

Osarczuk v Associated Univ., Inc.

2013 NY Slip Op 31138(U)

May 16, 2013

Sup Ct, Suffolk County

Docket Number: 2836/1996

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

BARBARA OSARCZUK, JOHN OSARCZUK,
HELGA A. DEMPSEY, GARY OSARCZUK,
DOROTHY OSARCZUK, CAROL
ANGELORA, WILLIAM FERGUSON,
DEBORAH FERGUSON, JAMES
ANDREJKOVIC, JOAN WEISNER, MICHAEL
MIESEMER, BARBARA MIESEMER,
VINCENT SCAVONE, ROBERT O'GARA,
JEAN O'GARA, PAULINE MODICA, NANCY
BOND, FLORENCE CARRANO, RANDY
SNELL, Individually, and as parent and
guardian of LAUREN SNELL, an infant,
DONNA J. VELARDO, and THOMAS
CUNNINGHAM, Individually and on behalf of
all others similarly situated,

Plaintiffs,

-against-

ASSOCIATED UNIVERSITIES,
INCORPORATED, commonly known as
BROOKHAVEN NATIONAL LABORATORY,

Defendant.

ASSOCIATED UNIVERSITIES, INC.,

Third-Party Plaintiff,

-against-

PRECISION CONCEPTS, INC.,

Third-Party Defendant.

ORIG. RETURN DATE: FEBRUARY 23, 2012
FINAL SUBMISSION DATE: JULY 12, 2012
MTN. SEQ. #: 010
MOTION: MD

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KAK

Upon the following papers numbered 1 to 5 read on this motion _____
FOR LEAVE TO INTERVENE _____.

Notice of Motion and supporting papers 1-3; Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Intervene 4; Plaintiffs' Memorandum of Law in Response to Defendant's Opposition to Plaintiffs' Motion to Intervene 5; it is,

ORDERED that this motion by plaintiffs and proposed intervenors for an Order, pursuant to CPLR 1013, allowing the individuals who are listed on Exhibit "A" of the affirmation of A. Craig Purcell, Esq., dated January 24, 2012, to intervene in the instant proceeding and become parties plaintiffs herein, is hereby **DENIED** for the reasons set forth hereinafter.

This Court is familiar with both the facts and procedural history of this case, having previously granted plaintiffs' motion for class certification to the extent of certifying two subclasses in its decision of December 23, 2009. This Court found that "plaintiffs have sustained their burden of demonstrating that the statutory prerequisites for class action certification under CPLR 901 (a) have been met with respect to the residential property damage subclass and the economic loss subclass" (citations omitted). This Court went on to order that the liability issues in the case "be tried once on behalf of all members of the proposed classes."

This Court is also well-aware that the Appellate Division, Second Department, subsequently reversed this Court's judgment and de-certified the class (*see Osarczuk v Associated Univs., Inc.*, 82 AD3d 853 [2011]). Numerous individuals, i.e., 167, now move to intervene in the pending action, as they allegedly are and were residents of the area in the immediate vicinity of the Brookhaven National Laboratory ("BNL"), and have allegedly suffered the same damages which were alleged in plaintiffs' class action and were recognized by this Court in its prior decision.

This action was commenced on or about February 6, 1996, by summons and complaint. Plaintiffs, all presently or formerly living or working within a ten-mile radius of BNL, commenced this action to recover damages for personal injury and property damage alleged to be the result of various nuclear and non-nuclear materials of a hazardous and toxic nature emitted into the air, soil, and groundwater from BNL, a 5,265 acre facility that was operated by defendant ASSOCIATED UNIVERSITIES, INCORPORATED ("AUI") on behalf of the United States Department of Energy from 1947 to 1998. In 1998, "Brookhaven Science Associates" succeeded AUI as the operator of BNL. Plaintiffs seek compensatory and punitive damages for themselves and other members of their class to compensate for alleged personal injuries and property damage sustained.

BNL conducts many major programs, some of which address national needs, including high-energy and nuclear physics, physics and chemistry of materials, environmental energy research, neuroscience and medical imaging, and structural biology. BNL employs approximately 3,000 scientists, technicians, engineers, and support staff, and hosts over 4,000 guest researchers annually. BNL informs the Court that among other accolades, four BNL scientists have been awarded the Nobel Prize for advances in the field of physics.

Among the alleged contaminating substances are trichloroethane, tritium, strontium-90, uranium, argon-41, and cesium-137. Among the alleged injuries are cancer, nausea, headaches, immunological problems, loss of use and enjoyment of property and businesses, and psychological and emotional problems associated with fear of these health problems. Plaintiffs' complaint asserts causes of action sounding in negligence; abnormally dangerous activity; gross negligence; private nuisance; and medical monitoring.

In response to the complaint, BNL had made a motion to dismiss. By Order dated September 4, 1996 (Berler, J.), the Court denied most of BNL's motion, with the exception of certain causes of action which were dismissed with leave to re-plead. On January 28, 1999, plaintiffs filed a supplemental and amended summons and second amended complaint, which remains the controlling pleading herein. The case then proceeded through Court-supervised class discovery, which was completed in phases.

