Reeves v City of Newburgh
2018 NY Slip Op 33882(U)
May 14, 2018
Supreme Court, Orange County
Docket Number: EF007713-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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ROSEMARY REEVES, et al.,

Plaintiffs,

-against-

CITY OF NEWBURGH,

Defendant.

----------x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF007713-2017
Motion Date: March 27, 2018

The following papers numbered 1 to 5 were read on Defendant's motion for dismissal of the complaint and for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Affirmation in Opposition / Exhibits - Memorandum 4

Reply Memorandum 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiffs, thirty (30) residents of the City of Newburgh, brought this action alleging *inter alia* negligence on the part of the defendant City of Newburgh in the operation and maintenance of its municipal water distribution system. Each of the Plaintiffs alleges that he or she has resided in the City of Newburg for years, regularly consuming, bathing in, washing and cooking with City of Newburgh water. Plaintiffs further allege that they have suffered injuries to person and property due to exposure to perfluorooctane sulfonate ("PFOS") entering the City's water

supply as the result of activities conducted outside the City on the Stewart Air National Guard Base ("ANGB") Site and surrounding areas located at Stewart International Airport, 2.5 miles west of the City. Plaintiffs assert causes of action for negligence, failure to warn, trespass and private nuisance, and seek to recover money damages – for personal injuries, property damage, pain and suffering, medical expenses, medical monitoring, etc. – incurred by reason of the contamination by PFOS of their water.

Pertinent background concerning this action is set forth in this Court's prior Decisions and Orders in the related cases of *Matter of Coston v. City of Newburgh*, Index No. EF002562-2017, and *Matter of Sampson v. City of Newburgh,* Index No. EF002214-2017:

> The [ANGB] property was originally donated to the City of Newburgh in 1930 for use as a municipal airport. Prior to this, the land was used mostly for agricultural purposes. In 1941, the City turned over the land to the US Army for use as a flight training facility for West Point cadets. In 1948, the US Army transferred much of the ANGB to the US Air Force. The aviation facilities were turned over to the State of New York in 1969. In 1970, the military side was temporarily deactivated. In the 1970s the civilian side of Stewart was operating as an airport and in 1983, the US Air Force reopened the military side of Stewart with the establishment of the 105th Air Lift Wing of the New York Air National Guard.
>
> Aqueous film-forming form (AFFF), in which [PFOS] is a key ingredient, has been used over the years at the ANGB to put out fires and in training exercises.
>
> The bedrock beneath Stewart ANGB is predominantly a thinly bedded and fractured Martinsburg Shale, occurring at depths between 45 and 50 feet below grade near the base. Groundwater at the site is approximately 30 feet bgs and flows from the northwest to the southeast.
>
> Past operations at the ANGB include the use of AFFF used by the Air Force and other Defense Department and civilian agencies since 1970 to combat petroleum-based fires, which contains both PFOA and PFOS. Upon information and belief, the New York Air National Guard used this foam at the ANGB.
>
> Groundwater samples were collected at the ANGB and analyzed for perfluorinated compounds (PFCs). Samples collected from existing monitoring wells at the ANGB showed concentrations as high as 3,160 part per trillion (ppt), greater than the USEPA health advisory level of 70 ppt. Samples collected from catch basins located on the

> ANGB detected concentrations of PFCs as high as 6,990 part per trillion (ppt). PFCs have migrated off-site into Lake Washington and its tributaries. PFOS was detected in Lake Washington at a concentration of 243 ppt. Lake Washington serves as the City of Newburgh's primary water supply.
>
> The sample program showed that groundwater and surface water downgradient (Lake Washington) of the base has been impacted by PROS and PFOA, associated with AFFF which has been used at the base for fire-fighting, fire training, and fire suppression systems.
>
> ....
>
> The 2015 City of Newburgh annual drinking water quality report reflected levels of PFOS contamination ranging from 140-170 ppt. All results were below the then-existing EPA national recommended limit on PFOS in drinking water of 200 ppt. On April 25, 2016, the DEC issued a temporary emergency rule declaring PFOS, PFOA and related chemicals to be hazardous substances under state law, thereby allowing DEC to regulate and track the chemicals and remediate contaminated sites.
>
> On May 2, 2016, the City of Newburgh declared a state of emergency, implemented restrictions on water usage due to the discovery of PFOS in Washington Lake, its main water supply, and switched its drinking source first to its Browns Pond backup supply, and subsequently to the New York City Catskill Aqueduct. On May 19, 2016, the EPA issued a health advisory for lifetime exposure to PFOS, reducing the recommended level in drinking water from 200 ppt. to 70 ppt. By May 20, 2016, it had been widely publicized that (1) the EPA had instituted stricter guidelines for PFOS, such that the level in water samples from Lake Washington was more than twice the updated EPA guideline, and (2) the City of Newburgh had closed Lake Washington, switched to an alternative water supply, and applied for disaster relief under the state's Superfund program. On August 12, 2016, the DEC declared the Stewart Air National Guard Base a State Superfund Site.

