SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

GETTY PROPERTIES CORP., POWER TEST REALTY COMPANY LIMITED PARTNERSHIP, and LEEMILT'S PETROLEUM, INC.,

Plaintiffs,

-against-

LUKOIL AMERICAS CORPORATION, VINCENT DELAURENTIS and VADIM GLUZMAN,

Defendants.

----------X

DECISION AND ORDER

Index No.: 151772/2016
Motion Sequence No.: 001

O. PETER SHERWOOD, J.S.C.:

This action involves statutory environmental law and common-law claims, including breach of contract, tortious interference with contract, and negligence that are related to the leasing, operation, and management of certain gas station properties. By the instant motion (Sequence Number 001), Lukoil Americas Corporation (Lukoil) and its directors and officers, Vincent DeLaurentis and Vadim Gluzman, seek to dismiss all causes of action, asserted in the complaint of plaintiffs Getty Properties Corp. (Getty Corp.), Power Test Realty Company Limited Partnership (Power Test) and Leemilt's Petroleum, Inc. (Leemilt) (together, Getty), pursuant to CPLR 3211 (a) (1), (a) (2), (a) (5) and (a) (7). For the reasons stated herein, the relief requested in the motion is granted in part and denied in part.

I. BACKGROUND

The following facts are derived from the complaint and are assumed to be true. Getty owns and leases gas station properties and oil terminals (collectively, Gas Stations) in multiple states, including New York, New Jersey, Connecticut, and Massachusetts (Complaint, ¶ 2). Many of the Gas Stations are leased by Getty from its affiliates, Power Test and Leemilt, and subleased to other companies, including Getty Petroleum Marketing Inc. (GMPI). GMPI buys petroleum products from oil companies and suppliers, and delivers to the Gas Stations for sale to consumers (*id.*, ¶¶ 12-14).

In 1997, Getty leased Gas Stations (pursuant to a Master Lease) to GPMI. In 2000, as part of its acquisition of GPMI, Lukoil negotiated an amendment of the Master Lease (as amended, hereinafter, Master Lease), which was to run until November 2015 (*id.*, ¶¶ 16-17). The Master Lease required Getty, as lessor, to remediate environmental contamination that existed at the Gas Stations

when the Master Lease was executed and the lessee to remediate contamination discovered thereafter (*id.*, ¶ 18).

The complaint alleges that, after the acquisition in 2000, even though GPMI nominally took control of the Gas Stations, Lukoil and its two top executives, defendants Vadim Gluzman and Vincent DeLaurenits, were actually in control (*id.*, ¶¶ 19-22). The complaint also alleges Lukoil failed to maintain the Gas Stations, causing physical and environmental conditions of the premises to deteriorate, which drove customers away; and that Lukoil eventually decided to shutter hundreds of unprofitable stations, rather than invest in restoring them to profitability (*id.*, ¶¶ 23-25). The complaint further alleges that Lukoil fraudulently stripped the good assets of GPMI, by transferring them to its sister company, Lukoil North America (LNA), and left the bad assets with GPMI (*id.*, ¶¶ 49-54). Although the asset-stripping scheme doomed GPMI to failure, Lukoil did not want GPMI to file for bankruptcy until after the two-year period had expired for a bankruptcy trustee to "claw back" the asset transferred to LNA (*id.*, ¶¶ 55-60). In February 2011, Lukoil effectuated a sham sale of GPMI for $1 to Cambridge Petroleum Holdings (Cambridge), a newly-formed shell company, with the understanding that Cambridge would keep GPMI limping along until the claw-back period had expired, at which time Cambridge would file for bankruptcy protection for GPMI (*id.*, ¶¶ 61-64).

On December 5, 2011, two years and a few days after the transfer of GPMI's assets to LNA, GPMI filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Court). On April 9, 2012, Getty filed proofs of claim totaling $266 million against GPMI in the bankruptcy case. After the Bankruptcy Court entered an order terminating the Master Lease, Getty retook possession of the Gas Stations in May 2012. On August 24, 2012, the Bankruptcy Court confirmed the plan of liquidation proposed by GPMI's official committee of unsecured creditors. The liquidation plan, pursuant to which a liquidating trustee (Trustee) was appointed to liquidate GPMI's assets and the claims filed against it, became effective on September 23, 2012.

The Trustee sued Lukoil and its executives claiming fraudulent conveyance. On July 29, 2013, the lawsuit was settled for $93 million (the Lukoil Settlement), which settlement was approved by the Bankruptcy Court. In March 2015, the Trustee entered into a separate settlement with Getty, pursuant to which Getty's claim against GPMI under the Master Lease was allowed as a general

unsecured claim in the amount of $170 million. Getty received a distribution based on that claim pursuant to the terms of the liquidating plan (Getty Settlement). Notably, pursuant to the Getty Settlement, which was approved by the Bankruptcy Court on March 26, 2015, the Trustee and Getty agreed that Getty was not releasing claims against "any party that is not a Trustee Released Party" and that Getty could seek to hold a "non-Trustee Released Party liable as an alter-ego of a Debtor or on a similar basis" (Getty Settlement, ¶ 4). The term "Trustee Released Parties" was defined to include, collectively, "each of the Trustee, the Trustee's accountants and financial advisors, the Liquidating Trust, and the Liquidating Trust Assets" (*id.*, ¶ 3).

