<& /claims/inclusions/header.htm &>
GENEVA FOUNDRY v. STATE OF NEW YORK, # 2017-051-055, Claim No. 129067, Motion No. M-90320

Synopsis

97 claims alleged personal injury and property damage arising from the State's failure to warn them of the dangers of soil air and water contamination of their neighborhood which was adjacent to the long-closed Geneva Foundry. The Court granted defendant's motion to dismiss the claims as untimely and barred by governmental immunity.

Case information

UID:	2017-051-055
Claimant(s):	IN THE MATTER OF GENEVA FOUNDRY
Claimant short name:	GENEVA FOUNDRY
Footnote (claimant name) :	
Defendant(s):	STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	129067
Motion number(s):	M-90320
Cross-motion number(s):	
Judge:	DEBRA A. MARTIN
Claimant's attorney:	SMITH, SOVIK, KENDRICK & SUGNET, P.C. BY: BRADY O'MALLEY, ESQ.
Defendant's attorney:	HON. ERIC T. SCHNEIDERMAN New York State Attorney General BY: THOMAS G. RAMSAY, ESQ. Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	September 29, 2017
City:	Rochester
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

The following papers were read on defendant's motion to dismiss:

1. Notice of motion and affirmation of Thomas G. Ramsay, AAG, with attached exhibits, filed April 28, 2017;

2. Affirmation of Brady O'Malley, Esq., with attached exhibits, dated July 31, 2017;

3. Reply affirmation of Thomas G. Ramsay, AAG, dated August 4, 2017;

4. Filed papers: amended claim, claim of Dorothy Williams.

These claims arise from the alleged exposure to lead and other contaminants of the soil, air and water in the claimants' neighborhood adjacent to the now-closed Geneva Foundry.(1) These Geneva residents claim that the

State was aware of the contamination for years but failed to warn them of the dangers of the contamination. They claim injury to their person and property as a result of the alleged contamination.

Defendant moved to dismiss the claims. At oral argument, the parties conceded that only the State is a proper party, so that the claims against the named agencies are dismissed. The parties also conceded that the timeliness of the claims and governmental immunity were threshold issues. The Court agrees and for the reasons stated below, the Court grants the defendant's motion to dismiss.

The rules governing CPLR 3211 motions to dismiss are well established. In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the claimant "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005] [internal quotation marks and citations omitted]). Whether the claimant "can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The analysis is limited to whether the allegations as a whole discern any cause of action cognizable at law. The equation does not include a review of whether claimant will be able to ultimately prove their allegations. (*id*.) Nevertheless, where it is demonstrated that a material fact alleged by the claimants is indisputably not factual, the claim is susceptible to dismissal for failure to state a claim. (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-75 [1977].) This Court considered the claimants' allegations and the additional documentation provided by the claimants in opposition to determine if there exists a basis for the claims against the defendant.

Timeliness and Content of the Claims

The Court of Claims Act (CCA) § 10 (3) (governing injury to persons or property based on negligence and unintentional torts) and § 10 (3-b) (governing injury to persons or property based on intentional torts) require that the claim be filed and served upon the attorney general within ninety days after the accrual of the claim. CCA § 10 (7) further provides

"For the purposes of subdivision three of this section, a claim against the state which would be governed by section two hundred fourteen-c of the civil practice law and rules if it were asserted against a citizen of the state **shall be deemed to have accrued on the date of discovery of the injury by the claimant or on the date when through the exercise of reasonable diligence the injury should have been discovered by the claimant, whichever is earlier."**

(emphasis added.) Turning, then, to CPLR 214-c #(2), the date of accrual of a cause of action for damages for personal injury or property damage caused by exposure to any substance

"shall be computed 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."

Therefore, based on these statutes, the claimants were required to file their claims within 90 days of the discovery of their *injury* or from the date the *injury* should have been discovered if they exercised reasonable diligence.

Defendant moved to dismiss the claims for failure to file within 90 days of accrual. Claimants did not even attempt to plead a date when their injury occurred, arguing, instead, that the date of notification of the potential contamination was the operative event; that is, they could not have known of the contamination of their property before being notified of the soil contamination by the State on October 5, 2016 or by an exposé published in the local newspaper on October 12, 2016. Therefore, they argued, their individual claims filed on or about January 3, 2017 were timely as within 90 days of discovery of the contamination.

