INDEX NO. 17458-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 006 Motion Granted
007 Adjourned
010 Motion Granted

Present:
Hon. SANDRA L. SGROI

Motion #007 Adjourned to August 23, 2007
All Papers Remain in the Part

Adj'd Date: 7-19-07
Return Date: 5-3-07

ROBERT V. NICHOLSON, JEFF MATTERA, DONALD WATSON, JACK R. MELTZER, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

KEYSPAN CORP., KEYSPAN ENERGY CORP., KEYSPAN GAS EAST CORP., MARKETSPAN CORP., d/b/a KEYSPAN ENERGY and "JOHN DOES",

Defendants.

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Upon the following papers numbered 1 to 31 read on these Motions for various relief: Motion to reargue and for other relief(#006)1-7; Cross motion for partial summary judgment and for other relief (#007)8-14; Cross motion for leave to file a sur-reply and supporting papers

(#010) 15-17; Reply affirmation and affirmation in opposition to cross motion for summary judgment and supporting papers 18-23; Plaintiffs' Reply Affirmation in support of cross motion for partial summary judgment and in opposition to motion to reargue and supporting papers 24-30; Plaintiffs' Reply Memorandum in Support of Cross Motion for Partial Summary Judgment and in opposition to Keyspan's Motion to Reargue 31; it is,

ORDERED that the decision of this Court dated February 7, 2007 is modified to the extent that the penultimate sentence in the decision is modified to state "In applying this standard, the Plaintiffs' complaint alleges causes of action sounding in strict liability, private nuisance, public nuisance, trespass, ordinary negligence, gross negligence, and injunctive relief" thus deleting the cause of action for natural resource damage; and it is further

ORDERED that the order of this Court dated February 7, 2007 is further modified to dismiss the causes of action for the Plaintiffs' claims for unjust enrichment and natural resource damage; and it is further

ORDERED that the cross motion of the Defendants for leave to file a sur reply to the cross motion of the Plaintiffs is granted and the cross motion of the Plaintiffs for summary judgment is adjourned until August 23, 2007 in order to permit the Defendants to prepare and submit their sur reply.

In this civil action the Plaintiffs seek damages and injunctive relief based upon their exposure to contaminants from the alleged migration of these contaminants in an underground plume from a decommissioned manufactured gas plant located in Bay Shore that was formerly owned by predecessor corporations of KeySpan. This case raises issues of public concern not only because of the effect of the plume on the health, safety and welfare of the persons directly in the path of the plume, the real property and natural resources directly affected by the pollutants and the financial costs involved in remediating the plume of contaminants potentially borne by all of the ratepayers of KeySpan if those expenses are passed through to the utility's customers. The Plaintiffs and the KeySpan Defendants have been vigorously represented by their respective counsel throughout this litigation and although this action was only commenced in 2006, the Court has decided a number of motions involving this and other related matters.

While the Defendants do not seek reconsideration of the entire order of this Court issued on February 7, 2007, they do seek to have this Court reconsider the decision not to dismiss the Plaintiffs' causes of action sounding in natural resource damage and unjust enrichment.

The Defendants allege that the Plaintiffs have not properly moved to amend their complaint to add the claim of natural resource damage (see, ***CPLR*** 3025). Although the Court generally would grant a motion to add a cause of action absent prejudice, if the proposed claim is palpably improper or totally without merit, the motion to amend would be denied (see, ***Pergament v. Roach***, 838 N.Y.S.2d 591, 2007 N.Y. Slip Op. 05247, N.Y.A.D. 2 Dept. Jun 12, 2007; ***Buckholz v. Maple Garden Apartments, LLC***, 38 A.D.3d 584, 832 N.Y.S.2d 255). The issue of whether the Plaintiffs have a viable claim for natural resource damage will be resolved without denying the motion for failure to cross move for leave to amend the Complaint.

