CLERK'S NOTICE	DOCKET NUMBER 1581CV02722	Trial Court of Massachusetts The Superior Court

CASE NAME:
Rosa Layes et al vs. RHP Properties, Inc. et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
Ethan Horowitz, Esq.
Northeast Justice Center
50 Island St
Ste 203B
Lawrence, MA 01840

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

You are hereby notified that on the following entry was made on the above referenced docket:

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
10/27/2017	Arthur J. DeGiacobbe	(781)939-2757

48

FINAL
JUDGMENT ON FINDING OF THE COURT

Trial Court of Massachusetts
The Superior Court

Michael A. Sullivan, Clerk of Court
Middlesex County

DOCKET NUMBER
1581CV02722

CASE NAME
Rosa Layes et al
vs.
RHP Properties, Inc. et al

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

JUDGMENT FOR THE FOLLOWING PARTY(S)
Rosa Layes
Francis Layes

JUDGMENT AGAINST THE FOLLOWING PARTY(S)
RHP Properties, Inc.
Chelmsford Group, LLC

This action came on before the Court, Hon. Kenneth J Fishman, presiding, and upon consideration thereof,

After Judicial Finding, it is **ORDERED AND ADJUDGED**:

That judgment enter as outlined below, Jointly & Severally
with interest thereon as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	04/22/2015
2. Date Judgment Entered	10/27/2017
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*	919
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate	.000329
5. Single Damages	$1,722.00
6. Prejudgment Interest *(lines 3x4x5)*	$520.65
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$
8. Statutory Costs	$.00
9. Attorney Fees Awarded by Court (where authorized by law)	$95,000.00
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*	$97,242.65

SEE PAGE 2 FOR FURTHER ORDERS

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
10/27/2017	X Arthur D. Sugliemo

FINAL JUDGMENT ON FINDING OF THE COURT	DOCKET NUMBER 1581CV02722	Trial Court of Massachusetts The Superior Court

FURTHER ORDERS OF THE COURT:

That the defendants, RHP Properties, Inc. and Chelmsford Group, LLC's counterclaims be and hereby are dismissed. That RHP Properties, Inc. and Chelmsford Group, LLC's third-party complaint be and hereby is dismissed. It is further ORDERED that the defendants RHP Properties, Inc. and Chelmsford Group, LLC are permanently enjoined from implementing or engaging in any policies or practices that contravene or violate 940 Code Mass. Regs ss 10.03(2)(n) and 10.05(4)(d).

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
10/27/2017	X Arthur DeLuglio

40

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
Civil No. 1581-CV-02722

ROSA LAYES & another[1]
Plaintiffs

vs.

RHP PROPERTIES, INC. & another[2]
Defendants

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case requires the resolution of the question of who bears the obligation of paying for the replacement of heating oil tanks at a mobile home park, the resident of the home or the owner/operator of the park where the home sits. The plaintiffs, Rosa and Francis Layes, reside in a mobile home located within the mobile home park known as the Chelmsford Commons Mobile Home Park (the "Community"). The defendant, Chelmsford Group, LLC ("CG"), owns the property where the Layes' home is located, and the defendant, RHP Properties, Inc. ("RHP"), is the Community's management company. The Layes' Amended Class Action Complaint alleges violations of G. L. c. 93A, § 9 (Count I) and G. L. c. 186, § 14 (Count II), arising from the defendants' refusal to replace the Layes' home heating oil tank (the "Tank") after it leaked in May of 2014. The defendants' Amended Counterclaim, meanwhile, asserts claims under G. L. c. 21E (Count I) and negligence (Count II), seeking to recover damages arising from the leak and the Layes' alleged failure to maintain the Tank.

