Supreme Court Chambers
545 Hall of Justice
Rochester, New York 14614-2185

Ann Marie Taddeo
Justice

Phone: (585) 428-5541
Fax: (585) 784-4213

July 18, 2012

Alan J. Knauf, Esq.
Knauf Shaw, LLP
2 State Street, Suite 1125
Rochester, New York 14614

Maura W. Sommer, Esq.
McCusker, Anselmi, Rosen & Carvelli
210 Park Avenue, Suite 301
Florham Park, New Jersey 07932

RE: One Flint Street, LLC, et al v. Exxon Mobil Corporation, et al
Monroe County Index No. 2011/4470

Dear Counselors:

Enclosed is my Decision and Order in the above matter, the original of which is being sent to Ms. Sommer for filing with the Monroe County Clerk and service of filed copies on counsel and the Court.

Very truly yours,

Hon. Ann Marie Taddeo
Supreme Court Justice
Seventh Judicial District

AMT/paw
Enclosure
cc: Court Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

ONE FLINT ST. LLC and
DHD VENTURES NEW YORK, LLC,
Plaintiffs

V.

EXXON MOBIL CORPORATION,
EXXON MOBIL OIL CORPORATION,
GENESEE SCRAP & TIN BALING CO., INC.,
LOUIS ATKIN, MARVIN SHELTON d/d/a
FLINT AUTO WRECKERS,
LUCAS SCREW PRODUCTS, INC.,
ROCHESTER SCRAP BALING CORP.,
HY LAZERSON & SONS, INC. d/b/a
ROCHESTER SCRAP BALING COMPANY,
JOHN DOES and JOHN DOE COMPANIES,
Defendants.

Index No. 2011/4470

DECISION & ORDER

ANN MARIE TADDEO, J.

Upon a motion for partial summary judgment brought by Plaintiffs, One Flint St, LLC. and DHD Ventures New York, LLC, and an affirmation of Alan J. Knauf, Esq., an affidavit in support by Daniel Noll, P.E., and affidavit in support by Thomas Masaschi, an affidavit in support by James S. Smith, PhD., and a memorandum of law by Mr. Knauf; and upon an affirmation in opposition by Maura W. Sommer, Esq., and a memorandum of law by Patricia Prezioso, Esq. and Ms Sommer; and upon a reply affirmation by Mr. Knauf, a reply affidavit in support by Mr. Masaschi, a reply affidavit in support by Mr. Noll, a reply affidavit by Dr. Smith, and a reply memorandum of law by Mr. Knauf; and upon a sur-reply memorandum of law by Ms. Prezioso and Ms. Sommer, and an affidavit in further support of Defendants' sur-reply by Eric W. Errico; and upon a third affirmation by Mr. Knauf, a third affidavit by Mr. Noll, and a third memorandum of law by Mr. Knauf; and upon consideration of all exhibits attached to the above papers, and oral argument having been conducted, the Court renders the following decision:

Plaintiff commenced this action to recover damages based on Defendant's liability for the cost of remediation under Article 12 of the Navigation Law. Plaintiffs seek reimbursement for environmental costs they have expended due to an alleged discharge of petroleum by Defendants at Plaintiff's property, 5 Flint Street and 15 Flint Street (collectively here as "the site"). Here, Plaintiffs seek partial summary judgment against Defendant ExxonMobil.

ExxonMobil's predecessor, Vacuum Oil, operated an oil refinery on the site from1878 to 1935. (Note: Vacuum Oil was later purchased by Standard Oil of New York, which, after the break-up of Standard Oil, spun into Mobil, which ultimately merged with Exxon to become ExxonMobil. The Court will use the current corporate name, ExxonMobil, to reflect all past corporate identities.) According to Defendant's papers, the refining operations occurred north of Flint Street, while Plaintiff's properties lie south of Flint Street. According to Defendants, Vacuum's operations on what is now Plaintiff's property consisted of grease manufacturing, tank storage and barrel/drum preparations. After 1935, the Vacuum site was subdivided into several different parcels. The 5 Flint Street parcel has been used by various enterprises, including Rochester and Genesee Valley Railroad Company, Rochester Distilling Company and Rochester Scrap Baling Corp. (a defendant herein). The 15 Flint Street Parcel has been used by Rochester Scrap Baling Corp. and Flint Exchange Auto Parts. It is reported that during the time that the site was used as a scrap metal/salvage yard, there was a 1000 gallon underground storage tank in use on the site which was removed in 1993.