On March 2, 2016, Getty commenced this action. Getty asserts eleven causes of action, eight of which seek contribution for remediation costs pursuant to the respective environmental statutes of New York, New Jersey, Connecticut and Massachusetts. The ninth, tenth, and eleventh causes of action sound in negligence, tortious interference with a contract, and breach of contract, respectively. Defendants' motion seeks to dismissal of the entire complaint. On March 13, 2017, the court entered an interim order instructing the parties to submit supplemental briefs to address specific issues, including, non-debtor third party releases under applicable bankruptcy laws. The motion is now ready for decision.

II. DISCUSSION

Initially, defendants argue that the complaint should be dismissed because plaintiffs are precluded from seeking to recover the same claims against defendants, on an alter ego theory, that they had asserted and settled with GPMI in the Bankruptcy Court approved Getty Settlement. Defendants rely on a decision of the United States District Court for the Southern District of New York (District Court) in the case of *Tronox Inc. v Andadarko Petroleum Corp. (In re Tronox, Inc.)* (549 BR 21 [SD NY 2016]). They argue that dismissal is warranted because the facts in this case are "remarkably similar" to those in *Tronox* (*see* Defendants' brief at 2, NYSCEF Doc. No. 8). This assertion has no merit.

A. Tronox is Distinguishable and Res Judicata is Inapplicable

In *Tronox*, the plaintiffs (Avoca Plaintiffs) filed an action in state court against Tronox LLC; its parent, Tronox Worldwide; and as well as an indirect parent, Kerr McGee Corp. (New KMC), alleging personal injuries arising from their operation of a wood treatment plant. Tronox LLC,

Tronox Worldwide, and certain affiliates then filed for bankruptcy (Tronox Debtors), but not New KMC, as it did not come into existence until five years after the plant ceased operations. The Bankruptcy Court recommended approval of a settlement among the trustee for the Tronox Debtors and the United States government, on the one hand, and New KMC and its parent, Anadarko Petroleum Corp., on the other hand, to settle fraudulent transfer and environmental claims (Anadarko Settlement) (*Tronox*, 549 BR at 26). As part of its approval of the Anadarko Settlement, the District Court issued a permanent injunction that prohibited creditors in Tronox's bankruptcy case and others from pursuing claims against the settling defendants, including New KMC (*id.*). After the Tronox Debtors' plan of reorganization was confirmed by the Bankruptcy Court, the Avoca Plaintiffs attempted to restore the state court action against New KMC, which had been stayed during bankruptcy.

The District Court granted New KMC's motion to dismiss. Even though the Avoca Plaintiffs asserted direct claims against New KMC, the District Court ruled that "such claims have not been plausibly pled," because New KMC did not come into existence until five years after the plant ceased operation, and thus New KMC "could simply not have directly implemented or acquiesced" in policies relating to its operation (*Tronox*, 549 BR at 47). As to the Avoca Plantiffs' indirect claims against New KMC, based on alter ego or veil piercing theories, the District Court stated that an important element for indirect liability is "the predicate establishment of direct liability against the Tronox Debtors" (*id.* at 48). Because the Avoca Plaintiffs' claims against the Tronox Debtors were satisfied and extinguished by their receipt of a share of the proceeds from the Anadarko Settlement and as part of the confirmation of Tronox's bankruptcy plan, the District Court held that "the Avoca Plaintiffs may not now seek to assert claims [against New KMC that are] fundamentally dependent on liability [of the Tronox Debtors] which may not proceed" (*id.* at 50). Importantly, the District Court noted that, even if the Avoca Plaintiffs' claims were "not otherwise unavailable as a matter of law," the injunction issued in conjunction with approval of the Anadarko Settlement "separately" barred such claims against New KMC (*id.*). Specifically, the injunction barred the Tronox creditors from pursuing any "Anadarko Released Party," including New KMC, and barred any "Trust Derivative Claims," which were defined to include claims the Anadarko Litigation Trust asserted

(or could have asserted), that sought recovery arising from or related to the Tronox Debtors and the "Covered Sites," or claims based on alter ego, veil piercing and successor liability (*id.* at 51).