[1] Francis J. Layes
[2] Chelmsford Group, LLC

The case is currently before this Court on the plaintiffs' renewed motion for partial summary judgment on Count I of their Complaint and both counts of the Amended Counterclaim, and the defendant's cross-motion for summary judgment on all claims of the plaintiffs' Complaint. After hearing, and upon review and consideration, the plaintiffs' renewed motion for partial summary judgment on Count I of their Complaint (violation of G. L. c. 93A, § 9) and on the defendants' Amended Counterclaim is **ALLOWED**, and the defendants' cross-motion for summary judgment on all claims of the plaintiffs' Complaint is **DENIED**. The plaintiffs' motion to strike the affidavit of Joseph Carbone is **ALLOWED**. The plaintiffs' motion to supplement the summary judgment record is **ALLOWED**.

BACKGROUND

The following undisputed facts are taken from the Rule 9A Statement of Undisputed Material Facts in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment ("SOF"), and the exhibits referenced therein.[3] Some facts are reserved for discussion, below.

For more than ten years, the Layes have resided at the Community in a mobile home located on Site Number 157. CG has owned the land there, and has held a manufactured housing community license from the Chelmsford Board of Health concerning the Community

[3] Mass. R. Civ. P. 56(e) provides, in pertinent part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added.) The defendants' responses to several paragraphs of the plaintiffs' statement of facts fail to comply with this requirement, in that they purport to dispute the statement either (1) without citation to any specific facts or exhibits to substantiate the dispute (*e.g.*, SOF, pars. 3, 4, 5), or (2) with citation to incompetent evidence (*e.g.*, SOF, pars. 8, 11-16, 22, 24). To the extent the defendants have failed to comply with Rule 56(e) in disputing the facts alleged by the plaintiffs, this Court deems those facts (but not the plaintiffs' characterization of those facts) admitted where appropriate.

since approximately May of 201. RHP has served as the Community's management company, managing the day-to-day operations of the Community, since at least February of 2013.[4]

Rules promulgated by the Community's prior owner/operator in 2008 include a section devoted to "Utilities" (Section 9), which provides, in pertinent part, as follows:

> a. Owner/Operator's Responsibility: The owner/operator shall provide, pay for, maintain, and repair systems for providing water, sewage disposal, and electricity, up to the point of connection with each manufactured home, in accordance with applicable laws.
>
> b. Tenants' Responsibility: Tenants are responsible for paying for the maintenance and repair of utilities from the point of connection to the manufactured home to the inside of the home.
>
> . . .
>
> d. Metered Utilities: Each homeowner is required to pay for his/her own use of gas, oil, and electricity, as long as (1) there is individual metering by a utility or utilities, (2) the meter serves only the individual home, and (3) the homeowner's payment obligation has been disclosed in the Written Disclosures.
>
> . . .
>
> f. Tampering With Utilities: Tampering with meter boxes and utility services is not permitted.
>
> . . .
>
> h. Oil Barrels: Tenants are responsible for the maintenance and upkeep of their oil tanks and are responsible for complying with all city and state ordinances.

[4] The defendants purport to dispute this statement of fact, but cite only to Response Nos. 4, 8, and 9 of CG's Responses to Plaintiff's Request for Admissions in support. Those Responses fail to make any mention of RHP or its relationship to the Community as of February of 2013, however, and the defendants have failed to set forth specific facts showing that there is a genuine issue for trial on that point.

(Rules of Chelmsford Mobile Home Park dated 9/30/08, pp. 3-4.) These rules were revised in April of 2011. (Chelmsford Common Rules and Regulations, dated 4/22/11.) The 2011 rules include the same Section 9 devoted to utilities, except that subsection h, above, is omitted. A March 7, 2013 version of the rules includes the same Section 9 regarding utilities as the 2011 rules (with subsection h omitted).

The Layes purchased the Tank in 2006, approximately eight years before the leak that prompted this litigation. The Layes were required to pay for their heating fuel as part of their occupancy of their site at the Community, and the fuel they periodically put into the Tank was individually metered on the Tank itself. The Tank was located eight inches away from the Layes' home and four feet from one of the home's windows. There was no obstruction to the view between the Layes' home and the Tank. Mrs. Layes would sometimes look at the Tank through the window to see the gauge and check the Tank's fuel level, but she saw the Tank from the exterior no more than three times and possibly fewer over the years. The Layes never changed the filter on the Tank.

