[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CENTURY INDEMNITY COMPANY,

Plaintiff,

- v -

BROOKLYN UNION GAS COMPANY,

Defendant.

INDEX NO. 603405/01

MOTION SEQ. NO. 021

The following papers were read on this motion by plaintiff to amend the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Defendant Brooklyn Union Gas Company (Brooklyn Union) moves, by Order to Show Cause (OSC), for leave to amend its sixth amended complaint. In this action, Brooklyn Union seeks a declaration that Century Indemnity Company (Century) is obligated to pay or reimburse Brooklyn Union for its defense costs and pay coverage to Brooklyn Union for liabilities it incurs in connection with its manufactured gas plant sites (MGP Sites).

In its proposed seventh amended complaint for declaratory judgment and damages, Brooklyn Union seeks to make essentially the following changes:

1. eliminating all defendants other than Century Indemnity Company;

2. adding two MGP Sites (the Gowanus Canal and Newtown Creek) to the ten already listed in its sixth amended complaint;

3. redefining the period liability for alleged environmental property damage that occurred as solely "the periods of insurance at issue in this action," and deleting the information and belief allegation and the reference to the period which "began when MGP operations

commenced ..., or shortly thereafter" (*see e.g.* redlined copy of proposed Seventh Amended Complaint § 15, annexed to Affirmation of Jay T. Smith, exhibit B); and

4. updating the regulatory involvement at the Citizens Works MGP Site.

DISCUSSION

Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is "prejudice or surprise resulting directly from the delay," or if the proposed amendment "is palpably improper or insufficient as a matter of law." A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]." Prejudice to warrant denial of leave to amend requires "'some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position'" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept2012] [internal citations omitted]).

1. CHANGES REGARDING PARTY DEFENDANTS

Brooklyn Union seeks to drop Certain Underwriters of Lloyd's and London Market Insurance Companies as defendants to reflect its settlement with those insurance companies. Century does not oppose this aspect of Brooklyn Union's motion, and it is therefore granted.

2. ADDITION OF THE GOWANUS CANAL AND NEWTOWN CREEK AS COVERED SITES

A. THE GOWANUS CANAL

The Gowanus Canal is a man-made canal in Brooklyn, New York. On or about March 2, 2010, the United States Environmental Protection Agency (EPA) listed the Gowanus Canal on the National Priorities List of Superfund Sites, which was established pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (*see* 42 USC §§ 9601 et seq.; 40 CFR Pt. 300, App. B).

Brooklyn Union seeks to add allegations that the New York State Department of Environmental Conservation (DEC) and the EPA have each ordered it to investigate

environmental conditions at the Gowanus Canal, and that the EPA has alleged that Brooklyn Union is jointly and severally liable under CERCLA for the investigation and remediation of the canal as a result of operations at the Citizens Works, Fulton Municipal Works and Metropolitan Works MGPs, all sites which were included in Brooklyn Union's sixth amended complaint.

Brooklyn Union contends that its proposed amendment merely seeks to update events that have occurred since the last amended complaint was filed in January 2006, by including the listing of the site on the National Priorities List and the Administrative Consent Order and Settlement Agreement for Investigation, Sampling and Evaluation entered into between the EPA and Brooklyn Union on April 28, 2010 (Gowanus Canal Agreement). The Gowanus Canal Agreement requires Brooklyn Union to investigate the Gowanus Canal as a result of contamination which originally emanated from the three named Brooklyn Union MGP Sites.

Brooklyn Union further argues that the EPA alleges that the contamination in the canal is indivisible, and because liability pursuant to CERCLA is joint and several, it may ultimately be held liable for damages far beyond those caused by the wastes from its plants, i.e. "all costs of removal or remedial action" (*see B.F. Goodrich Co. v Murtha*, 958 F2d 1192, 1198 [2d Cir 1992] ["Where the environmental harm is indivisible liability is joint and several"]). Moreover, a defendant seeking to avoid joint and several liability bears the burden of establishing that the harm is, in fact, divisible and a reasonable basis for apportionment exists (*see Burlington N. and Santa Fe Ry. Co. v U.S.*, 556 US 599, 614 [2009]).

According to Brooklyn Union, Century initially took the position that it would not oppose an amendment to add allegations regarding the Gowanus Canal if the note of issue were withdrawn;[1] however, it later changed its position and opposed the amendment arguing that, by

---

[1] On November 24, 2009, Brooklyn Union filed a note of issue with respect to the Citizens Works, Clifton Works, Coney Island Works and Greenpoint Works sites, and agreed to limit the initial trial to issues covering insurance coverage for the Citizens Works site. Fulton Municipal Works and Metropolitan Works, the other two MGP Sites impacting the Gowanus Canal do not appear to have been included in

raising the matter of joint and several liability, Brooklyn Union was impermissibly seeking coverage for "non-MGP liabilities."