In this case, it is undisputed that Lukoil and GPMI co-existed during the relevant time period when the alleged misconduct occurred. Thus, claims against Lukoil can be based on direct and/or indirect liability, unlike those in *Tronox*. Also, it is undisputed that Lukoil is not a "Trustee Released Party," as that term is defined in the Getty Settlement, and, as such, Lukoil was not entitled to be released under the Getty Settlement. Moreover, the complaint contains specific allegations that "Defendants directly engaged in harmful conduct" or defendants' liability was "based on a theory of piercing the corporate veil" (Complaint, ¶ 77). For instance, the complaint alleges that Defendants were "directly responsible for most if not all decisions regarding GPMI's environmental maintenance and cleanup on the Gas Stations," and that a "gross injustice would occur if Lukoil were allowed to escape responsibility for environmental contamination that it caused while falsely purporting to act through a supposedly independent GPMI" (*id.*, ¶¶ 78-91).[1] In *Tronox*, the District Court acknowledged that, "[i]f the Avoca Plaintiffs had alleged that [New KMC] was directly liable because it instructed its subsidiaries to not clean up the Avoca Plant site, causing further injuries, such a claim would not constitute a Trust Derivative Claim," and would fall outside the scope of the injunction (548 BR at 52). The District Court explained that such an allegation would present a claim based on the alleged tortious conduct of New KMC, itself, that was "directed at the Avoca Plaintiffs, and not at Tronox or its creditors in general" (*id.*).

Here, not only does the Getty Settlement lack an injunction ogainst claims in favor of Lukoil, it specifically states: "Nothing in this Settlement Agreement . . . shall affect or impact the rights, claims, or causes of action of . . . [Getty] against any party that is not a Trustee Released Party (including insofar as [Getty] seeks to hold a non-Trustee Released Party liable as an alter ego of a Debtor or on a similar basis" (Getty Settlement, ¶ 4). This language reflects the intention of the parties to the Getty Settlement. Accordingly, this court must interpret the settlement agreement "so as to give effect to the intention of the parties as expressed in the unequivocal language they have employed" (*Tronox*, 548 BR at 50 [internal quotation marks and citations omitted]; *see also Plath*

[1] *See also* plaintiffs' supplemental brief at 4, n 3 (listing various portions of the complaint that allege direct claims against defendants).

v Justus, 28 NY2d 16, 22-23 [1971] ["an aggrieved party should be allowed to settle a portion of his claim with one of the wrongdoers and at the same time expressly reserve his rights as against other wrongdoers," and the court must interpret a qualified release containing a reservation of rights in the settlement agreement "to carry out the intention of the parties"]).

Yet, defendants argue that the "carve-out" in the Getty Settlement to preserve alter ego claims "does not save" the complaint, because the District Court in *Tronox* "ruled that parties cannot preserve alter ego claims that do not exist at law" (Defendants' supplemental brief at 3, n 2). Although the court so held, it does not aid defendants' cause because what the District Court actually said was that the Avoca Plaintiffs' belief that their alter ego claims were retained and/or fell outside the scope of the injunction in the Anadarko Settlement Agreement, was "trumped by [the] contractual language [of the settlement] that clearly states they are not" (*Tronox*, 549 BR at 54).

As discussed above, the injunction in the Anadarko Settlement Agreement barred Tronox's creditors from asserting "Trust Derivative Claims," which was defined to include alter ego, veil piercing and successor liability claims (*id.* at 51). Here, the carve-out in the Getty Settlement, specifically preserved alter ego claims (derivative claims) against defendants, and must be given effect. Thus, the fact that plaintiffs received a distribution from the proceeds under the Getty Settlement for their claims against GPMI's estate and assets is of no moment, particularly where Lukoil, the non-debtor, did not contribute funds to the Getty Settlement and was not a party thereto.

On the other hand, while Lukoil was a party to the Lukoil Settlement, and reportedly paid $93 million to settle the fraudulent conveyance suit commenced by the Trustee,[2] that settlement did not

---

[2] Defendants allege that the Lukoil Settlement resolved and released all claims between them and GPMI, "including environmental claims" (Defendants' supplemental brief at 1). However, neither the Lukoil Settlement, nor the motion seeking its approval by the Bankruptcy Court, mention environmental claims. In any event, the Trustee could only enter into settlements and releases which pertain to indirect or derivative claims that belong to GPMI's estate (such as a fraudulent transfer claim); and where creditors "have a claim for injury that is particularized as to them [i.e., an independent or direct claim], they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so" (*Tronox*, 549 BR at 40, quoting *Hirsch v Arthur Andersen & Co.*, 72 F3d 1085, 1093 [2d Cir 1995] [explaining the difference between derivative and individual creditor claims]). As discussed above, the complaint asserts direct and indirect claims against defendants, and the Lukoil Settlement and Getty Settlement did not and could not otherwise release defendants from direct claims against them, absent consent.