By Order dated May 18, 2005 (Werner, J.), the Court granted BNL's cross-motion for summary judgment and dismissed plaintiffs' complaint, and also denied plaintiffs' motion for class certification as moot. The Order of May 18, 2005 was appealed, and by decision of the Appellate Division, Second Department, dated January 30, 2007, the Court modified the Order to the following extent: "(1) by deleting the provisions thereof granting that branch of [BNL]'s cross-motion which was for summary judgment dismissing so much of the complaint as sought damages for and equitable relief as a remedy for personal injuries and property damage arising from exposure to non-nuclear hazardous and toxic materials and substituting therefor a provision denying that branch of [BNL]'s cross-motion, and (2) by deleting the provision thereof denying the plaintiffs' motion for class action certification pursuant to CPLR article 9" (*Osarczuk v Associated Univs., Inc.*, 36 AD3d 872, 873 [2007]). The Second Department directed that the matter be remitted to the Supreme Court, Suffolk County, for a determination of plaintiffs' motion for class action certification pursuant to CPLR article 9 in accordance therewith.

This Court undertook that determination as required and directed by the Second Department and concluded that two subclasses could indeed be

certified as contained in this Court's prior decision of December 23, 2009. However, upon appeal, the Second Department held that there were certain causation issues that were better decided on an individual basis. Specifically, the Second Department made it clear that:

Under the circumstances presented, questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners, cannot be resolved on a class-wide basis (*see Aprea v Hazeltine Corp.*, 247 AD2d at 565; *Robertson v Smalis Painting Co.*, 134 AD2d 881 [1987]; *Evans v City of Johnstown*, 97 AD2d at 3; *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830 [1979]; *cf. Geiger v American Tobacco Co.*, 277 AD2d 420 [2000]; *Rosenfeld v Robins Co.*, 63 AD2d 11, 17-18 [1978]). Accordingly, "[i]n view of the complicated issues of fact which must be resolved on an individual basis . . . common questions of law and fact do not predominate in this action," and the class action is not the superior method of adjudication of these claims (*Rosenfeld v Robins Co.*, 63 AD2d at 20). Therefore, the plaintiffs' renewed motion for class certification should have been denied in its entirety.

Plaintiffs now seek permissive intervention under CPLR 1013. The aforementioned statute provides in its entirety:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party

(CPLR 1013).

Permissive intervention under CPLR 1013 is appropriate when a person's claim and the action have common questions of law or fact (*see CPLR 1013*). As succinctly stated by the Appellate Division, Third Department:

While the only requirement for obtaining an order permitting intervention via CPLR 1013 is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion. As a consequence, when deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation. These latter considerations, which are grounded in general concepts of judicial efficiency and fairness to the original litigants, are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding. When that interest is less substantial or more indirect, other elements take on greater importance

(*Pier v Board of Assessment Review*, 209 AD2d 788, 789 [1994]). Here, this action was commenced in 1996, approximately 17 years ago, and there can be no dispute that the intervention of 167 plaintiffs would further delay this matter, unduly complicate the litigation, and prejudice the defendant in having to defend against a plethora of new claims.

Moreover, intervention pursuant to CPLR 1013 requires a substantive and procedurally appropriate pleading corresponding to the claims of each plaintiff so that the Court can perform the requisite analysis under CPLR 1013.¹ Indeed, CPLR 1014 requires that “a motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought” (CPLR 1014). The Court finds that resubmitting the class action complaint with some minor alterations, together with a list of proposed plaintiffs, does not fulfill the requirement of CPLR 1014 and warrants a denial of the motion (see *Farfan v Rivera*, 33 AD3d 755 [2006]; *Zehnder v State*, 266 AD2d 224 [1999]; *Serdaroglu v Serdaroglu*, 209 AD2d 608 [1994]; *Colonial Sand & Stone Co. v Flacke*, 75 AD2d 894 [1980]). Parsing the events as they apply to the individual plaintiffs is the responsibility of each individual plaintiff. The cumulative effect upon any property and its corresponding owner must be

¹ While the requirement may not be so restrictive as to require separate pleadings for each intervening plaintiff, there must be some commonality of facts as to any plaintiff or group of plaintiffs proceeding under the same complaint.

pleaded and proved as to the specific events involved and the resultant damage to the particular parcel of property.

Given the appellate court's directive, it is obvious that the Court requires specific pleadings for each of the proposed plaintiffs. The proposed third amended complaint annexed to plaintiffs' moving papers is a republishing of the second amended complaint with some minor modifications and without any tailoring to the facts and circumstances surrounding each individual plaintiff's claim. It is merely a rehash of the allegations of the prior class complaint. There is nothing specific to any plaintiff, nor is there any differentiation between the claims of the plaintiffs. The Court finds that this procedural attempt by plaintiffs is a thinly-veiled circumvention of the denial of the class action by the Second Department.

Furthermore, the Court is unaware of any precedent for a mass intervention, particularly given the prior analysis of the matter by the Second Department. While commencing new actions, with new index numbers, new pleadings and new discovery schedules is obviously daunting and labor intensive, the Second Department has spoken. Whether a new pleading is filed for each plaintiff or filed on behalf of similarly situated smaller groups of plaintiffs such that the causation concerns of the Second Department have been met, is at the discretion of the plaintiffs subject to further proceedings of the Court.

Wherefore, plaintiffs' motion is **DENIED** without prejudice and with leave to renew upon proper papers to replead in accordance with the requirements of CPLR 1013 and 1014, if so advised (see *Mohawk Maintenance Co. v. Drake*, 29 AD2d 689 [1968]).

The foregoing constitutes the decision and the Order of the court.

Dated: May 16, 2013



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION