LINKS: 57, 65

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-05600 GAF-MANx	Date	March 14, 2014
Title	Wishtoyo Foundation v. Magic Mountain LLC et al		

Present: The Honorable	**GARY ALLEN FEESS**	
Linda Jackson Williams for Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

ORDER RE: MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This is a case about water pollution from the Six Flags amusement park in Valencia, California ("the Facility"). The Facility is directly adjacent to the Santa Clara River, and it purportedly discharges contaminated storm water and industrial wastewater into the river from at least three points. These discharges allegedly violate two relevant permits: (1) an individual permit, Number CA0003352, issued specifically for the Facility (the "Individual Permit"); and (2) a general permit, Number CAS000001, a boilerplate set of rules that can apply to any number of locations throughout the state (the "General Permit"). Both permits were issued pursuant to the National Pollutant Discharge Elimination System ("NPDES") permit program. Though it could theoretically apply to any site in California, the General Permit binds only entities that agree to its terms.

Plaintiffs have brought suit against four Defendants with ties to the Facility: Magic Mountain, LLC ("MMLLC"), Six Flags Magic Mountain ("SFMM"), Six Flags Theme Parks, Inc. ("SFINC"), and Six Flags Entertainment Corporation ("SFEC") (collectively, "Defendants"). (Docket No. 1 [Complaint ("Compl.")].) They contend that Defendants own and operate the Facility, and are therefore responsible for all water discharged from it.

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In six of their ten causes of action, Plaintiffs allege that Defendants violated the terms of the Individual Permit. In the other four claims, Plaintiffs declare that Defendants violated the terms of the General Permit. Two motions for partial summary judgment are now before the Court. (Docket No. 57 [Mot. Regarding General Permit ("Permit Mem.")]; Docket No. 65 [Mot. Regarding Non-Dischargers ("Discharger Mem.")].) Each Defendant seeks judgment with regard to at least some portion of the claims against it.

The first motion, brought only by Defendants MMLLC and SFINC,[1] relates to the four General Permit claims. (Permit Mem.) MMLLC says that it never agreed to be bound by the General Permit, and is therefore governed solely by the terms of the Individual Permit. By contrast, SFINC admits that it signed a notice of intent to comply with the General Permit, but nevertheless maintains that it has not operated the Facility during the relevant time period. For these respective reasons, MMLLC and SFINC therefore believe that the General Permit claims against them lack merit.

The second motion—brought by SFINC, SFMM, and SFEC—pertains to both the General and the Individual Permit claims. (Discharger Mem.) All three of these Defendants argue that they do not operate the Facility. In light of this assertion, they ask the Court to find that they cannot be held liable as dischargers under either Permit.

A common problem infects both motions: in their answer to the complaint, all Defendants admitted that they own and operate the Facility. (Docket No. 50 [Am. Answer ("Answer")] ¶ 22.) In light of this admission, there is at least a genuine issue of fact as to whether Defendants are dischargers. The second motion must therefore be **DENIED** in full, and the first motion must be **DENIED** as to SFINC. And in light of several contested facts presented to it, the Court concludes that there is at least a genuine issue as to whether MMLLC ever consented to the terms of the General Permit. The first motion must therefore be **DENIED** as to MMLLC as well. The Court therefore concludes that all motions must be resolved in favor of Plaintiffs.

[1] It appears that the other two Defendants may have intended to join in this motion. Defendants indicate that the motion is brought by "Magic Mountain LLC, Six Flags Magic Mountain, Six Flags Theme Parks, Inc., and Six Flags Entertainment Corporation." However, the only argument made on their behalf is relegated to a three-sentence footnote, and this footnote simply repeats the thrust of Defendants' second motion. (See Permit Mem. at 4 n.3.)

LINKS: 57, 65

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II.
BACKGROUND

Both SFINC and MMLLC have clearly owned and operated the Facility at various points since the 1990s. (Docket No. 83 [Statements of Fact Regarding the Permit Mem. ("Permit SUF")] ¶¶ 1–5.) Beyond this, the Parties hotly contest the roles played by specific Defendants. Defendants say that only MMLLC currently has anything to do with the Facility, while Plaintiffs argue that all Defendants are its present owners and operators. (Id. ¶¶ 3, 8–10.)

Regardless of this dispute, the Parties do agree that SFINC, doing business as SFMM, filed a notice of intent ("NOI") to be bound to the General Permit in February 1998. (Docket No. 114 [Statements of Fact Regarding the Discharger Mem. ("Discharger SUF")] ¶ 3.) The NOI itself listed SFMM as the facility operator. (Docket No. 61-1, Ex. 2 [Not. of Intent ("Not.")] at 1.) None of the Defendants has ever filed a notice of termination of coverage for the General Permit. (Discharger SUF ¶ 22.)

The 1998 notice is the most recent (and therefore operative) NOI before the Court. (Permit SUF ¶ 5.) Since it was filed before MMLLC's creation, and MMLLC has never consented to be bound by the General Permit in its own name, MMLLC argues that it cannot be held liable under the General Permit. (Id.) Plaintiffs contest this assertion, pointing to three pieces of circumstantial evidence indicating that the General Permit applies to MMLLC. (Id. ¶¶ 11, 14, 22.)

First, on May 13, 2010, a Regional Water Quality Control Board issued MMLC a notice of violation of the terms of the General Permit. (Id. ¶¶ 11, 12.) MMLLC responded to it by addressing the concerns raised by the Board. (Id. ¶ 12.) Then, over three years later, another notice of violation based on the terms of the General Permit was issued. (Id. ¶ 14.) This second notice was sent to SFMM; however, it appears that SFMM was a fictitious business name affiliated at the time with MMLLC. (Id.; Discharger SUF ¶¶ 2, 15.) Finally, in November 2013, Defendants attempted to clarify the status of the General Permit by contacting the Regional Water Quality Control Board. (Permit SUF ¶ 21.) In response, the Board indicated that MMLLC's belief that it was not bound by the General Permit "is inaccurate and may be a misunderstanding on [MMLLC's] part." (Id. ¶ 22; Docket No. 77-2 [Water Board Correspondence] at 2.)

The Individual Permit, which has been renewed twice since 2005, was most recently issued in February 2011 to MMLLC. (Discharger SUF ¶¶ 4, 6, 7.)

III.

LINKS: 57, 65

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DISCUSSION

A. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, when addressing a motion for summary judgment, the Court must decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial, which it can meet by presenting evidence establishing the absence of a genuine issue or by "pointing out to the district court . . . that there is an absence of evidence" supporting a fact for which the non-moving party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). To defeat summary judgment, the non-moving party must put forth "affirmative evidence" that shows "that there is a genuine issue for trial." Anderson, 477 U.S. at 256–57. This evidence must be admissible. See Fed. R. Civ. P. 56(c), (e). The non-moving party cannot prevail by "simply show[ing] that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, the non-moving party must show that evidence in the record could lead a rational trier of fact to find in its favor. Id. at 587. In reviewing the record, the Court must believe the non-moving party's evidence, and must draw all justifiable inferences in its favor. Anderson, 477 U.S. at 255.

Partial summary judgment is authorized to establish part of a claim. Fed. R. Civ. P. 56(a). Other than constituting an appealable "judgment," partial summary judgment motions follow the same standards and procedures as summary judgment. Id..

B. APPLICATION

1. MMLLC AND THE GENERAL PERMIT

NPDES permits, such as the General Permit, are treated like any other contract. See Nw. Envtl. Advocates Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995) ("We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document."). "If the language of the permit, considered in light of the structure of the permit as a whole, 'is plain and capable of legal construction, the language alone must

LINKS: 57, 65

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determine the permit's meaning.'" NRDC v. County of L.A., 725 F.3d 1194, 1204–1205 (9th Cir. 2013) (quoting Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 270 (4th Cir. 2001). However, where the permit's language is ambiguous, a court "may turn to extrinsic evidence to interpret its terms." Id. at 1205.