While the Defendants allege that although the Plaintiffs raised the issue of a claim based upon natural resource damage in their opposition to KeySpan's motion to dismiss and that they have never amended their complaint to assert that cause of action, the Defendants further allege that the factual averments of the Plaintiffs'

Amended Complaint are not sufficient to allege a claim for a cause of action for natural resource damage under the Federal Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA") because there is no right under CERCLA for a private person to assert a personal claim thereunder.

In opposition, the attorney for the Plaintiffs assert, among other things, that they have standing to assert a claim sounding in natural resource damage because they do not seek to personally recover damages but seek to gain the remedy on behalf of municipalities to whom the remedy belongs (see generally, ***Freier v. Westinghouse Elec. Corp.***, 303 F.3d 176, 2002 U.S. App. LEXIS 16507, 33 Envtl. L. Rep. 20022, 33 Envtl. L. Rep. 20023 (2d Cir. N.Y. 2002)).

This Court agrees with the Defendants that CERCLA does not create a private right of action for the Plaintiffs to the extent that they seek to recover damages directly from the Keyspan Defendants or seek to enforce remedies that are available to various government entities under CERCLA (see, ***Ruffing v. Union Carbide Corp.***, 1 A.D.3d 339, 766 N.Y.S.2d 439).

The Appellate Division, Second Department has addressed the interplay of the Federal legislation known as CERCLA and the common law and state statutory rights of action in ***Leo v. General Electric Co.***, (145 A.D.2d 291, 538 N.Y.S.2d 844; see also, ***Article: Public and Private Claims in Natural Resource Damage Assessments,*** Carol A. Jones, Theodore D. Tomasi and Stephanie W. Fluke, 20 Harvard Environmental Law Review 111, Copyright (c) 1996 President and Fellows of Harvard College) wherein the Court stated:

> The defendant's assertion that this State's common law of nuisance has been preempted by the Federal Water Pollution Control Act (hereinafter FWPCA) (33 USC § 1251 *et seq.)*, the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA) (42 USC § 9601 *et seq.*) and the Toxic Substances Control Act (hereafter TSCA) (15 USC § 2601 *et seq.)* is without merit. (headnote deleted)" Preemption of State law is not favored (see, ***Commonwealth Edison Co. v Montana***, 453 U.S. 609) and each of the statutes on which the defendant relies contains specific provision for retention of the rights of citizens to maintain private actions under the law of the state where the pollution originated (see, 33 USC § 1365 [e]; 42 USC § 9652 [d]; 15 USC § 2619 [c] [3]).

While New York's common law and statutory enactments have not been preempted by CERCLA, this does not mean that CERCLA has created a new private cause of action for individuals in New York in a situation where the property owners are directly suing the alleged polluter (see, ***Matter of Eighth Jud. Dist. Asbestos Litig.***, 12 Misc. 3d 936, 815 N.Y.S.2d 815; ***California v. Blech***, 976 F.2d 525, 1992 U.S. App. LEXIS 24031, 92 Cal. Daily Op. Service 8122, 92 D.A.R. 13385, 35 Env't Rep. Cas. (BNA) 1529, 23 Envtl. L. Rep. 20023; see also, ***Article: Public and Private Claims in Natural Resource Damage Assessments,*** Carol A. Jones, Theodore D. Tomasi and Stephanie W. Fluke, 20 Harvard Environmental Law Review 111 Copyright (c) 1996 President and Fellows of Harvard College). In fact, the Federal legislative history both before and after CERCLA was enacted is consistent with the holding that no private cause of action has been created under CERCLA by Congress (see, ***Casenote: Leo V. Kerr-mcgee Chemical Corp.: Recognizing a Need for Congressional Reform in Toxic Tort Actions***, 7 Vill. Envtl. L.j. 109, 1996; c.f. ***Article: Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes***, 33 Ecology L.Q. 1, 2006).

This being said, the Court reiterates that the Plaintiffs still have causes of action sounding in strict liability, private nuisance, pubic nuisance, trespass, ordinary negligence, gross negligence and injunctive relief.