contain any injunction regarding creditors' claims in favor of Lukoil, a fact that is also distinctly different from the facts in *Tronox*. Notably, Lukoil also concedes that the Lukoil Settlement has "no direct relevance to our arguments in the motion to dismiss," as plaintiffs were not parties thereto, (Defendants' supplemental brief at 1). If the Lukoil Settlement or GPMI's liquidation plan contained provisions in favor of defendants, such as a release of claims by (or an injunction against claims of) creditors, defendants would have asserted them as a defense here. The absence of such provisions is not surprising because the bankruptcy law affords "non-debtor third party releases" – by which a non-debtor receives a release from the debtor and third parties pursuant to a settlement - only in extraordinary cases (*see e.g. In re Metromedia Fiber Network*, 416 F3d 136, 141-143 [2d Cir 2005] [non-debtor third party release is approved in rare cases; courts should approve the release only after it found the release was important to the success of the debtor's reorganization, the non-debtor made a substantial contribution to the debtor's estate, or the creditors consented to the release]). The District Court in *Tronox* also noted that "a discharge injunction does not, however, affect the liability of any entity other than the debtor" (549 BR at 39, citing 11 USC § 524 [e]). Thus, neither Getty's release of claims against GPMI under the Getty Settlement, nor the Trustee's release of claims against Lukoil under the Lukoil Settlement, affect the liability of defendants with respect to plaintiffs' claims. Thus, defendants' reliance upon *Tronox* is misplaced.

Notwithstanding, defendants argue that "even if some of Plaintiffs' claims could be considered direct claims against Defendants not premised on the liability of GPMI, those claims would still be barred as res judicata" (Defendants' supplemental brief at 3). Defendants assert that the common-law doctrine of res judicata bars the "re-litigation of claims against Defendants that are similar to [claims] that have been settled and released against GPMI" (*id.*). Defendants rely extensively on the bankruptcy court's "related to" jurisdiction under 28 USC § 1334 (b) to support their argument.

The argument is without merit because the doctrine of res judicata is inapplicable to the facts of this case. Notably, the Court of Appeals has stated that the doctrine applies to "*the parties in a litigation and those in privity with them, [and where] a judgment on the merits* by a court of competent jurisdiction is conclusive of the *issues of fact and questions of law necessarily decided* therein in any subsequent action" (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]

[emphasis added]; *Computer Assoc. Intl., Inc. v Altai, Inc.*, 126 F3d 365, 369 [2d Cir 1997], *cert denied* 523 US 1106 [1998] [under the doctrine of res judicata, a final judgment on the merits precludes the parties or their privies from relitigating issues that were or could have been raised in the action]). Here, the Getty Settlement cannot be deemed a "final judgment on the merits" as to the proofs of claim settled by Getty with the Trustee. In fact, in the Trustee's motion seeking court approval of the settlement, the Trustee stated that the proofs of claim raised "substantial and complex legal and factual issues," which would render the outcome of any "final litigated resolution of these matters unpredictable and costly," and that in the Trustee's business judgment, it was best that the disputes be settled, given the "uncertainty and expense of continued litigation" (Motion for Approval, attached as Exhibit D to Sorkin aff, ¶ 3). By virtue of the Getty Settlement, such issues of fact and questions of law were not "necessarily decided" by the Bankruptcy Court.

Also, the *Tronox* District Court pointed out that the Bankruptcy Court's findings of liability against New KMC in the adversary proceeding "clearly do not qualify" as a "final judgment" because the parties settled prior to the Bankruptcy Court making any damages determination. No final judgment was entered in the adversary proceeding, and the issue of whether New KMC was an alter ego was "not actually litigated and necessarily determined in the Adversary Proceeding" (549 BR at 48-49). Here, the Trustee, a party to the Getty Settlement, cannot be said to be "in privity" with defendants, as evidenced by the fact that the Trustee had earlier sued defendants, which eventually led to the Lukoil Settlement. Further, the carve-out in the Getty Settlement, wherein the Trustee specifically agreed that Getty would not be releasing a non-Trustee Released Party from liability, showed that the Trustee's interest was not aligned with, nor was the Trustee in privity with, defendants.

Defendants argue that "bankruptcy law informs the analysis because the GPMI bankruptcy court had subject matter jurisdiction under 28 USC § 1334 (b)" to hear plaintiffs' claims, and that because "[p]laintiffs participated in the bankruptcy proceedings, they could and should have brought their claims against [d]efendants at that time" (Defendants' supplemental brief at 4). In essence, defendants argue that because the claims in the complaint would have a "conceivable effect" on GPMI's bankruptcy estate, and could have been heard by the Bankruptcy Court under its "related

to" jurisdiction pursuant to section 1334 (b), plaintiffs' failure to raise such claims in bankruptcy bars their claims here.

Defendants' argument is unavailing. Notably, because defendants are seeking to invoke the doctrine of res judicata as a defense, the burden is on them to establish that the doctrine bars the instant action (*Computer Assoc.*, 126 F3d at 369). Moreover, because it is undisputed that defendants participated in the bankruptcy process and were fully aware of the potential claims against them, given their assertion that the Bankruptcy Court has jurisdiction to adjudicate such claims, they could and should have requested the Bankruptcy Court to hear these claims. In any event, while they argue that "[p]laintiffs are barred from re-litigation of claims against [d]efendants that are similar to claims that have been settled and released against GPMI" (Defendants' supplemental brief at 3), they fail to show that the Getty Settlement has a preclusive effect for claims against them, as explained above.