On or about May 21, 2014, the Layes smelled oil near the Tank and reported the issue to Community maintenance employee Ronald Hennessey and the Layes' home heating oil supplier, Gagnon. The leak appeared to originate from the bottom of the Tank. Ryan Gill, a representative from Gagnon, came to the property that day to address the leak and noticed fuel on the cement pad underneath the Tank. He also noticed "a whole bunch of debris around [the Tank], pallets, miscellaneous stuff." Gagnon, in coordination with Mr. Hennessey, emptied the contents of the Tank into a temporary transfer tank and the leaking Tank was subsequently removed from the Layes' home site. When Mrs. Layes asked Mr. Hennessey and RHP Regional Property Manager Kimberly Lombard about the status of the Tank in the months that followed,

she was advised that the Layes were responsible for arranging a permanent replacement of the Tank.

When Mrs. Layes contacted Gagnon in January of 2015 to arrange for the delivery of additional oil into the temporary tank, Gagnon refused to supply additional oil until a permanent tank, positioned upright and placed on a concrete slab, was installed. Other suppliers also refused to provide oil without a permanent tank installed. Without oil to fuel their furnace, the Layes relied on a wood stove, propane-fueled fireplace insert, and kerosene heater to heat their home that winter. These heat sources were inadequate to heat the home 24 hours per day, such that the morning temperature inside the home was often in the mid-50s

After sending a demand letter pursuant to G. L. c. 93A on March 20, 2015, the Layes filed this lawsuit on April 22, 2015. On November 2, 2015, the court allowed the Layes' motion for a preliminary injunction and issued an order requiring the defendants to "act promptly to provide a new fuel tank on a concrete foundation on Plaintiffs' home site with the tank properly connected, with permit and inspection if so required for installation and operation."

DISCUSSION

A. Summary Judgment Standard

The standard governing motions for summary judgment provides that summary judgment shall be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Barrows v. Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 625 (2012), citing *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The party moving for summary judgment "need not prove that no factual disputes exist, only that there is no genuine dispute of material fact." *Norwood v. Adams-Russell Co.*, 401 Mass. 677, 683 (1988). The moving party bears the burden of demonstrating the absence of

evidence to support the non-moving party's claims. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 817 (1991).

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. To be successful, a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). If the moving party asserts the absence of any triable issue, the nonmoving party must respond with specific allegations adequate to establish a genuine issue of material fact. *Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp.*, 469 Mass. 800, 804 (2014), citing *Drakopoulos v. U.S. Bank Nat'l Ass'n*, 465 Mass. 775, 777–778 (2013), and *Pederson v. Time, Inc.*, 404 Mass. 14, 16–17 (1989).

B. Analysis

a. Plaintiffs' Evidentiary Motions

The Layes move to strike the affidavit of RHP Vice President Joseph Carbone submitted by the defendants on grounds that it is based only on information and belief, rather than personal knowledge as required by Mass. R. Civ. P. 56(e).

Rule 56(e) provides that affidavits submitted in connection with summary judgment proceedings "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mr. Carbone's affidavit, which was originally prepared in September 2015 in connection with the defendants' opposition to the plaintiffs' motion for a preliminary injunction, states in its introductory and concluding sentences that the affidavit's contents are

"based upon information and belief," rather than personal knowledge. Nor is it apparent from the substance of the affidavit that Mr. Carbone's averments are based on his personal knowledge. He makes several statements regarding what the Layes, RHP, and other individuals and entities knew, said, and did, without establishing how he learned that information. Under these circumstances, Mr. Carbone's affidavit does not comply with Mass. R. Civ. P. 56(e) and must be stricken from the summary judgment record. See *Madsen v. Erwin*, 395 Mass. 715, 719 (1985); *Shapiro Equip. Corp. v. Morris & Son Const. Corp.*, 369 Mass. 968, 969 (1976).