The Defendants also seek to dismiss the unjust enrichment claim of the Plaintiffs. The Court agrees with the Defendants that the complaint fails to state a cause of action for unjust enrichment. In opposition to the Defendants' motion, the Plaintiffs state that "(t)he Amended Complaint alleges in paragraph 64 that KeySpan's billing and charging the past and future costs of remediation to the rate payers, whose properties it damaged and whose health is put at risk by exposure to the contaminants is unconscionable and has unjustly enriched KeySpan and its stockholders, to the extent that the cost of remediation is passed on to the rate payers."

As a regulated Public Utility, the rates that the Defendants charge customers are set by the New York State Public Service Commission or other state or federal regulatory agencies (hereinafter "PSC") and the PSC has "exclusive original jurisdiction over those rates" (see, ***Porr v. NYNEX Corp.***, 230 A.D.2d 564, 660 N.Y.S.2d 440). Further, the Appellate Division, Second Department affirmatively stated that "there can be no 'unjust enrichment' where a consumer has paid the filed rate." (supra; see also ***Samuel v. Time Warner, Inc.***, 10 Misc. 3d 537, 809 N.Y.S.2d 408). The motion to reargue is therefore granted and the cause of action for unjust enrichment is dismissed.

The Plaintiffs have cross moved for partial summary judgment alleging that the KeySpan defendants are strictly liable for the remediation of the private properties and the natural resources of the State that have been contaminated, that CERCLA requires that the KeySpan Defendants are prohibited from recovering any part of the remediation costs from its rate payers, and that the Defendants pay the cost of repairing or restoring the property damaged by the contaminants. After the Plaintiffs cross moved for summary judgment, the Defendants submitted a reply affirmation that was served on May 21, 2007. Thereafter, on May 29, 2007, the Plaintiffs served a reply affirmation in support of the cross motion and in opposition to the motion to reargue and attached to this affirmation additional documentary evidence allegedly for the purpose of proving the Defendants strict liability.

Upon receiving the Plaintiffs additional papers, the Defendants sought leave to file a sur reply to address these new documents. When the Plaintiffs refused, the Defendants cross moved for leave to file a sur reply (#010).

In ***Dannasch v. Bifulco***,(184 A.D.2d 415, 585 N.Y.S.2d 360) the Appellate Division, First Department stated "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (see also, ***Azzopardi v. American Blower Corp.,*** 192 A.D.2d 453, 596 N.Y.S.2d 404). The Plaintiffs submitted new material in their reply and the Defendants have simply asked to be able to respond to that new material which technically should not have been attached to the reply. While the Court is free to disregard the material submitted by the Plaintiffs, it is aware that the complexity of this matter may require a relaxation of some of the procedural motion rules that are applied to standard practice before this Court. Therefore, the Court will grant the motion of the Defendants for leave to file a sur reply to the additional papers filed by the Plaintiffs and it will not reject the new documents introduced by the Plaintiffs in their reply. The cross motion of the Plaintiffs for summary judgment (#007) is adjourned until August 23, 2007 in order to permit the Defendants to prepare and submit their sur reply in order to address the new documents submitted by the Plaintiffs. The

and it will not reject the new documents introduced by the Plaintiffs in their reply. The cross motion of the Plaintiffs for summary judgment (#007) is adjourned until August 23, 2007 in order to permit the Defendants to prepare and submit their sur reply in order to address the new documents submitted by the Plaintiffs. The Court will accept no further papers on the cross motion for summary judgment (#007) after the Defendants submit their sur reply.

Although all motion papers are being held in Chambers in Central Islip, New York at this time, the Court is unsure whether all submissions have been received by the Parties. The Court will permit the attorneys for the parties to review the motion papers at a mutually convenient time to ascertain if all papers have been received in the Part.

Dated: 8/2/07

SANDRA L. SGROI, J. S. C.