(*See, Matter of Coston v. City of Newburgh, supra; Matter of Sampson, supra*).

Defendant moves to dismiss the Complaint herein for (1) failure to effect timely service of a Notice of Claim as required by General Municipal Law ("GML") §50-e, and (2) failure to state a cause of action.[1] In response to Defendant's motion, the claims of twenty-four (24) of

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[1]Defendant's additional motion for summary judgment is premature in that Defendant has yet to file an Answer to the Complaint. CPLR §3212(a) provides that any party may move for summary judgment only "after issue has been joined." The Court declines at this juncture to convert Defendant's motion for dismissal to one for summary judgment pursuant to CPLR §3211(c).

the named Plaintiffs have been withdrawn, leaving only those of plaintiffs Diane and Ronald Hebrank, Michael Gorenstein, Maribel and Roy Hamilton and their minor child, R.H.

A. The Timeliness of Plaintiffs' Notices of Claim

1. General Municipal Law §50-e

"Timely service of a notice of claim is a condition precedent to a lawsuit sounding in tort and commenced against a municipality." *Matter of Ramos v. Board of Education,* 148 AD3d 909, 910 (2d Dept. 2017). *See,* GML §50-i(1). GML §50-e(1) provides:

> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation...the notice of claim shall comply with and be served in accordance with the provisions of this section within 90 days after the claim arises....

When a claim involving injury caused by the latent effects of exposure to toxic substances "arises" for purposes of GML §50-e is determined by resort to the standard set forth in CPLR §214-c, the toxic tort statute of limitations. *See,* CPLR §214-c(3); *Searle v. City of New Rochelle,* 293 AD2d 735, 736-737 (2d Dept. 2002); *Hedlund v. County of Tompkins,* 235 AD2d 980 (3d Dept. 1997); *Krogmann v. Glens Falls City School District,* 231 AD2d 76, 77-79 (3d Dept. 1997).

CPLR §214-c provides that "an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances" shall, for purposes of GML §§ 50-e and 50-i, be "deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through reasonable diligence the injury should have been discovered, whichever is earlier." CPLR §214-c(3).

Defendant, as the moving party, bears the initial burden of demonstrating *prima facie* that a required Notice of Claim was not timely served, and must therefore establish when the plaintiff's cause of action accrued. *See, Vasilatos v. Dzamba,* 148 AD3d 1275, 1277 (3d Dept. 2017); *Hill v. New York City Health & Hospitals Corp.,* 147 AD3d 430 (1st Dept. 2017); *Larkin v. Rochester Housing Authority,* 81 AD3d 1354, 1355 (4th Dept. 2011); *Niagara Frontier Transp. Auth. v. City of Buffalo Sewer Auth.,* 1 AD3d 893, 895 (4th Dept. 2003); *Leale v. New York City Health & Hospitals Corp.*, 222 AD2d 414, 415 (2d Dept. 1995).

2. Property Damage Claims

Claims of injury to property caused by the latent effects of exposure to toxic substances are generally held to arise or accrue upon discovery of the contamination. *See, Suffolk County Water Authority v. Dow Chemical Co., supra,* 121 AD3d at 58; *Water Authority of Western Nassau County v. Lockheed Martin Corporation,* 276 AD2d 624, 625 (2d Dept. 2000).

This Court previously held in *Matter of Coston v. City of Newburgh, supra,* and *Matter of Sampson, supra*, and holds again here, that claims for or predicated upon *injury to property* resulting from PFOS contamination of the City of Newburgh public water supply arose no later than August 2016, when the New York State Department of Environmental Conservation declared the Stewart Air National Guard Base a State Superfund Site, and arguably arose as early as May 2016, when the PFOS contamination of City of Newburgh water under the EPA's revised safety standard was documented and well publicized. With respect to the Plaintiffs' property claims, then, the Notices of Claim served in June 2017 were untimely by a matter of some ten (10) to thirteen (13) months.

Consequently, all of Plaintiffs' claims for or predicated upon injury to property must be dismissed. This includes (1) the causes of action for negligence and failure to warn, except insofar as they seek damages for personal injury resulting from exposure to PFOS, and (2) the causes of action for trespass and private nuisance in their entirety.