The Layes also move to supplement the summary judgment record. The Layes filed the summary judgment package pursuant to Superior Court Rule 9A on August 24, 2016, and a hearing was held on September 13, 2016. The Layes filed their motion to supplement the record on October 4, 2016, seeking to include an October 15, 1998 letter from the Attorney General's Office to John Flaherty, the President of the Mobilehome Federation of Massachusetts, which provides an unofficial response to his inquiry regarding the issue of ownership of above-ground oil tanks. The motion to supplement also attaches an August 29, 2016 letter from the Attorney General's Office to RHP Community Manager Victoria Ashworth, which alleges that the Community's 2015 Rules and Regulations, including rules imposing oil tank maintenance and replacement responsibilities upon residents, are in violation of Massachusetts law. The motion is allowed, but the letter has been considered to the extent allowed by Mass. R. Civ. P. 56 and consistent with evidentiary principles.

b. <u>Plaintiffs' Claim Pursuant to G. L. c. 93A, § 9</u>

To prove their G. L. c. 93A claim, the Layes must establish the following elements: (1) that they sent a qualifying demand letter 30 days before filing suit; (2) that the defendants were engaged in "trade or commerce" in their dealings with the Layes; (3) that the defendants' actions

toward the Layes amounted to an "unfair or deceptive act or practice;" and (4) that the Layes were injured by the defendants' actions. G. L. c. 93A, §§ 2, 9. The Layes' March 20, 2015 demand letter satisfies the requirements of G. L. c. 93A, § 9(3), and there is no question that the defendants' conduct toward the Layes took place in a business context so as to constitute "trade or commerce." The undisputed facts also reveal that the Layes were injured by the defendants' refusal to pay for a permanent replacement tank in that they were unable to use their furnace and adequately heat their home during the winter following the leak. The defendants' liability under G. L. c. 93A, therefore, turns on whether their refusal to provide a replacement tank constitutes an "unfair or deceptive act or practice."

The Manufactured Housing Act (G. L. c. 140, §§ 32A-S), and regulations promulgated by the Attorney General pursuant to the Act, impose a number of requirements on operators of manufactured housing communities and their tenants with respect to utilities and fuel tanks, in particular. The regulations also specifically provide that an operator's failure to comply with any provision of the Manufactured Housing Act or 940 Code Mass. Regs. § 10.00 "shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2." 940 Code Mass. Regs. § 10.02(3). The Layes' claim under G. L. c. 93A is based on the defendants' alleged violation of those regulations by refusing to replace the Tank at their expense and attempting to place the burden of maintenance and replacement of the Tank on the Layes. While the Layes argue that the applicable regulations place the responsibility for maintaining and replacing the Tank on the defendants, the defendants contend the Layes are responsible for maintaining and replacing the Tank because it falls under an exception to the regulations which provides that an operator is not obligated to pay where the heating fuel is individually metered to the home.

For the reasons explained below, this Court holds that the plain meaning of the regulations at issue places the burden of maintaining and replacing the Tank on the defendants. In addition, the defendants have failed to put forth any evidence that negligence on the part of the Layes caused the Tank to leak and require replacement, rendering the negligence exceptions to the relevant regulations inapplicable. As a result, the defendants' conduct is in violation of 940 Code Mass. Regs. § 10.03(2)(n) and § 10.05(4), and is, therefore, a per se "unfair or deceptive act or practice" pursuant to G. L. c. 93A, § 9 and 940 Code Mass. Regs. § 10.02(3). With this final element of their claim under G. L. c. 93A, § 9 satisfied, the Layes are entitled to summary judgment on Count I of their Complaint.

i. Interpreting the Applicable Regulations

The regulations promulgated by the Attorney General provide, in pertinent part: "It shall be an unfair or deceptive act or practice in violation of M.G.L. c. 93A for an operator[5] . . . to require any resident to pay for the removal or replacement of oil storage tanks on a home site to meet environmental concerns or risks not caused by the negligence of the resident, provided that the operator may recover such costs as capital improvements in accordance with 940 CMR 10.03(2)(l)." 940 Code Mass. Regs. § 10.03(2)(n).