Defendants cannot use the bankruptcy filing of their debtor corporate affiliates to shield their own liability when they themselves did not seek bankruptcy protection. Further, the allegation that it is plaintiffs who are "strategically" abusing the bankruptcy regime is baseless (*id.* at 5). Defendants' motion seeking to dismiss the complaint based upon res judicata is denied.

B. The Environmental Pollution Claims

The complaint, in its first though eighth causes of action, asserts environmental claims based on statutory provisions in New York, New Jersey, Massachusetts and Connecticut, based on defendants' alleged exercise of management and control over the operations of the Gas Stations in those states and the failure to remediate environmental damage. Plaintiffs assert that they are entitled to seek contribution from defendants among the responsible parties for remediation costs pursuant to the environmental statutes (Plaintiffs' opposition brief at 19-22).

Defendants argue that the third through eighth causes of action, asserted under New Jersey, Massachusetts, and Connecticut law should be dismissed pursuant to CPLR 3211 (a) (2), because this court lacks subject matter jurisdiction, and the relevant statutes confer exclusive jurisdiction to their respective state courts (Defendants' moving brief at 20-22). For example, as to the Massachusetts and Connecticut statutes, defendants rely on the following provisions: "[a]ny person who has given notice pursuant to this section *may* commence a civil action in the superior court . .

. seeking from the notice recipient contribution, reimbursement . . . " (Mass Gen Laws Ann ch. 21E § 4A [c] [emphasis added]), and "[i]f the commissioner finds that the recipient of any such order fails to comply therewith, he *may* request the Attorney General to bring an action to the superior court for the judicial district of Hartford . . . " (Conn Gen Stat § 22a-432 [emphasis added]).

Defendants' argument that these statutes confer "exclusive jurisdiction" upon the foreign courts is unavailing. Use of the term "may," as opposed to "shall," in the statute indicates that the legislature intended the term to have a "permissive" (as opposed to "compulsory") meaning or purpose (*see e.g. Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA), Inc.*, 131 AD3d 431, 432 [1st Dept 2015] [Georgia law which states that disputes "may" be adjudicated in its state courts is "permissive"]; McKinney's Cons Laws of NY, Book 1, Statutes § 177 [a] ["words of command in a statute are construed as peremptory, and words of discretion are treated as permissive"]). More importantly, it has been repeatedly held by the New York courts that "[a] statute or rule of another State granting the courts of that State exclusive jurisdiction over certain controversies does not divest the New York courts of jurisdiction over such controversies" (*Sachs v Adeli*, 26 AD3d 52, 55 [1st Dept 2005] [internal quotation marks and citations omitted]). In their reply papers, defendants fail to address the foregoing, and merely counter that they are "unaware of a single New York case adjudicating a dispute under the New Jersey Spill Act, Connecticut Water Act, or Massachusetts Oil Act" (Defendants' reply at 14). Because they are challenging this court's jurisdiction (which was selected by plaintiffs based on the Master Lease, as explained below), the burden is on defendants to present opposing legal authority.

Alternatively, defendants argue that, if this court finds it has jurisdiction, the "principle of comity compel[s] dismissing these [environmental] claims" because the relevant states have established "a complex remedial regime for the cleanup of hazardous substances in coordination with state environmental agencies . . . " (Defendants' moving brief at 22-23). However, defendants concede that the decision to afford comity is "discretionary and requires the consent of the presiding judge" (*id.*).

As a threshold matter, the legislatures of the relevant states have not given their courts exclusive jurisdiction to hear disputes regarding the application, interpretation and/or enforcement of their environmental statutes. Additionally, the Master Lease in the instant case stipulates that the

New York courts shall have exclusive jurisdiction to hear any claim or controversy arising therefrom or relating thereto (Master Lease, ¶ 33.2). Moreover, it has been observed by the Court of Appeals that, "the determination of whether effect is to be given to foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict" (*Ehrlich-Bober & Co., Inc. v University of Houston*, 49 NY2d 574, 580 [1980]). The Court of Appeals has also indicated that the New York courts generally accord recognition to the judgments and statutes of sister states, and that the public policy exception to the doctrine of comity is invoked only in rare instances (*Greschler v Greschler*, 51 NY2d 368, 376-377 [1980]). Defendants do not argue that the New York courts do not recognize, apply and enforce the environmental statutes of sister states, or that the public policy of enforcing environmental statutes is different among the various states, including New York.

