moreover, the record shows that both CDM and Chopra-Lee were selectedto work on the LF & G site demolition project based on theirexpertise in working with matters involving environmental risks. 1990Subcontract Agreement (referring to CDM's scope of services with regardto the demolition project as a "series of Environmental Work Orders"),Exhibit B to Slater Affidavits I and II; Cherenzia Deposition Transcriptat 28-29, 54-55 Exhibit G to Slater Affidavits I and II. On this record,a trier of fact could find that CDM and Chopra-Lee had sufficient controlover the LF & G site such that they possessed control over thedisposal of the waste oil found in the transformers located on the site.The court thus properly examines whether CDM and Chopra-Lee could also befound to be arrangers under 42 U.S.C. § 9607(a)(3).

The fact that a party merely had the opportunity or ability to controlanother party's waste disposal practices is insufficient to hold thatparty liable as an arranger under CERCLA. AAMCO, supra, at 286. However, aparty that was not actively involved in "the timing, manneror location of disposal" may be held liable as an arranger. Id, (quotingCPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1279(W.D.Mich. 1991)) (internal quotation marks omitted). Specifically, forarranger liability to attach, "there must be some nexus between thepotentially responsible party and the disposal of the hazardoussubstance." Id, (citing CPC International, supra, at 1278, and Murtha,supra, at 1199). Such nexus is premised upon the potentially responsibleparty's conduct, sufficient to impose an obligation, with respect to thedisposal or transport of the hazardous substance. AAMCO, supra, at 286.As the Second Circuit stated, "it is the obligation to exercise controlover hazardous waste disposal," rather than the mere ability oropportunity to control such disposal, that renders a party subject toarranger liability under CERCLA. Id. (emphasis in original).

In this case, the contract documents pursuant to which CDM provided theRAA with environmental services in connection with the demolition projectat the LF & G site, obligated CDM to supervise the demolition projectand assure compliance with all applicable environmental regulations. 1990Subcontract Agreement, Exhibit B to Slater Affidavits I and II; AmendmentNo. 3, Exhibit E to Russ Declaration. Under the Chopra-Lee SubcontractAgreement executed by CDM and Chopra-Lee on February 7, 1997, CDMsubcontracted with Chopra-Lee to perform certain services with respect tothe demolition project at the LF & G site that CDM was obligated toperform under Amendment No. 3. Russ Declaration, Exhibit E. It waspursuant to the Chopra-Lee Subcontract that Mr. Cherenzia was appointed asthe resident project representative, thereby assuming supervisoryresponsibilities with regard to the demolition project, includingcompliance with applicable environmental regulations. These facts couldbe construed by a reasonable trier of fact as establishing that CDM orChopra-Lee had an obligation, rather than a mere opportunity, to controlthe disposal of any hazardous substances on the site.

Additionally, in this case, before the waste oil could be shipped offthe LF & G site, the generator of such waste was required to executea "non-hazardous waste manifest," certifying that the contents of theshipment were accurately described, were in proper condition fortransport, and were not subject to federal hazardous waste regulations.KY. REV. STAT. ANN. § 224.43-335 (Banks-Baldwin 1998)

(requiringmanifest be completed before non-hazardous waste may be accepted bytransporter or waste disposal facility, certifying such waste wasnon-hazardous); see Slater Affidavit I, Exhibit E, and Slater AffidavitII, Exhibit F; Cherenzia Deposition Transcript, Exhibit G to SlaterAffidavits I and II, pp. 29, 40-43, 54-55, 116-20. The manifests executedwith regard to the waste oil at issue were signed by Chopra-Lee employeeMr. Cherenzia. Exhibits L and M to Slater Affidavits I and II.[4]Moreover, according to the letter from the RAA Project Manager, RichRiedl, authorizing CDM's inspectors to sign waste manifests as the "OwnerRepresentative," Chopra-Lee employee Cherenzia was considered a CDMinspector. Slater Affidavit I, Exhibit E; Slater Affidavit II, ExhibitF. Thus, as the Subcontract Agreement, which incorporated by referenceAmendment No. 3, required CDM to assure the demolition work conformed toenvironmental laws and as Chopra-Lee was CDM's agent in executing themanifest as a legally required action to permit removal of the hazardouswaste oil from the site, such evidence raises a material issue of fact asto whether CDM and Chopra-Lee acting on its behalf as its subcontractorhad an obligation to control the waste sufficient to render them bothliable as arrangers for purposes of § 107.

