302 A.D.2d 338, 754 N.Y.S.2d 655, 2003 N.Y. Slip Op. 10629
**(Cite as: 302 A.D.2d 338, 754 N.Y.S.2d 655)**

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Supreme Court, Appellate Division, Second Department, New York.
AMCO INTERNATIONAL, INC., et al., Respondents–Appellants,
v.
LONG ISLAND RAILROAD COMPANY, Appellant–Respondent.

Feb. 3, 2003.

Cross-appeals were taken from order of the Supreme Court, Suffolk County, Hall, J., which, in an action under Navigation Law to recover damages for the discharge of petroleum, granted plaintiffs' motion for partial summary judgment on issue of liability, entered judgment against defendant in principal sum of $1,400,679.61, and limited award of attorneys' fee to plaintiffs and expenses included in cleanup costs. The Supreme Court, Appellate Division, held that: (1) plaintiffs were not entitled to prejudgment interest; (2) evidence showing profits which could be anticipated to a reasonable certainty justified award of lost profits; and (3) plaintiffs were entitled to award of litigation costs.

Affirmed as modified, and matter remitted.

West Headnotes

**[1] Interest 219 ⚿39(2.20)**

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.20) k. Particular cases and issues. Most Cited Cases

Plaintiffs were not entitled to prejudgment interest in action to recover damages for the discharge of petroleum, since they had not yet expended funds for remediation and had not, therefore, been deprived of use of those funds.

**[2] Environmental Law 149E ⚿446**

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek446 k. Covered costs; damages. Most Cited Cases

Evidence showing profits which could be anticipated to a reasonable certainty, especially plaintiffs' prior sales of high quality nonprime plastic scrap materials to existing clientele, justified award of lost profits to plaintiffs in action to recover damages for the discharge of petroleum which occurred when locomotive owned and operated by railroad company struck an object on its tracks, causing locomotive's fuel tank to rupture and leak. McKinney's Navigation Law § 181, subd. 1.

**[3] Environmental Law 149E ⚿720(2)**

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek711 Costs and Attorney Fees
149Ek720 Hazardous Waste or Materials
149Ek720(2) k. Response and cleanup actions. Most Cited Cases
(Formerly 149Ek710)

Plaintiffs were entitled to award of litigation costs in action to recover damages for the discharge of petroleum, since costs incurred during litigation were result of defendant's extended delay in cleaning contamination, and its recalcitrance in committing to plan of action which would restore plaintiffs' property to its pre-spill condition while maintaining minimum disruption of plaintiffs' business, thus necessitating litigation and its attendant costs. McKinney's Navigation Law §§ 172, subd. 5, 181, subds. 2, 5.

****655** Kelley Drye & Warren, LLP, New York, N.Y. (John M. Callagy, Jonathan K. Cooperman, and Michael E. Feder of counsel), for appellant-

respondent.

DL Rothberg & Associates, Inc., New York, N.Y. ( Debra L. Rothberg and Michael A. Freeman of counsel), and Morrison Cohen Singer & Weinstein, LLP, New York, N.Y. (Mary E. Flynn of counsel), for respondents-appellants (one brief filed).

MYRIAM J. ALTMAN, J.P., NANCY E. SMITH, HOWARD MILLER and WILLIAM F. MASTRO, JJ.

***338** In an action, *inter alia,* to recover damages for the discharge of petroleum pursuant to Navigation Law article 12, the defendant appeals from a judgment of the ****656** Supreme Court, Suffolk County (Hall, J.), entered July 26, 2001, which, upon the granting of the plaintiffs' motion for partial summary judgment on the issue of liability and after a nonjury trial on the issue of damages, is in favor of the plaintiffs and against it in the principal sum of $1,400,679.61, including the principal sums of $480,000 for remediation costs, $760,000 for lost profits, and $160,679.61 for cleanup costs, plus interest, costs and disbursements, and the plaintiffs cross-appeal from stated portions of the same judgment which, *inter alia,* limited the award of an attorney's fee and expenses included in the cleanup costs.

ORDERED that the judgment is modified by deleting the provision thereof awarding interest on the damages for remediation costs, and by deleting the provision thereof awarding cleanup costs in the principal sum of $160,679.61; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for a recalculation of damages for cleanup costs.

In April 1994 a locomotive owned and operated by the defendant struck an object on its tracks which caused the locomotive's fuel tank to rupture and leak. The defendant moved the locomotive onto an adjacent rail spur located on the plaintiffs' property where the tank continued to leak approximately 800 to 900 gallons of diesel fuel. The defendant immediately notified the New York State Department of Environmental Conservation (hereinafter the DEC) and the DEC directed the defendant to proceed with a cleanup of the site within three days. ***339** Thereafter, the defendant hired an environmental consulting firm to determine the extent of the spill and devise a plan for its removal. By January 1997, however, the contaminated soil had not been removed. The plaintiffs retained an attorney and their own environmental expert in an effort to facilitate negotiations with the defendant to accomplish the cleanup. When those negotiations proved unsuccessful, the plaintiff commenced this action in April 1997.

The vast majority of the plaintiffs' business involves the custom extrusion and sale, or repackaging and distribution of, high quality nonprime plastic scrap materials to customers who manufacture various plastic products. Until 1997 the plaintiffs purchased all of the high quality nonprime scrap material manufactured by Chevron Phillips Chemical Company (hereinafter Chevron), which delivered most of the scrap material in railcars to the plaintiffs' private rail spur, utilizing the defendant's main track. The plaintiffs would store the material in Chevron's railcars until it was used, returning the railcars to Chevron as they were emptied.

