

**Treeline 1 OCR, LLC v Nassau County Indus. Dev.
Agency**

2009 NY Slip Op 32295(U)

September 22, 2009

Supreme Court, Nassau County

Docket Number: 001007/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

TREELINE 1 OCR, LLC,

Plaintiff,

INDEX NO.: 001007/2009
MOTION DATE: 07/09/2009
MOTION SEQUENCE: 001, 002
and 003

-against-

NASSAU COUNTY INDUSTRIAL DEVELOPMENT
AGENCY, JOHNSON & HOFFMAN MANUFACTURING
CORP., AMEC NEW YORK, INC., JOHNSON &
HOFFMAN, LLC, NL VENTURES IV VOICE, L.P., NL
VENTURES VOICE MANAGEMENT, LLC, MANLEY
HOLDINGS, INC., ABC CORPS. 1 — 5,

Defendants.

The following papers read on this motion:

Notice of Motion to Dismiss against NL Ventures IV Voice Management, LLC and NL Ventures IV Voice, L.P.	1
Amended Notice of Motion to Dismiss for above Defendants ¹	2
Affidavit of Peter Carlsen in Support of Motion	3
Affidavit of Paul M. Robshaw in Support of Motion	4
Affidavit of Paul D. Sylvestri in Support of Motion	5
Memorandum of Law in Support of Motion	6
Affirmation in Opposition to Motion by NL Ventures, LLC and NL Ventures IV	7
Reply Affirmation of Paul D. Silvestri	8

¹ This has been treated as Motion Sequence # 3

Reply Memorandum of Law in Support of NL Ventures Motion	9
Motion Sequence # 2 to Dismiss on behalf of Johnson & Hoffman, LLC, and Manley Hodings, Inc.	10
Memorandum of Law of Johnson & Hoffman, LLC and Manley Hodings, Inc.	11
Affirmation in Opposition to Motion to Dismiss by Johnson & Hoffman & Manley	12
Reply Memorandum of Law in Support of Motion by Johnson & Hoffman, and Manley	13
Notice of Joinder by Nassau County IDA in Motion by Johnson & Hoffman and Manley	14

PRELIMINARY STATEMENT

The pending motions involve a claim on behalf of the former owner of One Old Country Road, Carle Place, New York, a 5-story office building with parking garage. It is located on the north side of Old Country Road, south of premises 40 Voice Road, and divided by a LIRR right-of-way. Plaintiffs contend that the use of 40 Voice Road by Defendants for the manufacture of machined metal parts, including metal stamping, deburring, and washing, resulted in the introduction of pollutants into the ground beneath One Old Country Road, including volatile organic vapors (“VOC’s”), tetrachlorethylene (“PCE”), and trichlorethylene (“TCE”). Plaintiff contends that the existence of these contaminants caused the termination of a contract of sale for \$71,250,000; and that the premises were eventually sold for \$65,000,000, reflective of the damage caused by the contaminants.

There are three motions, one of which is simply an Amended Notice of Motion, and should be considered part of Sequence # 1. Motion # 1, relying on CPLR § 3211 (a)(1), (7) and (8), seeks dismissal of the complaint against NL Ventures IV Voice Management, L.L.C. (“Ventures LLC”) and NL Ventures IV Voice, L.P. (“Ventures L.P.”) The asserted grounds are that Ventures, LLC was not directly involved in the leasing of the property which is the subject of the underlying action, but was simply a general partner of Ventures L.P. The second basis for the claim is that both Ventures LLC and Ventures L.P were both dissolved on October 24, 2007, and are therefore not amenable to suit.

Plaintiff responds that § 11.356 of the V.T.C.A Business Organization Code, entitled “limited Survival After Termination”, provides a three-year term after the date of an entity’s termination during which an action may be brought, which will cause the entity to “survive for the purposes of (1) the action until all judgments, orders, and decrees have been fully executed; and (2) the application or distribution of any property of the terminated filing entity as provided by Section 11.053 until the property has been applied or distributed.” Defendant replies that the statutory provision for the three-year extension after termination is not effective until 2010 as to entities created prior to January 1, 2006, unless they voluntarily elect to adopt and become subject to the Code before 2010. Both entities seeking dismissal were created prior to January 1, 2006 and did not voluntarily subject themselves to the three-year extension for the filing of claims against them before dissolving.

Johnson & Hoffman, LLC (“J & H”) and Manley Holdings, Inc. move under Motion Sequence # 2 for dismissal of the complaint against them on the ground that they have a defense based upon documentary evidence, and that Plaintiff has failed to state a cause of action against them. The thrust of their claim is that J & H purchased the 40 Voice Road property on or about January 31, 2005, while Manley acquired title on August 10, 2007. However, the contamination of which Plaintiff complains pre-dated the ownership of either of them, as evidenced by a July 6, 2004 voluntary cleanup agreement between New York State Department of Environmental Conservation (“NYSDEC”) and New York State Department of Health (“NYSDOH”), and “certain of the Defendants” as alleged in the Complaint at ¶ 40.