However, it was later discovered that the waste oil contained PCBs.PCBs are listed among the 700 substances which the EPA has designated ashazardous for purposes of CERCLA. Table 302.4, 40 C.F.R. § 302. Theoil that was drained out of the transformers thus was not non-hazardousbut, rather, hazardous waste and, as such, subject to differentregulations. Specifically, pursuant to 40 C.F.R. § 262.20

A generator who transports or offers for transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a Manifest OMB control number 2050-0039 on EPA form 8700-22, and, if necessary, EPA form 8700-22A . . . .

40 C.F.R. § 262.20.[5]

Regardless of whether the waste oil qualified as hazardous ornon-hazardous waste, it could not be transported off the LF & G siteprior to execution of the applicable waste manifest. 40 C.F.R. § 262.20(hazardous waste); KY. REV. STAT. ANN. § 224.43-335 (Banks-Baldwin1998) (non-hazardous waste). Further, Mr. Cherenzia also allegedlycompleted the chain of custody form that accompanied the waste oilshipment. Under these circumstances, a trier of fact could find that Mr.Cherenzia's signature on the manifest demonstrates the requisite nexusbetween Chopra-Lee and the disposal of the waste oil to subjectChopra-Lee to arranger liability under CERCLA § 107(a)(3). SeeEmergency Tech. Servs. Corp. v. Morton Int'l, 1993 WL 210531, *2-3(N.D.Ill. 1993) (finding defendant corporation liable as an "arranger"where, inter alia, defendant provided shipping and manifest documents andlabels for waste drums and supplied description codes and instructionsfor completing waste manifests).

Although Chopra-Lee employee Cherenzia was specifically grantedsignatory authority with regard to the waste manifests, the recordindicates that such authority was granted to Cherenzia as

CDM'sinspector. Slater Affidavit I, Exhibit E; Slater Affidavit II, ExhibitF. "[T]he established rule is that a principal is liable to third partiesfor the acts of an agent acting within the scope of his real or apparentauthority." Citibank, N.A. v. Nyland (CF8) Ltd., 878 F.2d 620, 623-24 (2dCir. 1989). Further, CERCLA liability may attach to an agent actingwithin the scope of his agency responsibilities to the principal. See42 U.S.C. § 9607(b) (exempting from specifically enumerated CERCLAdefenses liability based on "an act or omission of a third party otherthanan employee or agent of the defendant. . . .") (emphasis added). See alsoRedwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1503-1505(11th Cir. 1996) (holding management agent for apartment complex whoseobligations were similar to those of owner subject to CERCLA liability asowner). Accordingly, on this record, if the trier of fact finds thatChopra-Lee is subject to arranger liability based on Cherenzia'ssignature on the waste manifests which ultimately permitted the waste tobe transported off the site, then such liability may be imputed to CDM asChopra-Lee's principal under applicable agency principles. Moreover, itis undisputed Chopra-Lee was CDM's subcontractor for purposes of assuringthat the demolition project was conducted in accordance with applicableenvironmental laws. Chopra-Lee Subcontract Agreement, Russ DeclarationExhibit E, pp. 1-3. Thus, a reasonable jury could find, based on the CDMcontract to provide environmental oversite and assurance that thedemolition project complied with applicable law, that CDM and Chopra-Leehad an obligation to control the removal of the hazardous wastes and thatthey in fact exercised such control. The fact that the waste oil was, asthe time of its removal, unknown to be hazardous, is irrelevant as CERCLAimposes strict liability upon responsible parties. Prisco, supra, at603.

