Tsakis v Keyspan Corp.
2016 NY Slip Op 30126(U)
January 7, 2016
Supreme Court, Suffolk County
Docket Number: 08-5022
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 08-5022
CAL. No. 14-01439OT

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1-16-15
ADJ. DATE 6-1-15
Mot. Seq. # 006 - MG; CASEDISP

JON and CHERYL TSAKIS,

Plaintiffs,

- against -

KEYSPAN CORP., KEYSPAN ENERGY CORP., KEYSPAN GAS EAST CORP.,

Defendants.

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Upon the following papers numbered 1 to 139 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 107 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 108 - 124 ; Replying Affidavits and supporting papers 125 - 133 ; Other memorandum of law, 134 - 135; affidavits 136 - 139 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing plaintiffs' complaint is granted.

This action arises out of claims that real property owned by plaintiffs Jon and Cheryl Tsakis was contaminated by the release and migration of pollutants into the ground near their property from a former manufactured gas plant ("MGP") located in Bay Shore, New York, that was owned and operated by the predecessors of defendants. The subject plant, which was decommissioned in the 1970s, was situated on a 10.3 acre parcel just north of the Long Island Rail Road tracks.

Plaintiffs Jon and Cheryl Tsakis own real property located on 20-22 North Clinton Avenue in Bay Shore, New York. The complaint alleges that the operations at the MGP caused extensive contamination of the air, soil and ground water, which spread to the subject premises. The complaint seeks to recover monetary damages for depreciation of the market value of the property, personal injuries, and medical monitoring costs. The first through eighth causes of action seek to recover damages under theories of strict liability, negligence, navigation law, physical trespass, negligence, and public and private nuisance. Plaintiffs seek equitable relief in the form of medical monitoring and injunctive relief in their eighth cause of action and punitive damages in their ninth cause of action. Pursuant to a decision of this Court dated November 29, 2010, the first cause of action in strict liability for violations of the Superfund law and the ninth cause of action for breach of contract were dismissed.

Defendants now move for summary judgment dismissing the complaint on the grounds that the remaining claims are barred by the statute of limitations, and that they are unsupported by the record and lack merit. In support of their motion, defendants submit, among other things, copies of the pleadings; affidavits of Theodore Leissing, James Campbell, Matthew O'Neil, Bernard Kueper, Barbara Beck, and Richard Marchitelli; correspondence from the New York State Department of Environmental Conservation (NYSDEC) to plaintiffs' counsel, and transcripts of the deposition testimony of plaintiffs They also submit articles from various periodicals regarding the contamination, resident mailing lists, NYSDEC fact sheets, and photographs of the remediation and construction performed by KeySpan. The Court notes that upon the parties' consent, it will consider the joint submissions of documentary and testimonial evidence proffered by defendants in the instant motion and in the other actions assigned index numbers 3712/2008, 837/2010, 2084/2010, and 2085/2010. Plaintiffs oppose the motion, arguing that the claims are not barred by the statute of limitations and that defendants' long history of fraudulent representations tolls the running of the statute of limitations. In opposition, plaintiffs submit their own affidavits, an affirmation of Irving Like, and expert affidavits of Elinor Brunswick, Timothy Minnich, and Martin Trent.

CPLR 214-c provides a three-year statute of limitations for latent injuries to persons or property caused by exposure to harmful substances, beginning on the date the injury is discovered or should have been discovered by a reasonably diligent plaintiff, whichever is earlier (*see* ***Byrd v Manor***, 82 AD3d 813, 918 NYS2d 558 [2d Dept 2011]; ***Miller Realty Assoc v Amendola***, 51 AD3d 987, 859 NYS2d 258 [2d Dept 2008]). A cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e. when the injury is apparent, not when the specific cause of the injury is identified (*see* ***Matter of New York County DES Litigation***, 89 NY2d 506, 655 NYS2d 862 [1997]; ***Byrd v Manor***, *supra*; ***Searle v City of New Rochelle***, 293 AD2d 735, 742 NYS2d 314 [2d Dept 2002]).