Notably, the instant dispute stems from a commercial transaction (i.e. negotiation for an amendment of the Master Lease in connection with Lukoil's acquisition of GPMI in year 2000), and from the allegation that Lukoil subsequently adopted a policy of illegally avoiding environmental duties that gave rise to pollution of the Gas Stations in the various states, including New York. The Court of Appeals has indicated that, where an action concerns a commercial transaction in New York, and New York courts would otherwise have proper jurisdiction, comity does not prevent New York courts from exercising that jurisdiction (*Ehrlich-Bober*, 49 NY2d at 582). Thus, this court will not decline jurisdiction on comity grounds.

With respect to New York's environmental statutes, defendants argue that plaintiffs' failure to allege that the cleanup costs they seek were approved by the New York State Department of Environmental Conservation (DEC), requires dismissal of the New York environmental claims (Defendants' moving brief at 23). Plaintiffs contend that the complaint pleads, in paragraph 72, that they have obtained DEC approval for the remediation work (Plaintiffs' opposition brief at 24). Plaintiffs also submit an affidavit from a senior officer testifying that none of the work in New York was undertaken without DEC approval (Fisher affidavit, ¶¶ 2-4). Defendants' reply papers failed to address or controvert plaintiffs' response. Therefore, the New York environmental claims are validly pled, as set forth in the complaint, and survive defendants' dismissal challenge.

With respect to the Massachusetts environmental statutes, defendants assert that plaintiffs' failure to comply with section 4A of the statutes by not giving timely notice and entering into good

faith negotiations in an attempt to resolve the dispute prior to the commencement of a lawsuit, requires dismissal of the relevant claims (Defendants' moving brief at 24-25). In response, plaintiffs assert they gave defendants notice of their claims on June 1, 2016, and invited defendants to discuss a resolution of the claims in good faith (Plaintiffs' opposition at 25). Defendants point out that the June 1, 2016, notice was given four months after Plaintiffs commenced this action, and contend that because it was not given in compliance with the statute this failure is a "jurisdictional bar" (Defendants' reply at 15, citing *Massachusetts Hardware & Supply Co. v Salamome,* 1998 WL 1247994 [Mass Super Ct, 1998] [Section 4A provides that "[o]nly after notice has been given and after the procedures described in this section have been carried out, any person who has given notice pursuant to this section may commence a civil action . . ."]). Because the pre-suit notice procedure was not strictly followed, plaintiffs' claims under the Massachusetts environmental statutes are dismissed without prejudice.

With respect to the Connecticut environmental claims, defendants argue that such claims are barred by the two-year limitation period, because plaintiffs knew or should have known of the alleged contamination "since April 9, 2012, the date that Getty Realty filed proofs of claim alleging contamination at the Gas Stations," and the instant lawsuit was commenced on March 2, 2016 (Defendants' moving brief at 25, citing unpublished decision *70 Water St. Assoc., LLC v Harris & Gans Co.*, 2005 WL 895764, *3 [Conn Super Ct, Mar. 7, 2005] [two-year limitation period applied to personal injury or property damage caused by exposure to hazardous pollutants; period is measured from the date when the injury or, damage is discovered or, in the exercise of reasonable care, should have been discovered]). In response, plaintiffs contend that they discovered the contamination "on a rolling basis beginning only after mid-2012 and continuing through the present," and because the limitation period is two years from the date of discovery,[3] and defendants cannot establish that "all of the contamination in Connecticut happened to be discovered in the beginning part of the investigation," there is an issue of fact as to when each instance of contamination was discovered, which renders the motion to dismiss on timeliness grounds improper

[3] Section 52-577c (b) of the Connecticut General Statutes provides, in relevant part, that a plaintiff has "two years [to commence an action] from the date when the . . . damage complained of is discovered or in the exercise of reasonable care should have been discovered."

(Plaintiffs' opposition at 25). Defendants argue that, whether "[p]laintiffs might not have known [of] the precise extent of contamination as of [GPMI's] bankruptcy petition date is irrelevant, as the extent of damages does not determine when a claim accrues" (Defendants' reply at 12, citing *Oliver Chevrolet v Mobil Oil Corp.*, 249 AD2d 793, 794 [3d Dept 1998]). Defendants' statement as to the accrual date of a claim is correct if a plaintiff seeks recovery for property damage (249 AD2d at 794-795 ["even if plaintiff was not actually cognizant of the precise nature or extent of the [property] damage," it was aware that some amount of leakage had occurred and that there had been a wrongful invasion of its property rights, and thus "plaintiff's property damage claims, whether couched in terms of negligence, nuisance or injury to business, are time barred"]). However, if a plaintiff seeks reimbursement of money expended for remediation, which is not "a claim for property damage but as one for indemnification," the claim is "governed by a six-year limitations period, measured from the time plaintiff suffered a loss by paying the debt for which it alleges defendant should have been held responsible" (*id.* at 795 [citations omitted]; *see also Matter of Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 2007 WL 1601491 [SD NY 2007], on reconsideration, 2007 WL 2936214 [2007] [discussing various claim principles and statutes of limitation under New York law]).[4]