Plaintiff claims that during the time Defendant owned the refinery, petroleum was carelessly or negligently released into the ground. This supposedly caused contamination of the soil and ground water. Additionally, Plaintiff claims that Defendant knew or should have known about the leakage. In their motion to dismiss, Plaintiff seeks an order:

1) declaring ExxonMobil strictly liable under Navigation Law §181(1);
2) requiring ExxonMobil to pay for remediation;
3) requiring ExxonMobil to compensate Plaintiffs for costs incurred to date.

Navigation Law §181(1) reads: "Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." A "discharge" is further defined as: "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters" (Navigation Law § 172 [8]).

Plaintiff seeks summary judgment, claiming in their papers that ExxonMobil "set in motion the events that resulted in the discharge." *Damermath Petroleum v Herzog*, 111 AD2d 957. They assert that ExxonMobil's "failure, unintentional or otherwise, to take action...to control [a] spill...or to effect an immediate cleanup... renders defendants liable as a discharger." *State v Green*, 96 NY2d 403. Plaintiffs rely on the holding in *State v Green,* where the Court ruled that even though liability can not be imposed upon a defendant based solely on its ownership of contaminated land, "where ...a landowner can control activities occurring on its property and has reason to believe that petroleum products [were] stored there, the landowner is liable as a discharger for the cleanup costs" *State v. Green,* at 405.

Plaintiffs cite *White v Regan*, 171 AD2d 197 which held that the statute imposes liability on an owner even in the absence of evidence that the owner caused the discharge, and regardless of whether the discharge occurred during the defendant's ownership. But the Court notes that

the statute defines an owner as the *present* owner. Accordingly, this Court is reluctant to apply the holding in *Green* so broadly to this case. In *Green*, as in many of the cases cited by Plaintiffs, the plaintiff was the State of New York, seeking to impose §181's strict liability upon the *current* owners of contaminated property. This Court draws a distinction to the present case, where Plaintiffs, One Flint and DHD Ventures, are the current owners. Plaintiffs can, of course, bring suit against a prior owner such as ExxonMobil for contribution, but there remain numerous questions to be answered before the issue of apportionment of fault can be determined.

In an effort to support their claim, Plaintiff has offered expert testimony to support their argument that since One Flint did not conduct refinery operations, only ExxonMobil could have discharged home healing oil. Exxonmobil responds that there is no proof that the heating oil did not come from the junkyard or salvage yard operation that existed well after their ownership ended.

Ultimately, the Court finds *1093 Group, LLC v. Canale*, 72 A.D.3d 1561, (4th Dept. 2010), to be controlling. The facts in *Canale* are remarkably similar to those in the case at bar. The plaintiff there commenced an action under article 12 of the Navigation Law to recover damages arising from the leakage of petroleum products from underground storage tanks on its property. Defendant, a former owner of the property, argued that in order to establish that defendant was liable as a 'discharger' under section 181(1), plaintiff had the initial burden of establishing that defendant "actually caused or contributed to such damage" *Supra* at 1562, quoting: *Patel v. Exxon Corp.*, 43 A.D.3d 1323, 1323. Ultimately, the Fourth Department held that Canale failed to establish that the discharge occurred while defendant owned the property rather than during the time in which plaintiff owned it.

"A subsequent purchaser such as plaintiff [could] not seek to recover under the Navigation Law from a prior owner if the leak occurred during the time in which the subsequent purchaser owned the property (*see Hjerpe v. Globerman,* 280 A.D.2d 646), because a claim may only be asserted by an injured person who is not responsible for the discharge" *Canale* at 1562, (*Fuchs & Bergh, Inc. v. Lance Enters., Inc.*, 22 A.D.3d 715, 717, quoting § 172[3]).

The Court holds that, at this time, Plaintiff has failed to meets its initial burden of establishing the source of petroleum contamination was solely a result of Vacuum Oil's operations. Their expert testimony, while intriguing, raises as many questions it answers. Further, the Court is uncertain that Plaintiff's themselves are blameless here. While the documents presented suggest that ExxonMobil may ultimately share some of the financial burden for the cleanup of this site, "[n]othing in the statute could be construed as making a landowner responsible solely because it is a landowner" *Canale*, at 1562.

In this case many of the named defendants have yet to answer Plaintiff's complaint. Further, because discovery has hardly even begun, too many relevant questions remain unanswerable. Therefore, the Court is constrained to rule that Defendants have not yet been given a fair and

reasonable opportunity to investigate the allegations being made against them. Once all the named defendants are given an opportunity to participate in the investigative process and discovery is conducted in earnest, the Court will be prepared to reconsider Plaintiff's motion.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion is denied, without prejudice to renew upon completion of discovery.

Dated: July 18, 2012

ENTER:

HON. ANN MARIE TADDEO
Supreme Court Justice