Century opposes the amendment on several bases. First, Century argues that Brooklyn Union has known about the listing of the Gowanus Canal as a Superfund Site, pursuant to CERCLA, since 2009, and entered into the Gowanus Canal Agreement with the EPA in April 2010, but did nothing to amend its complaint until August 2012. Century notes that in a brief filed by Brooklyn Union on June 2, 2010, in connection with another motion in this consolidated case, Brooklyn Union took the position that contamination of the Gowanus Canal is not relevant to the issues in the Citizens Works site trial, that all of the other potentially responsible parties (PRP's) have not yet been determined by the EPA, and that Brooklyn Union would be prejudiced if the jury formed the mistaken impression that Brooklyn Union was responsible for all of the contamination in the Gowanus Canal.

Characterizing Brooklyn Union's potential liability for the wastes of other PRP's through the application of joint and several liability as "non-MGP liabilites," Century argues that it would be severely prejudiced if it now had to litigate issues regarding the wastes of other PRP's for which no discovery has been conducted. Thus, according to Century, leave to amend should be denied (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:5, at 477 ["lateness coupled with significant prejudice to the other side, [constitute] the very elements of the laches doctrine"]).

In reply, Brooklyn Union contends that it is Century that has changed its position regarding the inclusion of allegations regarding the Gowanus Canal, in that initially it was Century that urged the court to include remediation of the Gowanus Canal in the trial (*see*

---

the note of issue.

Memorandum of Law in Support of Century's Motion to Determine Coverage for the Gowanus Canal as Part of the Citizens Site Trial, dated May 14, 2010, at 1 ["The trial should include Brooklyn Union's liability for remediation of the adjoining Gowanus Canal to the extent that liability 'arises out of,' was 'associated with,' or 'emanated from' Brooklyn Union's operations at the site"]).

It appears to the Court that both parties have switched positions to some degree regarding whether the trial should include the question of coverage for contamination of the Gowanus Canal resulting from the operations of the Citizens Works site. What now appears to be the main focus of Century's opposition is the question of Brooklyn Union's potential joint and several liability and whether that liability should be included in the upcoming trial.

Here, given that Century's 2010 motion sought to determine coverage for the Gowanus Canal as part of the Citizens Works MGP Site trial, Century cannot claim surprise in opposition to the herein motion. In light of the fact that very little to no discovery has been conducted regarding the contamination generated by PRPs other than Brooklyn Union, it is possible that Century would be prejudiced if the issue of coverage for remediation based on joint and several responsibility were part of the trial. However, the complaint as a whole involves numerous MGP Sites, and it was already contemplated that the initial trial would deal only with the Citizens Works site, and not the other two sites alleged in the complaint that are adjacent to the Gowanus Canal, Fulton Municipal Works and Metropolitan Works. Thus, even if the requested amendment is permitted, the trial of the Citizens Works Site should go forward without including the new allegations in the proposed Seventh Amended Complaint regarding the Gowanus Canal.

Century also argues that the proposed claims are meritless, and, therefore, Brooklyn Union's motion to amend should be denied. Century first contends that there is nothing in the

Gowanus Canal Agreement that asserts that Brooklyn Union has liability for pollution other than that generated by its MGP Sites. Century further argues that Brooklyn Union has not yet been held jointly and severally liable for the "non-MGP contamination" in the canal and that the issue of such potential liability is non-justiciable because it is not yet a live controversy. Therefore, Century maintains that Brooklyn Union is impermissibly seeking an advisory opinion.

In its reply memorandum, Brooklyn Union appears to backtrack somewhat from its proposed claim that "EPA has alleged, *inter alia,* that Brooklyn Union is jointly and severally liable under CERCLA for the investigation and remediation of all environmental property damage at the Gowanus Canal, regardless of whether Brooklyn Union caused such damage" (Proposed Seventh Amended Complaint, ¶ 31). In support of its claim, Brooklyn Union does not point to any specific statement made by the EPA in the Gowanus Canal Agreement, but rather relies on the EPA's statement in the Support Document for its proposal to add the Gowanus Canal to the National Priorities List that, although there are several hazardous substances in the canal, the origin of the substances has not been identified and the particular location in the canal cannot be determined (*see* Support Document for the Revised National Priorities List Final Rule - Gowanus Canal, at 62, annexed to Affidavit of Tracy L. Bell, exhibit 1). Brooklyn Union further relies on the many cases citing the well-established principle that liability under CERCLA is joint and several (*see e.g. Niagara Mohawk Power Corp. v Chevron U.S.A., Inc.,* 596 F3d 112, 121 [2d Cir 2010] ["Section 107 allows for complete cost recovery under a joint and several liability scheme; one PRP can potentially be accountable for the entire amount expended to remove or remediate hazardous materials"]; *New Castle County v Halliburton NUS Corp.*, 111 F3d 1116, 1121 [3d Cir 1997] ["In general, a section 107 cost recovery action also imposes joint and several liability on potentially responsible persons"]; *Paramount Communications v Horsehead Indus.*, 231 AD2d 40, 42 [1st Dept 1997] ["CERCLA

imposes joint and several liability on past as well as current owners or operators"]).