Discovery under CPLR §214-c occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based (*see* ***MRI Broadway Rental, Inc. v United States Mineral Prod. Co.***, 92 NY2d 421, 681 NYS2d 783 [1998]; ***Jensen v General Elec. Co.***, 82 NY2d 77, 603 NYS2d 420 [1993]). Where the record demonstrates that the plaintiff has knowledge of facts which would put a reasonable person on notice of the need to undertake further investigation into the contamination event, the plaintiff has three years from the date of the acquisition of that knowledge to commence suit under the discovery

rule set forth in CPLR §214-c (*see* ***Oliver v Chevrolet Mobil Oil Corp.***, 249 AD3d 793, 671 NYS2d 850 [3d Dept 1998]). Furthermore, a defendant moving for dismissal under CPLR 3211(a)(5) must make a prima facie showing that one or more causes of action set forth in the complaint are time barred under an applicable period of limitations (*see* ***Phillip F. v Roman Catholic Diocese of Las Vegas***, 70 AD3d 765, 894 NYS2d 125 [2d Dept 2010]; ***6D Farm Corp. v Carr***, 63 AD3d 903, 882 NYS2d 198 [2d Dept 2009]). Where such a showing is made, it is incumbent upon the plaintiff to aver evidentiary facts sufficient to establish that the statute is inapplicable due to an available exception or otherwise or that a question of fact exists with respect thereto (*see* ***Santo B. v Roman Catholic Archdiocese of N.Y.***, 51 AD3d 956, 861 NYS2d 674 [2d Dept 2008]; ***Seift v New York Med. Coll.***, 25 AD3d 686, 808 NYS2d 731 [2d Dept 2006]).

Theodore Leissing, who is employed by National Grid Service Company USA, Inc. as an area manager for site investigation and remediation, states in his affidavit that he was in charge of the day to day activities associated with the Bay Shore MGP remediation project from the 1990s until around 2005. He states that in 1999 the property owner of 20-22 North Clinton Avenue was included in KeySpan's "door-to-door" canvassing of the remediation area and was informed of the remediation status. The affidavit explains that the notification program involved a team of environmental, government and community relations employees who went door to door to advise area residents of the Bay Shore MGP issues involving the groundwater plume, the remediation activities that were taking place, and the investigation that KeySpan was conducting. It states that a letter describing the activities, as well as a hotline number, was given to residents, and that the letter was left as a door hanger for properties where the occupant was not present. Leissing's affidavit states that in April 2002, the NYSDEC sent a letter to residents with a survey related to the environmental investigation of the former Bay Shore MGP site. Leissing states that according to KeySpan's records, Arthur Mauriello, presumably a tenant of plaintiffs, participated in the "Private Well and Basement Survey." He states that KeySpan's records show that the survey response from Mr. Mauriello, which noted that there was an occasional odor in the basement, was received on May 3, 2002. He also states that the survey was sent to plaintiffs at the address 1279 Nova Drive, Waynesboro, Virginia, 22980, but that no response was received.

Further, Leissing states in his affidavit that KeySpan's records show Mauriello and another tenant, Darra DiGeronimo, were on KeySpan's fact sheet mailing list in January 2003, April 2004, and September 2004. He states that the records also show that plaintiffs and their tenants received fact sheets dated March 2006, February 2007, April 2007, among other more recent fact sheets. He further states that in a July 2003, Robert Nicholson, a former plaintiff in a similar litigation with KeySpan, sent a mass mailing, with plaintiffs' address listed as PO Box 3147 in Staunton, Virginia, urging property owners to commence legal action due to the impact of the hazardous waste on the subject area.

Leissing lists in his affidavit the dates and locations of the various public meetings held beginning in January 29, 2003. He states that the public meetings were attended by representatives of the NYDEC and discussed the remediation project. He also lists the various televised and written media reports that informed residents of the remediation project. He further states in his affidavit that a former plaintiff in a similar lawsuit hand-delivered flyers to residents to inform them of a public meeting regarding the contamination. Leissing states in his affidavit that the owners of the EXPO Tire store began posting signs offering information about the remediation starting in June 2005. He states that

from early 2007 until 2009, remediation work along North Clinton Avenue, both north and south of the railroad tracks, was highly visible to the community, and included the closure of North Clinton Avenue for over two months.