Defendants cite AAMCO, supra, in support of their argument that becausethey, like the defendant oil companies in AAMCO, supra, did not actuallyparticipate in the selection of the disposal site, manner or timing of thedisposal, they may not be held liable in the instant case as arrangers.However, in AAMCO, the defendant oil companies' only relationship to thedefendant service station operators was founded on lease arrangementswhereby the oil companies leased service station premises and equipmentto the independent service station operators. AAMCO, supra, at 283. Thecourt held that the mere existence of economic bargaining power which thedefendant oil companies could have invoked to impose certain terms andconditions, such as how waste oil was to be disposed, on the independentservice station operators was insufficient to subject the oil companiesto arranger liability. Id., at 286-87. In contrast, in the instant case,the same alleged facts on which the trier of fact could find CDM orChopra-Lee sufficiently controlled the waste oil pursuant to acontractual obligation such that either CDM or Chopra-Lee owned orpossessed it may be found by the trier of fact to establish the necessarynexus between the waste oil and its disposal in order for arrangerliability to attach. See AAMCO, supra, at 286-87. On this record, CDM andChopra-Lee may be found to have been actively involved in the course ofconduct leading to the removal of the hazardous wastes from the site, notsimply providing technical assistance and advice. Thus, there exists agenuine issue of material fact upon which either CDM or Chopra-Lee, orboth, may be considered as arrangers for purposes of liability underCERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

Accordingly, Defendants' motions, on this ground, should be DENIED.

B. Indemnification Agreement

As stated, the Contract Document executed between the RAA and Mainlineprovides for Mainline to indemnify the RAA and CDM for any claim, suit orother loss or damage occurring during the demolition project. ContractDocument, p. SC-1, ¶ 1 and p. SCC-1 (Addendum Number 1), Exhibit Nto Russ Declaration, and Exhibit C to Slater Affidavits I and II.Accordingly, CDM also requests Mainline be ordered to defend andindemnify CDM in all respects relative to this action. CDM Answer (DocketItem No. 12), ¶¶ 11 and 12; CDM Memorandum at 12-13, 16.

Mainline asserts, however, that as its claims against Defendants ariseout of the LF & G demolition project, such claims are not within thefour corners of theindemnification clause which pertains only to claims that "occur duringconstruction of the Project." Mainline Memorandum in Opposition to CDM'sMotion, at 20 (emphasis added). According to Mainline, as the term"construction" is not defined in the contract, it "must be given itsplain meaning which would not include, under any strained permutation,destruction, deconstruction, or demolition," nor the disposal ofPCB-contaminated waste. Mainline Memorandum in Opposition to CDM's Motionat 21. The court finds Mainline's creative argument without merit.

A construction of the contract under Kentucky law, as Mainline assertsis required, does not support Mainline's argument.[6] Under Kentuckylaw, as is the general rule, written contracts are to be interpreted togive meaning to all words and clauses contained therein. Roberts v.Huddleston, 259 Ky. 595, 82 S.W.2d 469, 472 (1935). Here, the failure toconstrue the term "construction" as including destruction, deconstructionand demolition would render the indemnification agreement contained inthe contract a nullity as the primary object of the work to be performedunder the contract between the RAA and Mainline was demolition of thestructures at the LF & C site. Rather, the term "construction" isused in the indemnification clause as used in the contract shouldreasonably be construed to include destruction, deconstruction anddemolition, the very work to be performed at the site. This finding isconsistent with a plain reading of the Contract Document in its entiretywhich, as its title indicates, is a "Contract Document for DemolitionServices." Contract Document, Exhibit N to Russ Declaration, and ExhibitC to Slater Affidavits I and II. The contract also refers repeatedly tothe "construction" to be performed thereunder. See, e.g., ContractDocument, pp. GC-40-GC-42 (referring to "Construction ProgressSchedule"). The "Construction Project Schedule" is defined as "[a]detailed plan showing the sequencing and timing of the Work, and for theProject. . . ." Contract Document, p. GC-6. "Project" is defined as"[t]he agreed scope of Work for completion of the `Demolition ServicesLousiville Forge & Gear-Phase II, LAIP Contract No. 132, LouisvilleInternational Airport,' as described in these Contact Documents." Id.Further "Work" is defined as "[a]ll labor, Materials, Supplies, tools,Equipment, and incidentals necessary or convenient to the Contractor'sperformance of all duties and obligations imposed by the ContractDocuments, including, without limitation, all of the Contractor'swarranty obligations, express or implied." Id., p. GC-7. Thus, whileperhaps somewhat awkward, the word "construction" fairly encompasses allof the work to be performed under the contract between the RAA, CDM andMainline, including the

demolition and removal of wastes.