Meanwhile, section 10.05(4) sets out the responsibilities of operators and tenants with respect to "basic utilities." It provides, in pertinent part:

> a. An operator shall make available, or cause to be made available, the following to each manufactured home site:
>
> 1. Electrical service supplying each manufactured home with sufficient amperage to meet the reasonable needs of the residents. . . .

[5] The regulations define "operator" as "a person who directly or indirectly owns, conducts, controls, manages, or operates any manufactured housing community, and his/her agents or employees." 940 Code Mass. Regs. § 10.01.

2. Natural gas connection to any provider of natural gas at the location of the manufactured housing community, provided such connection is economically reasonable.

b. An operator shall supply and pay for the following to each manufactured home site:

1. a supply of potable water . . .

2. a sanitary sewage disposal system . . .

3. electricity, natural gas, or other heating fuel, except for that which is metered through a meter which serves only the individual manufactured home and the occupancy agreement provides for payment by the occupant.

. . .

d. The basic utilities described in 940 CMR 10.05(4)(a) and (b), as applicable, shall be installed to the point of connection at each manufactured home and maintained in good repair and operating condition by the operator without charge to residents, except as damage thereto is caused by the negligent act or omission or willful misconduct of a resident. All such installation and maintenance shall be in accordance with applicable laws, codes, and professional standards.

940 Code Mass. Regs. § 10.05(4). In order to be consistent with 940 Code Mass. Regs. § 10.03(2)(n) and give full meaning to subsections (b)(3) and (d) of 940 Code Mass. Regs. § 10.05(4), the only reasonable interpretation of subsections (b)(3) and (d) is that the former refers to the actual utility itself (*e.g.*, the electricity, gas, or heating fuel used by tenants) and the latter refers to the mechanisms and infrastructure by which those utilities are delivered to each home. As a result, the exception in subsection (b)(3) on which the defendants rely to justify their position that they are not responsible for costs associated with replacing the tank is inapplicable. The defendants' interpretation of subsection (b)(3) as applying to costs associated with maintaining and replacing the tank would render subsection (b)(3) inconsistent with 940 Code

Mass. Regs. § 10.03(2)(n), which prohibits an operator from "requir[ing] any resident to pay for the removal or replacement of oil storage tanks on a home site to meet environmental concerns or risks not caused by the negligence of the resident," and includes no exception for tanks metered through a meter which serves only the individual manufactured home.

The defendants argue that the phrase, "as applicable," in 940 Code Mass. Regs. § 10.05(4)(d), claiming that it supports their contention that the exception in 940 Code Mass. Regs. § 10.05(4)(b)(3) applies to individually-metered heating fuel tanks. The "as applicable" language in 940 Code Mass. Regs. § 10.05(4)(d), however, is present because the operator is not required to provide tenants with every one of the utilities described in 940 Code Mass. Regs. § 10.05(4)(a) and (b). For example, the operator is required to make a natural gas connection available only if the connection is economically reasonable, 940 Code Mass. Regs. § 10.05(4)(a)(2), and has options with respect to what type of heating fuel it supplies, 940 Code Mass. Regs. § 10.05(4)(b)(3) ("electricity, natural gas, or other heating fuel").

The defendants point to the Attorney General's Guide to Manufactured Housing Community Law (the "Guide") as supporting their position that the tank is excluded because it is individually metered. The Court's interpretation of 940 Code Mass. Regs. § 10.05(b) and (d) as placing the responsibility for maintaining and replacing the tank on the defendants, however, is consistent with the Guide, which includes the following relevant provisions:

II. A CONSUMER'S GUIDE TO MANUFACTURED HOUSING LIVING

D. Community Conditions

. . .

1. Community owner/operator's maintenance responsibilities

. . .

e. Utility systems maintenance. A community owner/operator is responsible for supplying, maintaining,

repairing and paying for utilities to the point of connection at each manufactured home. The required utilities include drinkable water, a functioning sewage disposal system, electricity, and natural gas or other heating fuel unless that fuel is individually metered. 940 C.M.R. 10.05(4). See Sections II.D.2.d and II.D.8 of this guide.

. . .

2. Tenant's maintenance responsibilities

. . .

d. Utilities inside your home. Damage to, or malfunction of, any utilities inside your home is your responsibility. Although your community owner/operator is generally responsible for utilities and connections outside your home, you may be responsible for any damage that you negligently or purposely cause to these systems or connections (e.g., if you stop up a sewage disposal system through improper disposal). 940 C.M.R. 10.05 (4)(d). Finally, your community owner/operator may require you to upgrade your interior plumbing or wiring systems only to the extent that he or she can demonstrate the need for the upgrade to ensure the health and safety of residents, and then only on a non-discriminatory basis.

. . .

8. Utilities

a. Required utilities and payment obligations. Under the Regulations and the State Sanitary Code, your community owner/operator must provide and pay for utility connections for water, a functioning sewage disposal system, electricity, and natural gas or other heating fuel except that which is individually metered. 940 C.M.R. 10.05(4)(b); 105 C.M.R. 410.351. See Sections II.D.1.e and II.D.2.d of this guide. You cannot be directly charged for your use of any utility unless there is individual metering by a utility company, and your occupancy agreement provides for such a charge. 940 C.M.R. 10.05(4)(b)(3) and 10.05(4)(e). Your community owner/operator, however, can recover the cost of providing utilities to you indirectly through your rent, as long as such costs are distributed equally among all households. 940 C.M.R. 10.05(4)(c).

. . .

> **h. Oil storage tanks.** In recent years, community owner/operators have become concerned about their potential legal liability stemming from the environmental risks posed by leaking underground oil storage tanks. The Regulations require that the cost of removing or replacing an oil storage tank should be initially incurred by the community owner/operator, who is usually better able to pay for or finance these costs upfront. Thus, you may not be charged directly for the removal or replacement of oil storage tanks, but your community owner/operator may eventually recover such costs as capital improvements, in the manner allowed by law. 940 C.M.R. 10.03(2)(n). This general rule applies whether the tank is above or below-ground. There is one exception to the general rule: where your negligence has caused the environmental concern or risk posed by the oil tank, you may be held directly responsible for removing or replacing it. 940 C.M.R. 10.03(2)(n).

While these provisions are somewhat ambiguous, it is apparent from Section II.D.8.h, which specifically relates to oil storage tanks, that the intent of the Attorney General's regulations is to place the cost of removing or replacing an oil storage tank on the defendants. Section II.D.8.h notes only one exception to this rule, where the resident's "negligence has caused the environmental concern or risk posed by the oil tank." It notes no further exception for where the tank is individually metered. In addition, the intent of the regulations is confirmed by the August 29, 2016 letter from the Attorney General's office to RHP, which takes issue with the Community holding residents "responsible for the maintenance and replacement of any above ground oil or fuel storage tanks." The letter states that such a rule "directly violates 940 C.M.R. 10.03(2)(n) and 10.05(4)(d)" and concludes that "[t]his office would object to any rule attempting to impose oil tank maintenance and replacement responsibilities upon Chelmsford Commons residents." Again, the letter notes no exception for individually-metered tanks. Thus, the Guide's interpretation of the regulations is consistent with this Court's view of the meaning of the relevant statutory provisions.

ii. Evidence of Negligence

Having concluded that 940 Code Mass. Regs. § 10.05(4)(d) applies under the circumstances here and places the responsibility for maintaining and replacing the Tank on the defendants unless the damage to the Tank was "caused by the negligent act or omission or willful misconduct of a resident," the next issue is whether the summary judgment record contains any evidence that negligence on the part of the Layes caused the Tank to leak.[6] Based on the record, the Layes have established that the defendants have no reasonable expectation of proving that they acted negligently and caused the Tank to leak, thereby making the exception to the rule that operators may not require residents to pay for the removal or replacement of oil storage tanks inapplicable. 940 Code Mass. Regs. § 10.03(2)(n).

The allegation that the Layes' negligence caused the Tank to leak amounts to no more than speculation and is not supported by admissible evidence. The defendants point to the follow as evidence of negligence: (1) the Tank was located only eight inches away from the Layes' home and just four feet from a window of the home; (2) despite this close proximity, Mrs. Layes testified that she never looked at the Tank in the approximate eight years between the time she and her husband purchased it and the oil release in May of 2014; (3) believing it was the operator's responsibility, Mr. Layes never changed the filter on the Tank even though he knew the filter needed to be changed; and (4) the Gagnon representative who responded to the leak testified that "there was a whole bunch of debris around [the Tank], pallets, miscellaneous stuff." (Defendants' Opposition, at pp. 12-14.)

These points are insufficient, either individually or collectively, to raise a material question of fact regarding whether the Layes' negligence caused the Tank to leak and require

[6] The defendants make no allegation of willful misconduct by the Layes.

replacement. Although the Layes admit they had an unobstructed view of the Tank from a window in their home, at her deposition Mrs. Layes testified that she could see only the top and some of the sides of the Tank, but not the bottom of the Tank, from a window in the rear of the home. Here, the leak originated from the bottom of the Tank. More importantly, the Layes' failure to change the filter or otherwise maintain the Tank cannot constitute evidence of negligence given that the applicable regulations placed the duty of maintaining the Tank on the defendants. Finally, even if the Layes had a duty to maintain the Tank and failed to do so, the defendants have presented no evidence that any such failure *caused* the Tank to leak. When Mr. Carbone, in his capacity as the Mass. R. Civ. P. 30(b)(6) designee for both CG and RHP, was asked at his deposition about what information CG and RHP had to support the allegation that the Layes' conduct caused the leak, he testified that it was the Layes' responsibility to maintain the tank and that it would not have leaked if they had maintained it, but could point to no specific maintenance issues as the cause of the leak. He went on to admit that neither he nor anyone else at CG or RHP had any specific information regarding what caused the leak. Without evidence of causation, the defendants have no reasonable expectation of proving the Layes' acts or omissions caused the leak.[7]

c. Defendants' Negligence Counterclaim

The Layes also move for summary judgment on the defendants' counterclaim for negligence on grounds that the defendants/plaintiffs-in-counterclaim have no reasonable expectation of proving their claim. To prevail on their negligence counterclaim, the defendants/plaintiffs-in-counterclaim must establish that: (1) the Layes owed them a duty of

[7] While the defendants rely on *Cassidy v. Cranberry Highway Estate, Inc.*, Docket No. 08-CV-00331 (Mass. Housing Ct., Bristol County, May 20, 2010), that case is distinguishable, and, in any event, not controlling precedent here.

reasonable care; (2) the Layes' breached that duty; (3) the defendants/plaintiffs-in-counterclaim sustained damages; and (4) those damages were proximately caused by the Layes' breach. *Glidden v. Maglio*, 430 Mass. 694, 696 (2000). The defendants/plaintiffs-in-counterclaim have no reasonable expectation of proving this claim for the same reasons that the negligence exceptions to 940 Code Mass. Regs. § 10.03(2)(n) and § 10.05(4)(d) do not apply. Without evidence that anything the Layes did or did not do caused the Tank to leak and require replacement, the defendants/plaintiffs-in-counterclaim have no reasonable expectation of proving causation, an essential element of their negligence counterclaim, and summary judgment on that claim is warranted.

d. Defendants' Counterclaim Pursuant to G. L. c. 21E

The defendants' counterclaim pursuant to G. L. c. 21E, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act ("Chapter 21E"), seeks to hold the Layes liable for damages associated with the leak and cleanup. To prevail on this claim, the defendants/plaintiffs-in-counterclaim must prove the Layes are among the classes of persons whom Chapter 21E holds liable for an oil release. Commonwealth v. Boston Edison Co., 444 Mass. 324, 332 (2005) ("a party's liability under the statute is governed exclusively by the five categories set forth in G. L. c. 21E, § 5(a)"). Section 5(a) of Chapter 21E sets forth five categories of parties who may be liable, only two of which pertain to releases of oil: "the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material," and "any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site." G. L. c. 21E, § 5(a)(1) & (5).