The fact that Brooklyn Union has not been formally adjudicated to be jointly and severally liable for the remediation of the Gowanus Canal, does not preclude Brooklyn Union from making those allegations in its complaint. Further, Century can contest that the EPA has made such a specific allegation regarding the Gowanus Canal in its answer. Regardless of whether the EPA has made such a specific allegation about the nature and extent of Brooklyn Union's liability for remediation of the Gowanus Canal, Brooklyn Union is not precluded from seeking insurance coverage for its liabilities in connection with the Gowanus Canal, since the issue of joint and several liability goes to the extent, rather than the existence, of liability.

Pursuant to the Gowanus Canal Agreement, Brooklyn Union is required to undertake certain responsibilities with respect to the investigative phase at the site. Those responsibilities appear to relate to a groundwater monitoring well installation, sampling and analysis work plan and reimbursement to the EPA for certain response costs of the EPA. According to Brooklyn Union, it has already assisted the EPA in conducting the remedial investigation of the site (*see* Affidavit of Tracy L. Bell (Bell Aff.) ¶¶ 10 & 11). It appears from the draft Gowanus Canal Remedial Investigation Report (RI) and draft Feasibility Study (FS) for the site based upon the remedial investigation completed by the EPA in January 2011, that the investigation of the site is not limited to the contaminants in the Gowanus Canal that were generated exclusively by Brooklyn Union and its MGPs (*see* Bell Aff., exhibits 4, 5). In fact, the draft FS specifically refers to a 140-year history of pollution from a variety of sources (*id.*, exhibit 5 at 1-15). Nor do the various remedial alternatives appear to distinguish between and among the contaminants emanating from different PRPs (*id.* at 4-7). Although ultimately, Brooklyn Union's liability may be limited to that portion of the costs of remediation of the Gowanus Canal that are roughly proportionate to the amount of contamination it contributed to the canal, it need not wait until

that determination is made in order to litigate the availability of any insurance coverage under Century's policies (*see e.g. State Farm Fire & Cas. Co. v LiMauro,* 103 AD2d 514, 518 [2d Dept 1984], *aff* 65 NY2d 369 [1985] [litigation regarding availability of excess coverage permitted where there is a potential that the excess coverage might be reached)]. This is particularly true where, with respect to these allegations, the case is at a pleadings stage and not at the stage of a motion for summary judgment (*see e.g. Brockman v Cipriani Wall St.*, 96 AD3d 576, 577 [1st Dept 2012] [motion for summary judgment on claim of common-law indemnification premature where no finding of responsibility for plaintiff's accident had yet been made]). Furthermore, should Brooklyn Union have waited until the extent of its liability were determined by the EPA, Century would doubtlessly have raised a defense based upon Brooklyn Union's delay.

Citing *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.* (98 NY2d 208, 224 [2002])(the Con Ed case), and *Long Is. Light. Co. v Aetna Cas. & Surety Co.* (Sup Ct, NY County, Jan. 11, 1999, Gammerman, J., index No. 604715/97) (the LILCO case), Century contends that, even assuming Brooklyn Union is ultimately found jointly and severally liable by the EPA, its insurance policies only cover liability due to property damage arising out of Brooklyn Union's operations, and not pollution caused by others. However, neither case cited by Century deal squarely with the situation before this Court.

Relying on the Con Ed case, Century asserts that, under its insurance policies, coverage is only triggered by contamination which occurred during the policy period. Century argues that Brooklyn Union's complaint does not and cannot allege the time period during which the contamination caused by other PRP's occurred. Therefore, according to Century, the allegations are fatally defective. In the Con Ed case, however, the issue under consideration was not whether Con Ed's insurance policies provided coverage for joint and several liability, rather whether it could "collect its total liability – 'all sums' – under any policy in effect during the

50 years that the property damage occurred, up to that policy's limit" which is referred to as "joint and several allocation" (*Consolidated Edison Co. of N.Y.*, 98 NY2d at 222). Here, the question is whether coverage will apply should the contamination to the Gowanus Canal emanating from Brooklyn Union's Citizens Works site be found indivisible from the other wastes at the site, and therefore, Brooklyn Union be held jointly and severally liable for the cleanup.

In the LILCO case, in rejecting coverage for pollution caused by parties other than the policyholder, the court specifically noted that LILCO, the insured, "'had no legal or factual relationship, connection or involvement with the damaged property' during the policy period of the insurance" (*Long Is. Light. Co.*, at *6). That does not appear to be the situation here.

With respect to Century's contention that Brooklyn Union is free to bring claims regarding the Gowanus Canal in another action, the Court concludes that such an approach would likely result in a duplication of efforts that would unnecessarily burden the courts.

Thus, given the general principle that leave to amend should be freely given, there is insufficient reason for denying Brooklyn Union's motion to amend the complaint. Granting that motion does not mean that the question of coverage for the Gowanus Canal will be part of the Citizens Works trial. Similarly, Century is not precluded from raising legal objections to the allegations regarding the Gowanus Canal in its answer or future dispositive motions.

B. NEWTOWN CREEK

Newtown Creek, a waterway that forms a border between Brooklyn and Queens, like the Gowanus Canal, has been listed by the EPA on the National Priorities list (*see* 40 CFR Part 300, App B). On June 16, 2011 and July 7, 2011, Brooklyn Union and the EPA, respectively, signed an Administrative Agreement and Consent Order for Remedial Investigation/Feasibility Study regarding an investigation of Newtown Creek (Newtown Creek Agreement). Several other potentially responsible parties signed the Newtown Creek Agreement as well.

Brooklyn Union argues that since the filing of the sixth amended complaint, Newtown Creek has been the subject of EPA activity and that, again like the Gowanus Canal, the EPA has alleged that Brooklyn Union is jointly and severally liable for the cost of investigation and remediation as a result of its ownership and operation of MGPs in the area (Equity Works and Greenpoint), both of which are named in the sixth amended complaint.[2] According to Brooklyn Union, there has been no active discovery with respect to Greenpoint or Equity Works, thus Century will not be prejudiced if discovery must be conducted with respect to Newtown Creek when it is conducted with respect to the two individual MGP Sites.

Century has not made any separate arguments with respect to Brooklyn Union's motion as it applies to Newtown Creek, and, therefore, Brooklyn Union's motion is granted, for the same reasons that apply to its allegations regarding the Gowanus Canal.

3. REDEFINITION OF THE PERIOD FOR LIABILITY FOR PROPERTY DAMAGE FOR ALL SITES

Brooklyn Union seeks to narrow the period of property damages by eliminating the information and belief allegations and the reference to the period of time when MGP operations commenced at the respective MGP Sites, relying instead on liability which "occurred throughout" the periods of insurance coverage at issue in the litigation. Brooklyn Union argues that it is not necessary to prove damage prior to the period of the policy in order to trigger coverage, and that its previous "information and belief" allegations did not constitute judicial admissions (*see Sound Communications, Inc. v Rack & Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011]).

Century opposes the amendment arguing that it is prejudiced by Brooklyn Union's effort

---

[2] In the Newtown Creek Agreement, the EPA specifically alleges that all of the respondents are jointly and severally liable for carrying out the agreement (*see* Bell Aff., exhibit 7at 3).

to recharacterize the property damage as having occurred during the policy periods, despite Brooklyn Union's prior information and belief allegations that the property damage "began when MGP operations commenced" at the respective MGP sites (*see* Sixth Amended Complaint ¶¶ 17, 21, 24, 27, 30, 33, 36, 39, 42, and 45). As Brooklyn Union argues, this proposed amendment does not foreclose Century from relying on allegations regarding the occurrence of damage from a period prior to the policy period as a defense. Thus, Brooklyn Union's motion is granted with respect to its proposed changes regarding the period of property damage.

4. CLARIFICATION REGARDING REGULATORY INVOLVEMENT AT THE CITIZENS WORKS SITE

The sixth amended complaint alleged, with respect to the Citizens Works site that the City of New York demanded that Brooklyn Union participate in the investigation and cleanup of the site. Brooklyn Union seeks to eliminate the allegations regarding the City of New York, substituting allegations that the DEC has now formally ordered Brooklyn Union to investigate the site and to clean up any contamination from the former MGP under DEC's oversight.

Century opposes the amendment, contending that the allegations regarding the demand by the City of New York that Brooklyn Union investigate and clean up the Citizens Works site support Century's late notice defense. But again, such a change in Brooklyn Union's allegation doesn't preclude Century from introducing evidence or making arguments concerning the earlier role of New York City in support of a late notice defense.

CONCLUSION

Accordingly, it is hereby

ORDERED that Brooklyn Union Gas's motion for leave to amend its complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is

further,

ORDERED that Century Indemnity Company shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further,

ORDERED that counsel are directed to appear for a pre-trial conference in Room 341, 60 Centre Street, Part 7 on May 23, 2013, at 11:00 am.

This constitutes the Decision and Order of the Court.

Dated: 4-9-13

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**