They further argued that there is a question of fact as to whether the foundry is a superfund site, as the documents attached to their responsive papers suggests[(2)]. In that case, CPLR 214-f extends the time within which to file a claim to three years from that designation. However, it is clear from CCA §§10 (3), 10 (3-b), 10 (7), and CPLR 214-c that the *accrual* of the cause of action is the date of *discovery of the injury* and the claim must be filed within 90 days thereof. The statute of limitations in 214-f may apply if this were a superfund site (or becomes one) but that does not change the date of accrual. CPLR 214-c (4) contains a provision that allows for the accrual to be calculated based on the *discovery of the cause* of the injury in certain circumstances but that alternative calculation is not included in CCA §10 (7), which is indicative of the legislative intent that actions against the State be excluded from the extended accrual calculation. Furthermore, claimants have not alleged any facts to support this alternative calculation. (*see Matter of New York County DES Litig., 89 NY2d 506 [1997]; Krogmann*

v Glens Falls City School Dist., 231 AD2d 76, 78 [3d Dept 1997].) Since there is no basis to abandon the statutory accrual date of discovery of the injury, claimants failed to file their claims within 90 days of the discovery of their injuries and their claims must be dismissed as untimely.

Although claimants argued the unfairness of the State in withholding information of soil contamination for decades and that they tried to comply with the claim requirements at the first possible date, it would be likewise unfair to embroil the State in complex tort litigation with 90+ claimants if there is no connection between their alleged injuries and the contaminated soil. For example, claimants alleged a varied collection of disorders, such as speech impediment (Tiana Biery), depression, migraines, and memory loss (Martiza Arroyo), miscarriage and lupus (Nancy Coluzzi), a "hole in her skull" (Mackenzie Leisenring), and many claimants failed to allege any specific injury at all.

With respect to the contents of the claim, CCA § 11 (b) states:

"The claim shall state the time when and place where such claim arose, the nature of same, the items of damage or injuries claimed to have been sustained and, except in an action to recover damages for personal injury, medical, dental or podiatric malpractice or wrongful death, the total sum claimed…"

These requirements are strictly construed, "substantive conditions upon the State's waiver of sovereign immunity." (*Lepkowski v State of New York*, 1 NY3d 201, 207 [2003].) Furthermore, the courts have consistently held that failure to satisfy the pleading requirements is a jurisdictional defect. (*Kolnacki v State of New York*, 8 NY3d 277, 280-81 [2007]; *Harper v State of New York*, 34 AD2d 865, 865 [3d Dept 1970].)

Although claimants argued that the contamination was known to the State because of its soil testing, the Court of Claims Act does not require the State to "ferret out or assemble information that section 11 (b) obligates the claimant to allege." (*Lepkowski,* at 208 [internal citations omitted].) Finally, with respect to the causes of action based on injury to property, the claim must contain an *ad damnum clause*. (*Bermudez v State of New York*, 44 Misc 3d 605, 608 [Ct Cl 2014].)

The claimants' allegations pertaining to personal injury damages are generally formulaic ("emotional distress, overwhelming fear, and a persistent and deep interference with all aspects of daily living and quality of life") except for the description of specific maladies suffered by some claimants that they attribute to the contamination. There is no indication when they were diagnosed or how they came in contact with the contamination. The allegations pertaining to property damage are even more nebulous and without any damage figures. Although they argued that any property damage number would be pure speculation, this also leaves the State without any basis for investigating the claims.

For these reasons, the Court finds the claims were untimely filed and jurisdictional defective.

Governmental Immunity

Even if the claims were not dismissible on procedural grounds, the Court finds that, contrary to the claimants' contention, the Court may consider the immunity defense on a motion to dismiss and grant the motion without allowing for discovery. (*see Estate of Gail Radvin v City of New York*, 119 AD3d 730 [2d Dept 2014]; *Freeman v City of New York*, 111 AD3d 780 [2d Dept 2013]; *Lewis v State of New York*, 68 AD3d 1513 [3d Dept 2009].) Therefore, our analysis begins with the determination of whether the State's actions were governmental or proprietary. The parties agreed at oral argument that the State's actions arise from their governmental function. The next step is to categorize the State's governmental actions as discretionary or ministerial. The defendant argued that the State's actions were discretionary, for which the State cannot be liable. Claimants urged that the actions were ministerial or, at the very least, that discovery is necessary to determine if they fall into that category. Furthermore, both parties rely on *Applewhite v Accuhealth, Inc.* (21 NY3d 420, 425 [2013]) and *McLean v City of New York* (12 NY3d 194 [2009]) in support of their positions.