The instant complaint asserts that defendants are liable for the cleanup costs pursuant to Connecticut General Statutes § 22a-452 (a), which is entitled "Reimbursement for containment or removal costs." According to *Oliver Chevrolet*, a case relied upon by Defendants, the statute of limitation for a reimbursement claim is measured from the time when the plaintiff paid for the cleanup obligation. Here, the complaint alleges that "Getty has spent substantial time and money . . . to clean up the contamination described above at the Connecticut Gas Stations [and that Getty] expects to incur further substantial fees in this regard [for remediation] in the future" (Complaint,

[4] Pursuant to the Master Lease, its performance and interpretation is governed and construed by the laws of the State of New York, without regard to principles of conflicts of law (Master Lease, ¶ 33.1).

¶¶ 159, 170).[5] Based upon the foregoing, defendants' motion to dismiss the Connecticut environmental claims must be denied.

C. The Common-Law Claims

In addition to the environmental pollution claims, the complaint asserts three causes of action based on common law: negligence (ninth); tortious interference with contract (tenth); and breach of contract (eleventh). Defendants move to dismiss of the all common-law claims.

1. The Negligence Claim

With respect to the negligence claim, the complaint alleges that defendants owed plaintiffs a duty of care because defendants exercised actual control over GPMI's decisions concerning the handling, storage and cleanup of petroleum products at the Gas Stations and that defendants breached this duty by failing to plan and execute remediation activities in response to known or suspected contamination, which failure caused "extensive contamination on the Gas Stations" (Complaint, ¶¶ 173-175). A logical interpretation of these allegations is that the negligence claim seeks recovery for damages due to contamination of the Gas Stations.

In New York, an action to recover damages for an injury to property, except as provided in CPLR 214-c, is to be commenced within three years (CPLR 214 [4]). In turn, CPLR 214-c provides that a cause of action for injury to property caused by the latent effects of exposure to toxic substances must be commenced within three years "from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (CPLR 314-c [2]).

As noted above, plaintiffs have conceded that, by the time they retook possession of the Gas Stations in May 2012, the vast majority of the hundreds of such Gas Stations already had contamination (Complaint, ¶ 76). Nonetheless, they argue that "Getty has discovered the contamination at issue in this case on a rolling basis since that time," and contend that the complaint must be construed in their favor, on a motion to dismiss, because "there is a very substantial amount

---

[5] The Complaint also alleges: "By the time Getty regained control of the Gas Stations [in May 2012], however, the vast majority of the contamination had already occurred" (Complaint, ¶ 76).

of additional contamination that Getty anticipates it will discover as its investigation continues" (Plaintiffs' opposition brief at 13).

Plaintiffs' argument is unpersuasive in light of *Oliver Chevrolet*, as discussed above. Because the negligence claim is based upon property damage, the precise extent of the actual damage is irrelevant for claim accrual purposes, because "even if plaintiff was not actually cognizant of the precise nature or extent of the [property] damage," it was aware that some amount of damage had occurred, and that there had been a wrongful invasion of its property rights; thus, "plaintiff's property damage claims, whether couched in terms of negligence, nuisance or injury to business, are time barred" (249 AD2d at 794-795). Plaintiffs could have asserted the negligence claim against defendants in May 2012, when they discovered that the bulk of the Gas Stations were already contaminated, or within three years thereafter. Because this action was commenced on March 2, 2016, more than three years after such discovery, the negligence claim is time-barred, and defendants' motion to dismiss this claim is granted.

2. The Tortious Interference With Contract Claim

The complaint alleges that Lukoil, acting through individual defendants DeLaurentis and Gluzman, procured a breach of the Master Lease, a binding contract, by directing and causing GPMI to fail to maintain the Gas Stations in compliance with environmental laws, as required by the Master Lease (Complaint, ¶¶ 179-181).

Claims for tortious interference with a contract are subject to a three-year statute of limitations, which accrues when an injury is sustained (*American Fed. Group Ltd. v Edelman*, 282 AD2d 279, 279 [1st Dept 2001]; CPLR 214 [4]). Because plaintiffs' injury was allegedly sustained as a result of defendants' alleged interference with the Master Lease between 2000-2011 when GPMI was Lukoil's subsidiary, the alleged claim would have accrued no later than 2011. Because the limitations period for this claim expired in 2014, two years before this action was commenced, the claim is time-barred. Plaintiffs' argument, that the claim arises under CPLR 214-c (2), and that the limitation period runs from the date they discovered the injury, has no merit (*see* Plaintiffs' opposition at 16). CPLR 214-c (2) applies where the injury is caused by the latent effects of exposure to toxic substances. Here, the complaint alleges that the injury was caused by an interference with contract. Because the claim is time-barred, the court need not address the merits.