The Layes cannot be liable as owners or operators of a site at which there has been a release of oil because they do not own the real property where leak occurred and the Tank itself does not qualify as a "site." An "owner" under Chapter 21E is someone who holds legal title to the affected site, *Commonwealth v. Blackstone Valley Elec. Co.*, 808 F. Supp. 912, 916 (D. Mass. 1992), while an "operator" is a person who has "actual control of, and active involvement in, operations at the site." *Martignetti v. Haigh-Farr, Inc.*, 425 Mass. 294, 304 (1997). Meanwhile, Chapter 21E defines "site" as "any building, structure, installation, equipment, pipe or pipeline, including any pipe into a sewer or publicly-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any other place or area where oil or hazardous material has been deposited, stored, disposed of or placed, or otherwise come to be located." G. L. c. 21E, § 2. While the definition of "site" includes storage containers, it goes on to explicitly exclude "any consumer product in consumer use. . . ." Thus, even if the Layes are considered the owners of the Tank, the Tank does not qualify as a "site" under Chapter 21E because it is a "consumer product in consumer use." Id. See *Eastlande Mobile Home Park, Inc. v. Young*, 2014 WL 9911768, *4 (Mass. Super. Ct. May 5, 2014) (Kelley Brown, J.) (in case involving leak from mobile home's above-ground oil tank, "[b]ecause a consumer product, as it appears to be the source of the leak in this case, cannot be a 'site' upon which owner/operator liability is based, Eastlande's claim is not viable under the plain language of the statute").

The Layes also cannot be held liable under G. L. c. 21E, § 5(a)(5), as persons who caused or are legally responsible for a release of oil. To establish that a person "otherwise caused or is legally responsible for a release," the defendants/plaintiffs-in-counterclaim must establish that the Layes both had a duty to prevent the release and caused the release. *Marenghi v. Mobil Oil*

Corp., 420 Mass. 371, 373-374 (1995) (no liability under G. L. c. 21E, § 5(a)(5) where defendant complied with contractual obligations regarding tank maintenance and repair and there was no evidence defendant's conduct caused leak). As explained above, the applicable regulations place the responsibility of maintaining the Tank in "good repair and operating condition" and "in accordance with applicable laws, codes, and professional standards" on the defendants. 940 CMR § 10.05(4)(d). Moreover, the summary judgment record contains no evidence that the acts or omissions of the Layes caused the leak, making liability under G. L. c. 21E, § 5(a)(5) impossible.

Because the Layes do not fall within one of the categories of persons whom Chapter 21E holds responsible for an oil release, the defendants/plaintiffs-in-counterclaim cannot prevail on their Chapter 21E counterclaim and summary judgment is warranted.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' renewed motion for partial summary judgment on Count I of their Complaint (violation of G. L. c. 93A, § 9) and on the defendants' Amended Counterclaim is **ALLOWED,** and the defendants' cross-motion for summary judgment on all claims of the plaintiffs' Complaint is **DENIED**. The plaintiffs' motion to strike the affidavit of Joseph Carbone is **ALLOWED**. The plaintiffs' motion to supplement the summary judgment record is **ALLOWED**. It is further **ORDERED** that the Clerk shall schedule a hearing on the outstanding issues of class certification and the appropriate remedy in light of this Court's summary judgment decisions.

Dated: December 22, 2016.

Kenneth J. Fishman
Justice of the Superior Court