If the actions were discretionary, the analysis ends in a finding of no liability, even if made "willfully, illegally and arbitrarily" (*Rottkamp v Young*, 21 AD2d 373, 374 [2d Dept 1964], *affd* 15 NY2d 831 [1965]; *see also Miller v State of New York*, 125 AD2d 853, 854 [3d Dept 1986]). But if the actions were ministerial, claimants must then prove that the State owed them a "special duty", the violation of which may be the basis of liability. (*McLean* at 203). Rather than join those learned jurists who have struggled with the semantical distinction between "discretionary" and "ministerial"[(3)], which might well require further evidentiary submissions to resolve, the Court will assume, *arguendo,* that the State's actions were ministerial and proceed to consider the existence of a

"special duty." In other words, "if plaintiffs cannot overcome the threshold burden of demonstrating that defendant owed the requisite duty of care, there will be no occasion to address whether defendant can avoid liability by relying on the governmental function immunity defense." (*Valdez v City of New York*, 18 NY3d 69, 80 [2011].)

First, the Court must review the claimants' allegations and the documentary evidence presented in the claimants' opposition to the State's motion to dismiss. The claimants' responsive papers provided exhibits that gave the history of the testing for contamination in the neighborhood surrounding the Foundry. The first testing of the potential contamination in the area appears to have been in 1986. At that time, Cornell University representatives analyzed soil samples from a garden and fence line of the Gringeri[(4)] residence at 234 Exchange Street, and noted the presence of a variety of heavy metals including lead. This information was apparently provided to the NYS Department of Health (DOH), which, in turn, requested further analysis of the findings by Dr. John Hawley at DOH. Dr. Hawley concluded that the lead levels in the two samples were elevated and that Mrs. Gringeri and other local gardeners should be advised to wash all produce from their gardens to remove soil particles that may contain lead and other metals. Dr. Hawley also made recommendations for further actions for DOH and DEC to collect more data on the foundry and, possibly, the creation of a map of potentially sensitive areas, such as schools within a ¼ mile radius of the foundry. Mr. Linse, DOH District Director, sent a letter to Mrs. Gringeri, stating that there was no significant health hazard associated with eating food from her garden but that she should thoroughly wash produce before doing so. (Exhibit 7 to O'Malley Affirmation, pgs. 4-5.)

Although the State DEC performed additional testing at various sites on the foundry property in 1995, and expanded their investigation to include soil testing or sample analysis of selected residential properties in 1998,1999, 2005, 2006 and 2015, there is no allegation that the State had any direct communication with any of the claimants, that their property was among those tested, or that they were even aware of the testing[(5)]. In fact, it is the lack of communication that formed the basis for their claims; they alleged that the State first tested soil samples in 1986, that the State assumed a duty to act on their behalf, that the claimants relied on the State's actions, that the State knew that its inaction could result in harm to the claimants, that the State did not advise the claimants on the potential harm caused by exposure to the contamination, did not perform abatement or proper testing, and generally failed to inform the claimants of the danger of their situation until, at the earliest, January 2017. (Amended Claim, ¶¶ 588-592.)

A special duty can arise in three situations:

"(1) the plaintiff belonged to a class for whose benefit a statute was

enacted; (2) the government entity voluntarily assumed a duty to the

plaintiff beyond what was owed to the public generally; or (3) the

municipality took positive control of a known and dangerous safety

condition (*see e.g. Metz*, 20 NY3d at 180)." (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013].)

Claimants' response to the State's motion indicated that they are relying on the second and third prongs of this test. They argued that their amended claim alleged the State undertook the testing and then concealed the results. Furthermore, they alleged that the claimants relied on the State's actions and that the State knew that inaction could lead to harm. (Amended Claim, ¶¶ 588-59.)