3. Breach of Contract Claim

The complaint alleges that GPMI breached the Master Lease by its failures to pay for environmental remediation of the Gas Stations and to maintain the Gas Stations in good physical condition, and that plaintiffs can hold defendants liable for GPMI's breach of the Master Lease by piercing the corporate veil (Complaint, ¶¶ 187-191).

Defendants argue this claim must be dismissed because Lukoil was not a party to the Master Lease (Defendants' moving brief at 19). They also argue that, because plaintiffs settled the contract claims arising under the Master Lease (the proofs of claim filed in the Bankruptcy Court) with GPMI, plaintiffs are precluded from piercing the corporate veil based upon GPMI's breach, which is analogous to an alter ego claim against Lukoil (*id.*).

Instead of addressing defendants' arguments, plaintiffs contend that the complaint alleges Lukoil deliberately made various fraudulent misrepresentations to Getty, including a misrepresentation as to "the extent of the necessary remediation work that Lukoil believed needed to be done at the Gas Stations" (Plaintiffs' opposition at 18). In effect, plaintiffs attempt to convert their breach of contract claim into a fraudulent misrepresentation claim, which may toll the limitations period where the plaintiff was induced by fraud to refrain from filing a timely action. However, plaintiff has not pled the elements of fraudulent misrepresentation.[6] Thus, the attempt fails.

In any event, because Lukoil was a nonparty to the Master Lease, Lukoil "cannot be named as a defendant in a breach of contract action unless the nonparty assumed the obligations under the agreement" (*N.F. Gozo Corp. v Kiselman*, 38 Misc 3d 48, 51 [App Term, 2d Dept, 2012]). Plaintiffs do not allege that Lukoil "assumed the obligations" of the Master Lease; instead, they allege that Lukoil controlled GPMI. Accordingly, the motion to dismiss the breach of contract claim is granted.

---

[6] "The elements of fraudulent misrepresentation are (1) the defendant made a material false representation, (2) the defendant intended to defraud the Plaintiffs thereby, (3) the Plaintiffs reasonably relied upon the representation, and (4) the Plaintiffs suffered damage as a result of their reliance" (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 [1st Dept 2005]).

D. The Claims Against DeLaurentis and Gluzman, the Individual Defendants

Defendants argue that the claims against DeLaurentis and Gluzman, as officers of Lukoil, should be dismissed because plaintiffs cannot hold these individuals liable for the wrongdoings committed by GPMI, and because the complaint fails to sufficiently allege facts to establish their liability (Defendants' moving brief at 13). They also argue that in order to hold these individuals liable, Plaintiffs must first pierce the corporate veil of GPMI to reach Lukoil, and then pierce the veil of Lukoil to reach DeLaurentis and Gluzman (*id.*).

These arguments are not persuasive. First, it is undisputed that DeLaurentis and Gluzman were officers of both Lukoil and GPMI during the relevant times that are the subject of this action. Thus, a "double veil piercing" is unnecessary to reach these individuals. More importantly, the complaint asserts direct claims against these individuals that are not based upon GPMI's liability or upon a veil piercing theory. For example, the complaint alleges that "DeLaurentis and Gluzman made the decision not to adequately remediate a substantial amount of contamination that defendants knew existed" (Complaint, ¶ 106). It also alleges that the individuals were "directly responsible for most if not all decisions regarding GPMI's environmental maintenance and cleanup of the Gas Stations" (*id.*, ¶ 83). It further states that "they used GPMI as a vehicle through which to defraud Getty – by misrepresenting anticipated long-term environment cost and GPMI's solvency – because they needed to effectuate the asset-stripping scheme" (*id.*, ¶ 86). Defendants are incorrect when they contend that the complaint alleges "no specific facts indicating DeLaurentis or Gluzman exceeded their roles as officers of [Lukoil] or GPMI to deliberately perpetrate some fraudulent or separate tortious conduct," and thus, that the claims against these individuals should be dismissed (Defendants' reply at 10). They further contend that "Plaintiffs' settlement with GPMI in bankruptcy extinguished the Individual Defendants' liability, and that res judicata bars Plaintiffs' claims" (*id.*). As against Lukoil, as discussed above, neither the Getty Settlement nor res judicata will bar the direct claims asserted against these individuals. Accordingly, the complaint adequately pleads claims against the individuals and dismissal is unwarranted at this time.

III. CONCLUSION

Based upon the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss (motion sequence number 001) is granted only to the extent of dismissing the fourth and fifth (violation of Massachusetts environmental statutes), ninth (negligence), tenth (tortious interference of contract) and eleventh (breach of contract) causes of action, and these causes of action are dismissed; and it is further

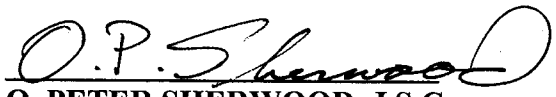
ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that all counsel for the respective parties shall appear for a status conference on Tuesday, September 19, 2017 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 14, 2017

ENTER:



O. PETER SHERWOOD, J.S.C.