Defendants assert that MMLLC is not bound by the General Permit because it never filed a formal notice of intent. (Permit Mem. at 5.) And ordinarily, a notice of intent is a prerequisite to being bound by the General Permit. (Docket No. 62-2 [General Permit] at 1) ("To obtain coverage . . . pursuant to this General Permit, operators . . . must submit a Notice of Intent . . . .") In spite of this wrinkle, the factual record is unclear with regard to MMLLC's permit status.

MMLLC has acted as though it were bound by the General Permit since at least 2010: when it was notified of a violation of the General Permit in May of that year, MMLLC notified authorities that it had corrected the violation. (Permit SUF ¶ 12.) And the permitting authorities have long treated MMLLC as though it were bound by the General Permit. They have sent notices of violation to it, and they have even expressly stated that MMLLC is covered by the General Permit. (Id. ¶¶ 11, 14, 22.)

The apparent response to this contradiction is simply to say that it does not matter: an entity can only be bound to the General Permit if it files an NOI, and there is no evidence that MMLLC ever did so. (Docket No. 79 [Reply Regarding General Permit ("Permit Reply")] at 3.) Defendants also point out that obligations under the General Permit cannot ordinarily be transferred, so any duties incurred by the 1998 NOI—which was filed before MMLLC came into existence—could not apply to MMLLC. (Mem. at 6) (quoting General Permit at 51.)

But this line of argument ignores crucial facts. First, the name on the NOI is SFMM, which is not a legal entity but rather a dba. (Not. at 1.) And at least as far as the permitting authorities are concerned, MMLLC does business as SFMM. (Permit SUF ¶ 22; Water Board Correspondence at 2) (indicating that the annual reports received by the Water Board over the past several years "are all self-titled 'Six Flags Magic Mountain' affirming the name on the existing notice of intent/NOI.") This is significant because one of the Court's primary "obligations in interpreting an NPDES permit is to determine the intent of the permitting authority . . . ." NRDC v. County of L.A., 725 F.3d at 1207 (quotations omitted). Moreover, defendants concede that SFINC was bound by the General Permit even though it likewise operated under the name SFMM. (Permit SUF ¶¶ 4, 15; Not. at 1; Docket No. 83, Smith Decl., Exs. A & B.) Given that SFINC therefore became bound under the General Permit which listed SFMM as the operator, there appears no good reason why MMLLC cannot likewise be bound by the same permit as it operates through the same dba. In short, if MMLLC still does business as

LINKS: 57, 65

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SFMM, why should it not also be bound to the General Permit?

Based on the foregoing discussion, the Court concludes that genuine issues of material fact remain for trial regarding MMLLC's obligations under the General Permit and that the motion for partial summary judgment must be **DENIED**.

2. DEFENDANTS AS OWNERS AND OPERATORS

Even with MMLLC's motion resolved, portions of both motions are still before the Court. The remainder of the first motion asks the Court to find that SFINC cannot be found liable under the General Permit. The second motion seeks a judgment in favor of SFINC, SFMM, and SFEC on both the General and the Individual Permit claims.

Unsurprisingly, these motions overlap when discussing SFINC. Defendants argue in both motions that SFINC ceased any exercise of control over the Facility prior to the time period at issue in this action. (Permit Mem. at 7; Discharger Mem. at 8.) They make similar arguments with regard to SFMM and SFEC. Both entities, they say, have never operated the Facility. (Discharger Mem. at 6, 7.) These motions therefore raise two common issues: (1) are SFINC, SFMM, and SFEC current owner/operators of the Facility; and (2) if so, can they be considered dischargers for liability purposes even though they are not named on a permit.