The analysis of the second prong--that of the assumption of a duty to claimants beyond that owed to the general public--is termed a "special relationship", which, itself, has four elements:

"[t]he elements of this 'special relationship' are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d at 260)."

(Freeman v City of New York, 111 AD3d 780, 781-82 [2d Dept 2013].) Many of the cases that involved this relationship were presented with the failure of a municipal police or fire department to respond to an incident which resulted in injury to an individual or group of individuals. However, even when a plaintiff had direct

communication with a municipal employee and it appeared that some level reliance on governmental action could be inferred, the courts did not find a "special relationship." For example, in *Pelaez v Seide* (2 NY3d 186, 202 [2004], *abrogated on other grounds by McLean v City of New York*, 12 NY3d 194 [2009]), the Court was presented with two cases in which municipal employees, responding to the discovery of elevated blood lead levels in children, tested the homes on several occasions, visited with the families, gave nutritional counseling and health advice to the parents, and performed developmental assessments of the children, but failed to ensure that lead abatement was completed. The children suffered serious effects of lead poisoning and plaintiffs brought the actions, alleging that they were not informed of the dangers of lead poisoning or advised to move. Acknowledging that it was the plaintiff's burden to establish a special duty, the Court found none of the elements of a special relationship existed. (*Id.* at 199). In *Freeman,* the court dismissed the complaint because it failed to allege any facts that showed there was any "direct contact" between the parties or that there was any "justifiable reliance" on any promise made to the plaintiff by the defendants. (111 AD3d at 782.) Likewise, the claims now before the Court are bereft of any facts to show a "special relationship" upon which a "special duty" could rest.

Finally, on the issue of whether the State "took positive control of a known and dangerous safety condition", claimants' factual allegations simply provide a timeline of infrequent soil sampling or analysis of samples taken by third parties, the results of which were not disclosed, and no timely remediation. This does not rise to the level of positive control required to meet this prong of the test. (*see Pelaez, at 204.)* Therefore, the pleading does not support this basis for liability by the State.

Conclusion

The Court grants the defendant's motion to dismiss. The Court lacks jurisdiction because of the failure of claimants to file their claims within 90 days of accrual and to plead their claim as required by CCA § 11. Furthermore, the State is entitled to immunity from liability arising out of its governmental functions. The Court need not consider the other aspects of the defendant's motion and declines to do so except to note that there is no basis in law or insufficient facts were alleged to support the causes of action for inverse condemnation, nuisance, negligent infliction of emotional distress, deprivation of procedural due process, negligent concealment, negligent misrepresentation, and fraud.

September 29, 2017

Rochester, New York

DEBRA A. MARTIN

Judge of the Court of Claims

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1. Initially, 96 claims, some involving multiple claimants, were filed between January 3, 2017 and January 23, 2017. By order dated February 22, 2017, these claims, any new claims, and any amended claims were to be joined for purposes of pleading, motions, discovery and liability trial, with the heading indicated above and under claim 129067. Amended claims were due by March 1, 2017. The claimants filed one amended claim on that date, which incorporated 94 of the initial claims (2 claimants were omitted from the amended claim but, to the extent those claims were unintentionally omitted from the amended claim, are still covered by this decision pursuant to the February 22, 2017 order). On March 22, 2017, the separate claim of Dorothy Williams, 129460, was filed and is included in the common heading and file number. Since the Williams claim tracks the allegations in the amended claim, all references to the "amended claim" in this Decision are intended to cover Williams, as well. Therefore, it is the intention of the Court, as stated in the February 22, 2017 order, that all claims filed by the firm of Smith Sovik Kendrick& Sugnet, PC pertaining to the Geneva Foundry are covered by this Decision.

2. The State denies that it has this designation.

3. As Prosser has noted, almost any act admits some discretion in the manner of performance, even driving a nail (*see* Prosser, Torts [4th ed], § 132, p 990) cited in *Tango v Tulevech* (61 NY2d 34, 41 [1983]).

4. Gringeri is not a claimant.

5.

[* 6]

At oral argument, claimants' counsel stated that there was no direct communication between the State and any claimant, except that some of them responded to the State's request to enter their property and obtain soil samples. <& /claims/inclusions/footer.htm &>