3. Personal Injury Claims

For purposes of the toxic tort "discovery rule", applicable by virtue of CPLR §214-c(3) to the Plaintiffs' claims in this case, discovery occurs, and the cause of action is thus deemed to accrue, when the injured party discovers "the primary condition on which the claim is based." *See, Matter of New York County DES Litigation,* 89 NY2d 506, 509 (1997).

> "[D]iscovery 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'" (*MRI Broadway Rental v. United States Min. Prods. Co.,* 92 NY2d 421, 429..., quoting *Matter of New York County DES Litig.,* 89 NY2d 506, 509...; *see Broich v. Nabisco, Inc.,* 2 AD3d 474...). "A plaintiff's 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" (*Searle v. City of New Rochelle,* 293 AD2d 735, 736...; *see Matter of New York County DES Litig.,* 89 NY2d at 506, 509...).

Byrd v. Pinecrest Manor, 82 AD3d 813, 815 (2d Dept. 2011) (emphasis added). *See also, Kamath v. Building New Lifestyles, Ltd.,* 146 AD3d 765, 767 (2d Dept. 2017); *Suffolk County Water Authority v. Dow Chemical Co.,* 121 AD3d 50, 57 (2d Dept. 2014).

Thus, claims of personal injury caused by the latent effects of exposure to toxic substances are generally held to arise or accrue at the time the plaintiff begins to experience symptoms of the injury for which he complains. *See, e.g., Kamath v. Building New Lifestyles, Ltd., supra; Byrd v. Pinecrest Manor, supra; Searle v. City of New Rochelle, supra; Chavious v.*

Tritec Asset Management, Inc., 284 AD2d 362, 363 (2d Dept. 2001); *Krogmann v. Glens Falls City School District, supra.* In any event, such claims accrue no later than the date when it is ascertained that the plaintiff has elevated levels of the toxic substance in his blood. *See, Matter of Turner v. New York City Housing Authority,* 243 AD2d 636, 637 (2d Dept. 1997); *Perry v. City of New York,* 238 AD2d 326 (2d Dept. 1997).

Although each of the remaining Plaintiffs has alleged that he/she suffers from a specified medical condition as a direct result of exposure to PFOS, Defendant has adduced no evidence as to when the Plaintiffs began to experience symptoms thereof or when such conditions were first diagnosed. Moreover, Defendant has adduced no evidence contradicting Plaintiffs' allegations that they sought PFOS blood testing, learned in March or April of 2017 that they had elevated levels of PFOS in their blood, and served Notices of Claim in June 2017, within 90 days of the date they received their blood test results.

Instead, invoking the rule that Plaintiffs' causes of action are "deemed to have accrued ... on the date when *through reasonable diligence the injury should have been discovered*" [CPLR §214-c(3)], Defendant contends that their personal injury claims like their property claims arose in May of 2016, when PFOS contamination of the City of Newburgh public water supply was widely publicized, or, alternatively, in November 2016, when the New York State Department of Health first offered City of Newburgh residents the opportunity for PFOS blood testing.

As noted above, it was Defendant's obligation to establish *prima facie* the date when, through reasonable diligence, Plaintiffs' injuries should have been discovered. *See, especially, Larkin v. Rochester Housing Authority, supra.* It may well be that a City of Newburgh resident diagnosed with, or suffering symptoms of, the medical conditions alleged in the Complaint

should in the exercise of reasonable diligence have discovered his injury upon revelation of the PFOS contamination of the City water supply. However, despite having had the opportunity to conduct GML §50-h hearings, Defendant as noted above adduces no evidence as to when the Plaintiffs began to experience symptoms or when their conditions were first diagnosed. Mere notice of the PFOS contamination in May 2016, standing alone, does not suffice; militating against any such conclusion is the fact that NYSDOH did not offer City of Newburgh residents blood testing until six (6) months later. Defendant's fallback position that Plaintiff's personal injury claims arose upon the *offer* of blood testing in November 2016 is arbitrary and irrational, as it implies Plaintiff's obligation to serve a Notice of Claim without awaiting the results of such testing. Defendant, despite having had the opportunity to conduct GML §50-h hearings, adduces no evidence when Plaintiffs actually availed themselves of the opportunity for blood testing, or how long it took for that testing to occur and the results to be communicated back to Plaintiffs.

In view of the foregoing, Defendant failed to meet its initial burden of establishing the date when through the exercise of reasonable diligence the Plaintiffs' injuries should have been discovered. Consequently, Defendant's motion to dismiss Plaintiffs' personal injury claims for failure to serve timely Notices of Claim must be denied.