In or about July 1997 Chevron notified the plaintiffs that it intended to increase the nonprime scrap output, and required an immediate return of the emptied railcars for storage purposes. It was also Chevron's intention to sell its increased output to the plaintiffs. Although the plaintiffs wanted to install five silos on its property near the rail spur to store the scrap material after its delivery and return the railcars more quickly to Chevron, it did not do so upon representations from the defendant that it would not be able to move in the necessary equipment to perform the excavation and remediation of the contaminated soil if the silos were placed on the

property near the rail spurs. It was also apparent that any excavation would include temporary removal of the rail spur to clean the soil under the spur. Because the plaintiffs could not accommodate Chevron's needs, Chevron began selling its nonprime scrap materials to other ****657** customers in July 1997, and the plaintiffs sales declined significantly from that point.

In 1999 testing was performed by both the defendant's and the plaintiffs' environmental experts. Although the contamination had dissipated through natural attenuation, it still existed within the spill area. While the defendant had represented that at the conclusion of the cleanup operation, the plaintiffs' property would be returned to its pre-spill condition, the main thrust of its theory at trial was that the natural process of attenuation since 1994 had dissipated the contamination so that the level of any harmful individual components of diesel fuel existing in the soil was below DEC standards, and thus, no remediation was necessary. In part, the defendant relied upon evidence which showed that during the attenuation process the contamination migrated to greater depths in the soil toward the groundwater table where it further dissipated. The plaintiffs, however, introduced expert evidence which indicated that regardless of the presence of low levels of specifically-identified individual components of diesel fuel within the spill area, there were still unacceptable levels of total petroleum hydrocarbons, the overall measure of identified and unidentified components of diesel fuel, ***340** existing in the soil which required remediation to restore the property to its pre-spill condition. The Supreme Court credited the testimony of the plaintiffs' expert, thus determining that the soil was contaminated and that it must be restored to its pre-spill condition pursuant to the mandate of the Navigation Law.

[1] Pursuant to the Navigation Law, any person who has discharged petroleum is strictly liable for "all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained" ( Navigation Law § 181[1] ). The purpose of the statute is, *inter alia,* to require the prompt cleanup and removal of oil and fuel discharge, to minimize damage to the environment, to restore the environment to its "pre-spill condition" and to compensate those damaged by such discharge (*see* 6 NYCRR 611.6 [a]; Navigation Law §§ 170, 171). The Supreme Court providently exercised its discretion in crediting the testimony of the plaintiffs' environmental expert, which was based on evidence in the record, that portions of the spill area were still contaminated. The court also properly required restoration of the area to its pre-spill condition. Further, the evidence supports the Supreme Court's award of damages in the sum of $480,000 for the cost of remediation. The Supreme Court, however, erred in awarding prejudgment interest since the plaintiffs had not yet expended the funds for remediation and had not, therefore, been deprived of the use of those funds (*cf. Fiorello v. Raheb,* 271 A.D.2d 402, 706 N.Y.S.2d 883; *155 Henry Owners Corp. v. Lovlyn Realty Co.,* 231 A.D.2d 559, 647 N.Y.S.2d 30).

[2] Contrary to the defendant's contention, the Supreme Court properly awarded lost profits to the plaintiffs. The evidence presented at trial indicated that, based upon, *inter alia,* prior sales to existing clientele, the profits which could be anticipated between 1998 and 2000 were reasonably certain ( *see Ashland Mgt. v. Janien,* 82 N.Y.2d 395, 403–406, 604 N.Y.S.2d 912, 624 N.E.2d 1007; *Greasy Spoon v. Jefferson Towers,* 75 N.Y.2d 792, 795–796, 552 N.Y.S.2d 92, 551 N.E.2d 585).

[3] Since an injured party may recover indirect damages, ***341** consisting of all costs associated with the cleanup and removal of a discharge (*see* Navigation Law § 172[5], § 181[2], [5] ), the Supreme Court should have awarded the plaintiffs their litigation costs (*see Strand v. Neglia,* 232 A.D.2d 907, 649 N.Y.S.2d 729; ****658***State of New York v. Tartan Oil Corp.,* 219 A.D.2d 111, 116, 638 N.Y.S.2d 989; *compare Gettner v. Getty Oil Co.,* 266 A.D.2d 342, 701 N.Y.S.2d 64 [declining to award litigation expenses based upon provisions of

the parties' lease which specifically disallowed such expenses] ). Under the facts of this case, the costs incurred during the litigation were the result of the defendant's extended delay in cleaning the contamination, and its recalcitrance in committing to a plan of action which would restore the plaintiffs' property to its pre-spill condition while maintaining a minimum disruption of the plaintiffs' business, thus necessitating the litigation and its attendant costs. Consequently, the plaintiffs are entitled to recover their attorney's fees and their expert fees, except those expended for a separate tax certiorari proceeding, and except the fees expended for their appraiser, recovery for which is not warranted under the circumstances. The matter is therefore remitted to the Supreme Court, Suffolk County, for a recalculation of the damages awarded for cleanup costs.

Contrary to the plaintiffs' contention, the Supreme Court properly declined to award damages for the alleged permanently diminished value of their property due to the stigma of contamination since the evidence did not support such an award ( *see Putnam v. State of New York,* 223 A.D.2d 872, 636 N.Y.S.2d 473).

The defendant's remaining contentions are without merit.

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