Mainline also argues, in opposition, that CDM is not an intendedbeneficiary of the Contract Document, which was executed between only theRAA and Mainline but, rather, an incidental beneficiary which, underKentucky law, cannot enforce the indemnification agreement againstMainline. Mainline Memorandum in Opposition to CDM's Motion at 19.Mainline thus urges the court to find that Mainline had no obligation orduty to indemnify CDM under the Contract Document. Id. On the otherhand, according to CDM, as the indemnification agreement expresslyprovides for Mainline to indemnify CDM with regard to the underlyingclaims, should the court fail to apply the indemnification clause,Mainline would recover from CDM for the very loss that theindemnification clause in the Contract Document was intended to cover,thereby circumventing Mainline's own express obligations underthe contract. CDM Memorandum at 12-13.[7]

Mainline's argument fails to consider Addendum Number 1's effect on theContract Document. Specifically, Addendum Number 1, dated November 12,1996, provides for the incorporation of the words "Camp, Dresser &McKee, the Program Manager" into the indemnification agreement such thatMainline agreed to indemnify not only the RAA, but also CDM. AddendumNumber 1, p. SCC-1, Exhibit N to Russ Declaration. Addendum Number 1 wasmade part of the Contract Document, see Contract, Exhibit C to Russ ReplyDeclaration, and Mainline does not argue otherwise. Accordingly, CDM isnot merely an incidental beneficiary to the Contract Document but,rather, an intended beneficiary of the subject indemnification clause.

CDM's primary argument in support of summary judgment under theindemnification provision is that unless the court finds that theindemnification agreement precludes the instant action, Mainlinepotentially could recover for the very loss for which it has agreed toindemnify CDM, thereby rendering the indemnification clause a nullity,contrary to the intent of the parties to the agreement. CDM Memorandum at12-13. CDM's theory ignores the fact that the relevant indemnificationclause specifically exempts from the stated indemnification actions which"result from the sole negligence of the Authority [the RAA], Camp,Dresser & McKee, the Program Manager and their respective officers,agents or employees." Contract Document, p. SC-1 and p. SCC-1 (AddendumNumber 1), Exhibit N to Russ Declaration, and Exhibit C to SlaterAffidavits I and II.

As discussed, a critical fact at issue in this case is whether theconduct by Chopra-Lee's employee Mr. Cherenzia was negligent in directingthat the oil samples be collected from ports located on the sides of thetransformers, rather than from the bottom drain valves, where PCBs were,it is asserted, more likely to have accumulated. CDM disputes thatCherenzia was involved in deciding from which of the four ports thesamples should be collected. Mainline, in opposition to CDM andChopra-Lee's motion, submitted an affidavit prepared by Mr. Neuner, theECC employee who accompanied Cherenzia in collecting the samples, inwhich Neuner states that it was Cherenzia who decided from which ports tocollect the oil samples and who opened the valves to permit Neuner tocollect the samples. Neuner Affidavit, ¶ 11. Mainline also submitsexcerpts from Cherenzia's deposition in which Mr. Cherenzia

denies hemade the decision to take the oil samples from the side ports, but admitswrenching open the ports to enable the sample to be collected. CherenziaDeposition at 104-107, Exhibit G to Slater Affidavits I and II. On thisrecord, the court finds a genuine issue of material fact exists withregard to whether Cherenzia's conduct in collecting the oil samples,under all the circumstances, was negligent. If Cherenzia were negligent,and such negligence were found to be the sole cause of the response costsat issue, then as a Chopra-Lee employee and agent of CDM, such conductcould also be found by the fact trier to be outside the indemnificationclause.[8] If such were theresult at trial, recovery by Mainline would not defeat the purpose of theindemnification clause on which CDM and Chopra-Lee rely; rather, it wouldbe consistent with its express terms.