These questions can readily be answered with reference to their answers in this case. SFINC, SFMM, and SFEC have already admitted that they own and operate the Facility. (Answer ¶ 22.) They tirelessly attempt to rewrite this admission, but these efforts are to no avail.

Defendants first claim that their admission was temporally vague, and they therefore did not admit to current ownership or operation of the Facility—rather, they admitted that the Facility "was and is" owned by Defendants. (Permit Reply at 4.) This theory is foreclosed by the pleadings. Paragraph 22 of the complaint stated in its entirety that

> Plaintiffs are informed and believe, and thereon allege, that the Magic Mountain Facility <u>is owned and/or operated</u> by Magic Mountain, LLC; Six Flags Magic Mountain; Six Flags Theme Parks, Inc.; and Six Flags Entertainment Corporation.

(Compl. ¶ 22) (emphasis added.) Defendants answered simply "[Defendants] admit[] the allegations of Paragraph 22." (Answer ¶ 22.) Nowhere, in either the complaint or in the answer, does the word "was" appear.

LINKS: 57, 65

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Defendants' next argument is even more spurious. They believe that "[m]ere references to SFINC in pleadings, correspondence, and reporting do not transform SFINC into a discharger . . . ." (Docket No. 100 [Reply Regarding Non-Dischargers ("Discharger Reply")] at 9.) Much as Defendants might wish otherwise, "mere" pleadings do matter. "Factual assertions in pleadings . . . are considered judicial admissions conclusively binding on the party who made them." American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). All Defendants answered the complaint by admitting that they are owners and/or operators, and this admission is therefore binding on them.

Since it appears that Defendants are each current owner/operators of the Facility, the Court moves to the second part of its analysis: can a defendant who has not been listed on a permit be considered a discharger. The answer is, unequivocally, yes.

Claims arising out of violations of NPDES permits can be brought not only against permittees, but against any discharger. See United States v. Smithfield Foods, 965 F. Supp. 769, 781 (E.D. Va. 1997); United States v. Lambert, 915 F. Supp. 797, 802–803 (S.D. W. Va. 1996); Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 442 (D. Md. 2010) (collecting cases). In Smithfield, the court found that "[b]y generating wastewater [two defendants] actively caused violations of [a third defendant's] Permit and are, therefore, considered 'persons' who may be held liable. Smithfield, 965 F. Supp. at 781-782.

This reasoning is firmly grounded in the language of the relevant statutes. "Except as in compliance with . . . [33 U.S.C. § 1342] . . . the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 1342 authorizes pollutant discharge, so long as it complies with a permit. 33 U.S.C. § 1342. Accordingly, a person who discharges pollutants not in compliance with a permit may be held liable. This is the very foundation of Plaintiffs' case.[2]

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In light of Defendants' admission that they own and/or operate the Facility—and the guidance provided by Smithfield and Section 1311—there is a genuine issue as to whether

[2] Defendants attempt to muddy the waters by claiming that "if you have a NPDES permit . . . you are explicitly excepted from" Section 1311. (Discharger Reply at 3.) This claim is somewhat confusing. One moment they argue that they do not have a permit, and therefore cannot be held liable. The next they claim that they are not liable because they are protected by their permits.

LINKS: 57, 65

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Title	Wishtoyo Foundation v. Magic Mountain LLC et al		

SFINC, SFMM,[3] and SFEC have violated the terms of the two permits. Their motions are therefore **DENIED**.

IV.
CONCLUSION

For the reasons given above, each of Defendants' motions for partial summary judgment must be **DENIED.** The hearing previously scheduled for March 17, 2014, is hereby **VACATED**.

IT IS SO ORDERED.

[3] Defendants argue separately that SFMM cannot be deemed a discharger because it exists only as a fictional entity. (Discharger Mem. at 7.) This might be the case. But in light of its admission that it owned the Facility, as well as the fact that reports were submitted to the permitting authority in SFMM's name, there is still some uncertainty as to SFMM's precise nature.