Plaintiff responds that the issue at this juncture is whether an adequate claim has been pled in the complaint. While these moving Defendants have shown deeds which reflect the acquisition of title after the discovery of contaminants and the imposition of a clean-up program on the owners, Plaintiff alleges that these Defendants have failed to carry out the obligations of the clean-up agreement and take adequate steps to prevent the

migration of the contaminants from 40 Voice Road to One Old Country Road.

That aspect of the motion which challenges the diminution of market value as an appropriate measure of damages where the condition affecting the premises is temporary, as opposed to permanent, is not part of the current motion. The essence of that claim is that the appropriate measure of damages is the difference in market rental during the period of time that the contamination is present.

In reply, J & H and Manley claim that the failure of Plaintiff to allege the appropriate level of damages, the lesser of the cost to remediate or diminution of market value is a fatal defect warranting dismissal of the complaint.

Lastly, Nassau County IDA joins in the motion to dismiss made on behalf of J & H and Manley, on the same grounds that they came into title of 40 Voice Road after each of them, and well after the discovery of contamination and agreement to remediate in 2004.

DISCUSSION

Motion Sequence # 1 by NL Ventures LLC and NL Ventures LP

The motion to dismiss the actions against NL Ventures LLC and NL Ventures LP are granted.

The outcome of this motion is dependent upon the law of Texas. Both of these entities were created and ultimately dissolved under the laws of that State. NY Limited Liability Company Law § 801. Ventures LLC filed its Articles of Organization in the Office of the Secretary of State of Texas on April 6, 2004. It was listed as the general partner of Ventures, LP, which filed its Certificate of Limited Partnership in Texas, also on April 6, 2004. They filed their Articles of Dissolution and Certificate of Cancellation respectively, on October 24, 2007. Ventures LP leased the property to co-Defendant Johnson and Hoffman, LLC. Johnson and Hoffman or AMI Johnson, LLC was the tenant during the time alleged in the complaint. Ventures LP and Ventures LLC claim that even if they were responsible for the actions of their tenants, the latter was simply the general

partner of Ventures LP, and is not independently responsible for the actions of the limited partnership. In any event, they have both ceased to exist and claims against them were extinguished.

Texas Revised Limited Partnership Act (“RLPA”) governs limited partnerships created before January 1, 2006. § 8.04 (b) provided that “on the dissolution of a limited partnership and until the filing of a certificate of cancellation . . . , unless a written partnership agreement provides otherwise, the persons winding up the limited partnership’s affairs may, in the name of and for and on behalf of the limited partnership, prosecute and defend civil, criminal, or administrative suits. The clear import of this statute was that upon the filing of a certificate of cancellation, action against a limited partnership could not proceed.

The law with respect to the survival of domestic filing entities changed, effective January 1, 2006, with the passage of V.T.C.A., Business Organizations Code. § 11.356 of the Code provides that notwithstanding the termination of a domestic filing entity, the terminated filing entity continues in existence until the third anniversary of the effective date of the entity’s termination, only for limited purposes, including prosecuting or defending an action or proceeding brought by or against the terminated entity. Plaintiff relies upon this ordinance, claiming that the action against Venture, LP was commenced well within the three years following the October 24, 2007 filing of the Certificate of Cancellation.

Movant, however, retorts that the revival statute does not become effective against limited partnerships formed before January 1, 2006, until January 1, 2010, unless they take specific steps defined in the statutes to adopt the Code prior to the effective date. Texas Business Organizations Code §§ 402.001, 402.003, 402.005.

It appears that movants Ventures LLC and Ventures LP are correct in their interpretation of the inapplicability of the 3-year survival ordinance . They were created prior to January 1, 2006, and there being no evidence of them having taken steps to bring

themselves under the Business Organization Code prior to their October 2007 termination, they no longer existed as an entity against which an action could be commenced in January 2009.

Motion Sequence # 2, Motion by Johnson & Hoffman, LLC and Manley Holdings, Inc.

These moving Defendants seek dismissal of the complaint on the grounds that they have a complete defense based upon documentary evidence and that Plaintiff has failed to state a cause of action. The essence of their motion is that contamination by volatile organic vapors (VOC's) at 40 Voice Road was documented as early as July 6, 2004, which date precedes the movants involvement with the property.

They point to an Assignment, Assumption and Amendment to Lease Agreement dated January 31, 2005. Exh. "B" to Motion to Dismiss Sequence # 2. By that document the Landlord, NL Ventures, LP, agreed to the assignment by the tenant, AMI Johnson, LLC, of its lease agreement to Johnson & Hoffman, LLC ("J & H"), and for a guaranty of J & H's obligations by JADE Equipment Corporation ("Jade"). As between the parties to the agreement, the assignees were to have no responsibility for contamination which occurred at any time prior to their assumption of the lease. They disclaim responsibility for contamination at One Old Country Road on this basis.