Accordingly, summary judgment in favor of CDM and Chopra-Lee upon theindemnification clause should be DENIED.

CONCLUSION

Based on the foregoing, the motions filed by Defendants Camp Dresser& McKee, Inc. (Docket Item No. 20), and by Chopra-Lee, Inc. (DocketItem No. 23), should be DENIED.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk ofthe Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with theClerk of the Court within ten (10) days of service of this Report andRecommendation in accordance with the above statute, Rules 72(b), 6(a)and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request anextension of such time waives the right to appeal the District Court'sOrder. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435(1985); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2dCir. 1989); Wesolek v. Canadair Limited, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to theattorneys for the Plaintiffs and the Defendants.

SO ORDERED.

March 22, 2000.

1. The fact statement is taken from the pleadings and motion papersfiled in this action.

2. Chopra-Lee does not argue that it did not own or possess the wasteoil, relying instead solely on the contention that it

did not arrange forthe disposal of the hazardous substance.

3. Although Mainline and CDM both refer to CDM as the Program Managerwith regard to the demolition project at the LF & G site, there areindications in the record that CDM was also referred to as the ProjectEngineer, including the Chopra-Lee Subcontract Agreement dated February7, 1997. Russ Declaration Exhibit E.

4. CDM conceded during oral argument that at all times relevant to theinstant case, Chopra-Lee acted as CDM's agent pursuant to the Chopra-LeeSubcontract Agreement.

5. CDM argues that as 40 C.F.R. § 262.20 applies only to"generators of hazardous waste," it does not apply to CDM which is notsuch a generator. Letter of Hugh M. Russ, III, filed March 21, 2000(Docket Item No. 44) at 2. The court notes, however, that under theregulations pertaining to the Solid Waste Disposal Act,42 U.S.C. § 9601, et seq., the term "generator" includes not only anyperson who produces hazardous wastes, but also one "whose act first causesa hazardous waste to become subject to regulation." 40 C.F.R. § 260.10.Upon removal of hazardous waste from a facility, such wastes are "subjectto regulation." Al Tech Specialty Steel Corp. v. Environmental ProtectionAgency, 846 F.2d 158, 159-60 (2d Cir. 1988) (holding leachate washazardous waste subject to regulation where it exhibited characteristicof hazardous waste). Thus, if the evidence demonstrates that the PCBcontaminated oil first became subject to regulation, i.e., upon removalfrom the transformers and the LF & G site, based on an actattributable to CDM, CDM would then be a generator for purposes of theSolid Waste Disposal Act. Further, although some courts have held that"generator," as used under CERCLA, refers to an "arranger," see e.g.,United States v. USX Corp., 68 F.3d 811, 815 (3d Cir. 1995), this court'sresearch indicates the term "generator" has not been defined underCERCLA. That a "generator" is not expressly defined under CERCLA raises aquestion whether CDM would, if found to be a generator under the SolidWaste Disposal Act, also be a generator for purposes of CERCLAliability. In any event, even if CDM and Chopra-Lee had no contractual"obligation to control" the removal of the waste oil, arranger liabilitymay be established based on an "obligation to control" the waste oilpursuant to the applicable legal requirement of the Solid Waste DisposalAct.

6. The parties do not dispute the applicability of Kentucky law to theindemnity issues in this case.

7. As filed, CDM's summary judgment motion also seeks summary judgmentthat Chopra-Lee was required to indemnify CDM with regard to the instantaction. CDM Memorandum at 13-14. That part of the motion was, however,withdrawn by CDM. Letter of Hugh M. Ross, III, Esq., dated October 14,1999 (Docket Item No. 42).

8. Mainline also claims that the removal of the transformer oil wasnot performed under the Contract Document. Mainline Memorandum inOpposition to CDMs Motion at 21-22. However, as discussed, supra, inconnection with whether Defendants are arrangers under42 U.S.C. § 9607(a)(3), all phases of the demolition project wereperformed by the parties pursuant to the Contract Document, pursuant towhich CDM was named the Program Manager with supervisory authority overthe entire project.