Jon Tsakis states in his affidavit that prior to his divorce from Cheryl Tsakis, they were joint owners of the subject property. He states that he and Cheryl resided at 1279 Nova Drive in Waynesboro, Virginia from 2001 until about 2013. He states that they lived at the subject address from 1990 to 1992 before moving to Virginia, and lived in Staunton, Virginia prior to moving to Waynesboro. He states that after they moved, they rented the subject property, which is improved with a four-family residence. He states that since moving to Virginia, he visited the subject property one or two times a year over the past 20 years. He states that they did not learn about the contamination until late 2007, when he observed a written notice in the window of a building on Union Boulevard. He states that he did not see any fact sheets prior to the commencement of this action, and that mail to the subject property was not forwarded to their home in Virginia. He further states that he never received a letter from Nicholson in 2003, and that they did not maintain a post office address in Staunton Virginia and had already moved to Waynesboro in 2001.

Here, the record demonstrates that plaintiffs had knowledge of facts which would put a reasonable person on notice of the need to undertake further investigation into the contamination events as early as 1999 door-to-door canvassing. Moreover, in 2002, KeySpan began sending notices to the subject premises regarding the investigation and remediation project. The Court finds such knowledge was sufficient to charge the plaintiff with discovery of the primary condition on which his claims are based (*see* ***MRI Broadway Rental, Inc., v United States Mineral Prod. Co.***, *supra*; ***Benjamin v Keyspan Corp.***, 104 AD3d 891, 963 NYS2d 128 [2d Dept 2013]). It is also sufficient to place a reasonable person on notice of the need to undertake further investigation to ascertain the scope of the injury (*see* ***Oliver v Chevrolet Mobil Oil Corp.***, *supra*). As to plaintiffs' cause of action seeking medical monitoring, it is dismissed as New York does not recognize an independent cause of action for medical monitoring (*see* ***Caronia v Philip Morris USA, Inc.***, 22 NY3d439, 982 NYS2d 40 [2013]; *see also* ***Ivory v International Bus. Machs. Corp.***, 116 AD3d 121, 983 NYS2d 110 [3d Dept 2014]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs contend that they did not learn about the contamination until around 2007 to 2008, and that they did not receive any of the fact sheets from KeySpan regarding the clean-up. However, with numerous sources including KeySpan and DEC mailings, the mailing by Mr. Nicholson, public meetings, neighbors, news media and visible signs of the remediation being performed, plaintiffs had sufficient notice. While plaintiffs argue that they lived out-of-state, that their tenants did not forward the literature from KeySpan, and that they did not receive the mailing from Mr. Nicholson, plaintiffs aver in their affidavit that they visited the subject property once or twice annually and do not deny receiving the "Private Well and Basement Survey," which was sent to their correct address in Waynesboro, Virginia. Furthermore, plaintiffs assert that even if they did receive the fact sheets and knew about the MGP contamination, defendants' fraudulent representations lulled them into not commencing litigation earlier. However, the expert affidavits submitted by plaintiffs merely criticize KeySpan's remediation plan, which was approved by the NYSDEC, and contend that, without testing of the subject property, KeySpan cannot conclude that it is not contaminated. Thus, it cannot be said that plaintiffs reasonably relied upon any deceptive acts or

statements of the defendants or their agents which effectively prevented them from commencing this action in a timely fashion (*see* ***Putter v North Shore Univ. Hosp.***, 7 NY3d 548, 825 NYS2d 435 [2006]; ***Phillip F. v Roman Catholic Diocese of Las Vegas***, 70 AD3d 765, 894 NYS2d 125 [2d Dept 2010]). Accordingly, plaintiffs' complaint is dismissed as time barred.

Dated: 1/7/16

THOMAS F. WHELAN, J.S.C.