These movants also attack the adequacy of the complaint and claim that it fails to state a cause of action. As a starting point, they discredit the basis for the Plaintiff's damage claim as the difference between a July 13, 2007 sales agreement for \$71,000,000 and a sales price of \$65,000,000 in a December 21, 2007 contract with the same purchaser. In the interim, the purchaser obtained a Phase II Environmental Report from Peak Environmental, which showed PCE and chloroform levels significantly higher than a table of maximum values in an Escrow Agreement created after Due Diligence Services noted the presence of VOC's in soil and groundwater at 40 Voice Road.

They point out that the level of damages varies, depending upon whether the condition is permanent or temporary. If not permanent, the correct measure of damages,

they claim, is the difference in value, or the cost to remediate, whichever is less. They challenge the existence of the first four causes of action, diminution of value, since this is a measure of damages, not a wrong allegedly perpetrated by Defendants.

On a motion to dismiss pursuant to Civil Practice Law and Rules § 3211 (a) (7), the court must determine, “accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated.” (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]). A motion pursuant to CPLR § 3211 (a)(7) will fail if, taking all facts alleged as true and affording them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action to our law.” (*Shava B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP* 38 A.D.3d 34, 38 [2d Dept. 2006]).

While Movant claims that the First — Fourth Causes of Action are defective in that they allege a form of damage, as opposed to an act of negligence, a reading of the allegations of those causes of action leads to a contrary conclusion. The allegations are that the Defendants caused the contamination under 40 Voice Road, and disregarded the safety and welfare of others by permitting it to migrate southward to the property of One Old Country Road. They further contend that this conduct resulted in damage “in an amount to be determined at time of trial but is believed to be no less than the differential between the July 2007 Sales Agreement and the reduced price in the December Sales Agreement which is the calculated sum of six million two-hundred fifty thousand dollars (\$6,250,000). While this may well be an appropriate level of damages if the condition is permanent, or the cost of remediation is greater, the failure of Plaintiff to further elucidate the issue of damages does not constitute a failure to state a cause of action. The Fifth Cause of Action alleges negligence in the ownership and operation of 40 Voice Road, and also states a cause of action.

The Sixth Cause of Action seeking Punitive Damages is dismissed. “Punitive

damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness.” (*Hale v. Odd Fellow & Rebekah Health Care Facility*, 302 A.D.2d 948 [4th Dept. 2003]). There is no such allegation in this proceeding and the Sixth Cause of Action is dismissed. (*Booth v. Hanson Aggregates New York, Inc.*, 16 A.D.3d 1137 [4th Dept. 2005]).

Defendants contend that because the contamination at 40 Voice Road preceded their involvement, the complaint must be dismissed. But the issue is not the contamination of 40 Voice Road, but the claim that Defendants permitted it to migrate to One Old Country Road. The environmental conditions at the latter site were only ascertained by virtue of the Peak Environmental Phase II Report of August 2007. NL Ventures, LP transferred title to Manley Holdings, on August 8, 2007, who transferred title to Nassau County Industrial Development Agency two days later, on August 10, 2007.

The motion by Johnson & Hoffman LLC is denied, as the complaint adequately states a cause of action against them. The motion on behalf of Manley Holdings is granted in that title vested in Manley for a 2-day period shortly after the time that the contamination at One Old Country Road was detected. Notably, the findings were based on samples taken on July 24 and August 4, 2008, prior to the vesting of title in Manley.

For the same reason, the motion of Nassau County Industrial Development Agency to join in the application of Johnson & Hoffman and Manley Holdings is granted and the action against the Agency is dismissed. Their involvement was through Manley, which acquired title after the damage to One Old Country Road was done.

CONCLUSIONS

NL Ventures IV Voice Management, LLC and NL Ventures IV Voice, L.P.’s motions to dismiss are granted on the ground that they were both dissolved on October

24, 2007, prior to the commencement of this action and, under applicable Texas law, they are not subject to involuntary revival for the purpose of defending an action or proceeding. Plaintiff has not obtained personal jurisdiction over them.

The motion by Manley Holdings, Inc. is granted and the action against them is dismissed. Manley Holdings acquired title for a 2-day period after the contamination at One Old Country Road was detected, and therefore, could not have contributed to its occurrence. The motion by Johnson & Hoffman, LLC is denied, since the complaint states a viable cause of action against them under applicable principles of complaint interpretation.

The application of Nassau County Industrial Development Agency for joinder in the Johnson & Hoffman and Manley motions is granted, and the complaint is dismissed as against them.

The Sixth Cause of Action for punitive damages is dismissed against all remaining Defendants.

This constitutes the Decision and Order of the Court.

Dated: September 22, 2009


J.S.C.

ENTERED

SEP 28 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**