B. The Legal Sufficiency of Plaintiffs' Personal Injury Claims

Defendant moves to dismiss Plaintiffs' claims for common law negligence and failure to warn on the purported grounds that (1) Plaintiffs have not alleged a valid claim for medical monitoring damages; (2) Defendant engaged in "state of the art" monitoring of the water supply, and lacked notice of any PFOS health hazard because PFOS levels in Lake Washington were at all times withing EPA standards until the EPA in May 2016 reduced the recommended PFOS

level in drinking water; and (3) compliance with EPA standards obviates Plaintiff's failure to warn claim as a matter of law.

1. The Legal Standard Governing CPLR §3211(a)(7) Motions

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), 'the standard is whether the pleading states a cause of action,' and, in considering such a motion, 'the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory' (*Sokol v. Leader,* 74 AD3d 1180, 1180-1181....)." *Jones v. Rochdale Village, Inc.*, 96 AD3d 1014, 1017 (2d Dept. 2012). *See, Lawrence v. Graubard Miller,* 11 NY3d 588, 595 (2008); *Mawere v. Landau,* 130 AD3d 986, 988 (2d Dept. 2015).

Where a defendant submits evidentiary material in support of a Section 3211(a)(7) motion to dismiss, "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v. Ginzburg,* 43 NY2d [268,] 275...). Yet, affidavits submitted by a defendant 'will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action' ' (*Lawrence v. Graubard Miller,* 11 NY3d 588, 595..., quoting *Rovello v. Orofino Realty Co.,* 40 NY2d [633,] 636....). Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' (*Guggenheimer v. Ginzburg,* 43 NY2d at 275....)." *Sokol v. Leader, supra,* 74 AD3d 1180, 1181-82 (2d Dept. 2010). *See, Mawere v. Landau, supra*; *Jones v. Rochdale Village, Inc., supra.*

2. Medical Monitoring Damages

"A threat of future harm is insufficient to impose liability against a defendant in a tort context." *Caronia v. Philip Morris USA, Inc.*, 22 NY3d 439, 446 (2013). However, where exposure to a toxic substances results in actual physical harm, the injured party may potentially recover damages to pay for medical monitoring. *Id.*, 22 NY3d at 446-452. *See also, Abusio v. Consolidated Edison Co. of New York*, 238 AD2d 454 (2d Dept.), *lv. denied* 90 NY2d 806 (1997); *Ivory v. IBM Corporation*, 116 AD3d 121, 130-131 (3d Dept. 2014).

Each of the remaining Plaintiffs has alleged that he/she suffers from a specified medical condition as a direct result of exposure to PFOS. At this stage of the proceedings, the allegations of injury are legally sufficient to support their claim for medical monitoring damages. Defendant having adduced no evidence that Plaintiffs do not suffer from the alleged medical conditions, or that those conditions did not result from exposure to PFOS, it has failed to demonstrate that the remaining Plaintiffs do not have a valid cause of action for medical monitoring

3. "State of the Art" Monitoring, Notice And Compliance With EPA Standards

In support of its motion, Defendant proffers a cursory affidavit by Wayne Vradenburgh, Jr., Superintendent of the Water Department of the City of Newburgh. Mr. Vradenburgh's affidavit does not establish that Defendant employed "state of the art" monitoring of the City water supply, or that Plaintiffs' allegation that Defendant had notice of a PFOS health hazard is simply "not a fact at all." Moreover, the legal authority proffered by Defendant does not establish that the City's compliance with EPA standards obviates Plaintiffs' failure to warn claim as a matter of law.

In short, Defendant has not established *conclusively* that Plaintiffs have no cause of action. Therefore, its motion to dismiss the remaining Plaintiffs' causes of action for common law negligence and failure to warn for failure to state a claim must be denied.

It is therefore

ORDERED, that the claims of all Plaintiffs in this action except Diane and Ronald Hebrank, Michael Gorenstein, Maribel and Roy Hamilton and their minor child, R.H., are dismissed in their entirety, and it is further

ORDERED, that Defendant's motion to dismiss the First and Second Causes of Action in the Complaint is granted in part, and the said Causes of Action, insofar as they assert claims for or predicated upon injury to property, are dismissed, and it is further

ORDERED, that Defendant's motion to dismiss the Third and Fourth Causes of Action in the Complaint is granted, and the said Causes of Action are dismissed, and it is further

ORDERED, that Defendant's motion is in all other respects denied.

The foregoing constitutes the decision and order of the court.

Dated: May 14, 2018
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE