

**Deluca v Tonawanda Coke Corp.**

2017 NY Slip Op 33404(U)

November 17, 2017

Supreme Court, Erie County

Docket Number: Index No. 805565/2016

Judge: Paula L. Feroletto

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At a Special Term of the Supreme Court,  
held in and for the County of Erie at 92  
Franklin Street, Part 1, Buffalo, New York,  
on the 18<sup>th</sup> day of October, 2017.

PRESENT: HON. PAULA L. FEROLETO, J.S.C.  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : : COUNTY OF ERIE

FRANK DELUCA and MARY DELUCA, Individually  
and as Class Representative Plaintiffs;  
MORGAN GREENE, Individually and as Class  
Representative Plaintiff;  
COLLEEN BRIGANTE, Individually and as Class  
Representative Plaintiff,  
  
Plaintiffs

-vs-

DECISION AND ORDER  
Index No.: 805565/2016

TONAWANDA COKE CORPORATION;  
ESTATE OF J.D. CRANE;  
MARK KAMHOLZ;  
ABC CORPORATIONS 1 through 20 (Fictitious  
Defendants); DEF CORPORATIONS 1 through 20  
(Fictitious Defendants), JOHN DOES 1 through 20  
(Fictitious Defendants),  
  
Defendants

APPEARANCES: Justin Lee Klein, Esq.  
Alfred M. Anthony, Esq.  
Michael T. Szczygiel, Esq.  
Attorneys for Plaintiffs  
  
Hugh M. Russ III, Esq.  
Julia M. Hilliker, Esq.  
Patrick J. Hines, Esq.  
Attorneys for Defendants

The defendants (Tonawanda Coke Corporation, Estate of J.D. Crane and Mark Kamholz;

(hereinafter “Tonawanda Coke defendants”, or “defendants”), moved for summary judgment on September 22, 2017 and for other relief should summary judgment not be granted. The defendants’ motion claims there is no evidence of contamination of the plaintiffs’ properties, no nexus between any emissions and injury, and no property damage requiring dismissal of the case. In the alternative, if the action is not dismissed based on a lack of proximate cause, they seek dismissal of the battery, trespass, strict liability, nuisance and gross negligence causes of action as well as dismissal of the complaints against the two individual defendants: Mark Kamholz and Estate of J.D. Crane. Defendants also move to preclude plaintiffs’ experts. The Notice of Motion is filed as Dkt. No. 127 under NYSCEF Index No. 805565/2016 and includes documents and Exhibits through Dkt. No. 168. (Additional documents are filed in reply at Dkt. Nos. 190-202).

On September 25, 2017 the class action plaintiffs cross moved for summary judgment and preclusion of defendants’ experts at trial. The summary judgment papers begin at Dkt. No. 169 and are supported by exhibits through Dkt. No. 185. The papers relative to the preclusion motion are found at Dkt. Nos. 172, 173 and included in additional exhibits in opposition to defendants’ motion at Dkt. Nos. 203-281.

Reply Affidavits and memorandum of the defendants are at Dkt. Nos. 280-282. A complete printout of the electronically filed documents reviewed by the court on the competing motions for summary judgment and preclusion motions is attached to this Decision and Order as Appendix 1.

#### **Brief factual review**

The defendants Tonawanda Coke Corporation and Mark L. Kamholz were both

defendants in a criminal prosecution in the United States District Court for the Western District of New York. Both were found guilty by jury verdict in March, 2013 of violating federal laws related to emissions from the Tonawanda Coke facility in Western New York (Verdict Sheet, Dkt. No. 178 ). The defendants were found to “knowingly operate and cause to be operated, a stationary source, ... in violation of its Title V permit requirements by emitting coke oven gas from a pressure relief valve...”. Other Clean Air act violations included operating quench towers without baffles during certain time periods. There were eleven (11) findings of guilt, during different time periods related to Clean Air Act violations. There were three guilty findings for violations of the Resource Conservation and Recovery Act. Those findings included disposing of hazardous waste on its property “without a permit to dispose of such hazardous waste as required under RCRA.” during certain time periods roughly from May, 1998 through December, 2009. The plaintiffs are homeowners in the vicinity of the plant.

The plaintiffs argue the verdict is a basis for the court to grant summary judgment against the defendants on the grounds of negligence, gross negligence, wanton and reckless conduct.

The claims of this class of plaintiffs includes a diminution in property value and a loss of quality of life. The expert disclosure of plaintiffs documents no actual loss in value, but a loss in appreciation value as submitted by plaintiffs’ expert, Anthony A. Girasole (Dkt. Nos. 220-230). The negligent actions of the defendants as alleged by plaintiffs include the emission of benzene from January 29, 2005 through December 31, 2009 as well the operation of the quench towers without baffles. The baffle system is designed to reduce particulate emissions. The quantity of benzene and particulates emitted is contested by both parties with extensive submissions.

The plaintiffs' experts rely on the 2009 NYSDEC Study (Dkt. No. 138) and the 2013 DOH Study (Dkt. No. 139). The interpretation of the two studies is contested by the experts on each side with the plaintiff alleging they document excessive benzene levels and the defense expert opining "there is inadequate data from which to quantify to any reasonable degree of scientific certainty the contribution from Tonawanda Coke to the total monitored benzene in the Tonawanda area." (Dittenhofer Affidavit, Dkt. No. 150 at Paragraph 6).

**Plaintiffs' Motion for Summary Judgment on Negligence, Gross Negligence and Wanton and Reckless Conduct.**

The defendants were found guilty of violating the Clean Air Act (CAA) Title 42 USC 7413(c)(1) and the Resource Conservation and Recovery Act (RCRA), 42 USC 6928(d)(2)(A). The CAA regulates air emissions.

The RCRA was enacted in 1976 and governs the disposal of solid waste and hazardous waste. Enforcement remedies in each statute allow the Environmental Protection Agency to:

- (A) issue an administrative penalty order in accordance with subsection (d),
- (B) issue an order requiring such person to comply with such requirement or prohibition,
- (C) bring a civil action in accordance with subsection (b) or section 305 [42 USCS § 7605], or
- (D) request the Attorney General to commence a criminal action in accordance with subsection C. 42 USC §7413 (a) (3).

Civil actions have certain penalties associated with them and the jurisdiction is in the federal courts of the district where the defendant is located. Federal civil actions under either the CAA or the RCRA include the possibility of an injunction or a penalty of up to \$25,000 for each violation. The instant action is not predicated on seeking injunctive relief nor civil remedy

for violation of the statute. Instead, it is a State action seeking damages for tort liability.

The plaintiffs argue they are entitled to summary judgment on negligence based on the guilty verdicts finding intentional violations of these federal statutes. They argue as authority the case of *Herdzik v Chojnaki*, 68 AD 3d 1639 (4<sup>th</sup> Dept. 2009). In *Herdzik*, defendant parents “violated Penal Law § 265.10 (5), which provides in relevant part that “[a]ny person who disposes of any of the weapons . . . specified in section 265.05 to any other person under the age of sixteen years is guilty of a class A misdemeanor.” (*Herdzik, id.* at 1642.) The defendant parents had given a paint ball gun and ammunition to a minor which injured the plaintiff. Based on the violation of the penal law statute, the Appellate Division reversed the trial court and directed partial summary judgment on the issue of negligence against defendant parents in their individual capacity.

This court has not found, and neither of the parties have cited, any cases finding violations of the statutes violated by the defendants in this case entitle plaintiffs to a finding of negligence per se. There are federal court actions seeking redress by groups of citizens under the statutes for civil penalties or injunctive relief, but no New York cases asserting negligence causes of action based on violations of the CAA or RCRA statutes.

“Under common law, a person is negligent when he fails to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. When a statute designed to protect a particular class of persons against a particular type of harm is invoked by a member of the protected class, a court may, in furtherance of the statutory purpose, interpret the statute as creating an additional standard of care (see: *Trimarco v Klein*, 56 NY2d

98, 108; *Martin v Herzog*, 228 NY 164, 168; Restatement, Torts 2d, § 286; 1 NY PJI2d, pp 152-153). Violation of such a statutory standard, if unexcused, constitutes negligence per se so that the violating party must be found negligent if the violation is proved (see, generally, 2 Harper and James, Law of Torts, § 17.6; Thayer, Public Wrong and Private Actions, 27 Harv L Rev 317; Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn L Rev 361; Morris, The Role of Criminal Statutes in Negligence Actions, 49 Col L Rev 21; James, Statutory Standards and Negligence in Accident Cases, 11 La L Rev 95). Negligence per se is not liability per se, however, because the protected class member still must establish that the statutory violation was the proximate cause of the occurrence.” *Dance v Town of Southampton*, 95 AD2d 442 at 445-446 (2<sup>d</sup> Dept. 1983).

The Court of Appeals in *Elliott v City of New York*, 95 NY2d 730 (2001), succinctly stated the law of New York in this area as follows, “This Court has long recognized a distinction between State statutes on the one hand, and local ordinances or administrative rules and regulations on the other, for purposes of establishing negligence (see, *Long v Forest-Fehlhaber*, 55 NY2d 154, 160; see also, *Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 349). As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability (see, *Van Gaasbeck v Webatuck Cent. School Dist. No. 1*, 21 NY2d 239, 243). By contrast, violation of a municipal ordinance constitutes only evidence of negligence (see, *Martin v Herzog*, 228 NY 164, 169).” *Elliott, supra* at 734.

Neither case mentions violation of a federal statute, but the court will attempt to analyze the violations here using the language of *Dance* and *Elliott*.

Defendants were found to have violated condition 4 of Tonawanda Coke's title V permits. The statute specifies: "(c) Criminal penalties. (1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) by the Administrator that such person is violating such requirement or prohibition), . . . section 502(a) or 503(c) of title V [42 USCS § 7661a(a) or 7661b(c)] (relating to permits), . . . including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed the United States under this Act (other than title II [42 USCS §§ 7521 et seq.]) shall, upon conviction, be punished by a fine pursuant to title 18 of the United States Code, or by imprisonment for not to exceed 5 years, or both."

The specific duty involved in the *Herdzik* case was related to providing a gun to a person under age sixteen. The violation in this case was emitting more benzene or coke oven gas as specified on the verdict sheet than was permitted under the permit issued to Tonawanda Coke for the 7413(c)(1) (CAA) violations. The RCRA violations were that the defendants "caused to be stored on the ground . . . a waste exhibiting the toxicity characteristics for benzene, a hazardous waste identified under the Resource Conservation and Recovery Act, (RCRA), **without a permit** to store such hazardous waste as required under RCRA." (Dkt. No.178). (emphasis added). The statutes in question do not prohibit the emission of coke oven gases, nor prohibit the storage of toxic waste, but regulate their emission or storage and permit certain levels to be emitted. Unlike the Penal Law statute in *Herdzik*, which is an absolute bar to providing a gun to a minor under age 16, these statutes regulate emissions and storage. "[S]tandards promulgated by regulatory

agencies as protective measures are inadequate to determine legal causation” (*Parker v Mobil Oil Corp.* 7 NY3d 434, at 450 [2006]).

The court finds these to be regulatory in nature, and the guilty verdicts are evidence of negligence, and will be so charged to the jury in this case, but are not negligence per se for the purpose of granting summary judgment to the plaintiffs as they request. Therefore plaintiffs’ motion which requests summary judgment on negligence, gross negligence and wanton and reckless conduct based on the guilty verdicts is denied.

**Proximate Cause/Defendants’ Motion for Summary Judgment.**

Defendants’ motion for dismissal relates primarily to proximate cause and argues that even with the criminal findings, there is no showing from which to quantify to any degree of scientific certainty the contribution of Tonawanda Coke to the benzene emissions in the study area nor to any possible particulate emissions.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). The proponent makes such a showing by tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*id.* citing, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action. (*id.*).

The defendants argue based on *Allen v. General Elec. Co.*, 2003 WL 22433809 (Sup. Ct., Monroe County 2003), (aff’d on opinion below, 16 AD3d 1095 [4<sup>th</sup> Dept. 2005]), and *Halliday v*

*Norton Co.*, 265 AD2d 614 (3<sup>rd</sup> Dept. 1999), that they are entitled to summary judgment because the named plaintiff in this class action suit is not able to show actual contamination to her property. However, on a motion for summary judgment the defendant has the initial burden of proof. In *Allen*, one of the plaintiffs' claims was dismissed. The plaintiffs did not claim the chemical contamination interfered with the enjoyment and use of their own property nor that the property been polluted. Instead, they sued only for the diminution in value due to proximity to the contaminated land. In *Halliday*, the defendants provided test results which showed no contamination and no levels of toxic materials.

The plaintiffs in the instant action, unlike the *Allen* plaintiffs whose complaint was dismissed, do complain of an interference with the enjoyment and use of their own property and do complain of being subjected to harmful chemicals from air contamination released by the defendants. While the defendants argue these concerns are not reasonable, on a motion for summary judgment it is not enough to point to holes in plaintiff's case. Defendants have not shown a lack of exposure to plaintiffs. From what has been presented, the defendants are pointing at holes. They have not made a prima facie showing of entitlement to judgment as a matter of law. Therefore, the burden never shifted to the plaintiffs and, as such, the defendants motion seeking summary judgment is denied.

#### **The Trespass Claim.**

In *Ivory v. International Bus. Machines Corp.*, 116 AD3d 121 (3<sup>rd</sup> Dept. 2014), the court stated, "As relevant to the vapor intrusion and air emissions, however, courts have precluded trespass claims where the entry or intrusion was intangible, such as the occurrence of . . . a

permeating odor or vapors of gasoline (see *Boswell v Leemilt's Petroleum*, 252 AD2d 889, 891, [1998]). ‘Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespass [because] they interfere with nearby property owners' use and enjoyment of their land, not with their exclusive possession of it’ (75 Am Jur 2d, Trespass § 27). Thus, plaintiffs have no valid trespass claims based on vapor intrusion or air emissions, as those caused only intangible intrusions.” *Ivory at* 129-130.

Defendants submit the affidavit of Mark Kamholz (Dkt. No. 166) in support of their motions. In paragraphs 12 and 13 he avers: “12. The quenching process necessarily causes particulate to become airborne along with the water vapor that is generated. The particulate does not contain any substances that are harmful to people, including benzene. 13. I am aware of regulations that require the installation of baffles in quench towers in certain circumstances. The baffles are essentially a configuration of wooden slats designed to knock down the particulate matter that becomes airborne as a part of the quenching process”.

This argument fails to establish that particulates were not transmitted into the air which may have gone onto plaintiffs property. The defendants’ argument again being that plaintiffs’ concerns are not “reasonable”. This, by its very nature, is a jury question. Since the defendants have not established that there was no particulate trespass onto the plaintiffs’ property, the motion to dismiss the trespass claim is denied.

**The Nuisance Claim.**

Private nuisance does not require damage to property. It “is established by proof of intentional action or inaction that substantially and unreasonably interferes with other people's

use and enjoyment of their property.” *Nemeth v K-Tooling*, 100 AD3d 1271, 1272 (3<sup>rd</sup> Dept. 2012).

In *Nemeth*, there was a bench trial with conflicting testimony from plaintiffs regarding offensive odors and loud noises coming from defendants' manufacturing processes at all hours, seven days a week. This was contradicted by defendants who submitted contrary evidence. The court refused to enjoin defendants' operation. *Id.*, at 1276.

In the instant case, while the defendants claim the interference is/was not unreasonable, the plaintiffs offer an opposing view and complain about the interference with the use and enjoyment of their land during the times of the violations of the Clean Air Act and RCRA. Whether or not this concern is reasonable needs to be resolved by a jury and the request by defendants to dismiss the nuisance claim is denied.

**The Strict Liability Claim/Gross Negligence.**

Defendants request dismissal of the strict liability claim while the plaintiffs argue the operation of Tonawanda Coke was “abnormally dangerous” and subject to strict liability. The items to consider in determining whether an activity is abnormally dangerous are set forth in *Doundoulakis v Town of Hempstead*, 42 NY2d 440 (1977). “Particularly useful are the six criteria listed in Restatement of Torts Second (§ 520): “(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to

which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes". *Id.*, at 448.

The record before this court, although extensive, simply does not provide a basis to either grant or deny summary judgment on this claim. As the court stated in *Doundoulakis*, "the parties never adequately explored the factors which would permit a proper determination of the nature of the activity." (*id.* at 453). The Court of Appeals sent the case back for trial on both the negligence and strict liability theories.

While the defendants argue the case of *Bove v. Donner-Hanna Coke Corp.*, 236 AD 37 (4<sup>th</sup> Dept. 1932) stands for the proposition that a coke oven operation is not inherently dangerous or unreasonable and that the plant was not a legal nuisance, there was no evidence in *Bove* of violations of regulations by Donner-Hanna in the operation of that coke oven process. The question of whether the defendants' actions in this case were unreasonable, and whether that created a high degree of risk of harm to others, are questions of fact which can not be ascertained on this record. Therefore, the motions to dismiss this cause of action, and to grant judgment as a matter of law are both denied.

### **The Battery Claim.**

Defendant argues that "the continuing tort doctrine has also been found inapplicable to civil battery claims asserted in a toxic tort case" and cites *Major v. Astrazeneca, Inc.*, 2006 WL

2640622, at 20-21 (ND NY 2006) in support of that statement. However, the battery claims in *Major* were dismissed due to the inability of the plaintiffs to show an intentional injury. An intentional tort is regulated by CPLR 215 and neither CPLR 214 or 214-c have any bearing on a battery claim.

The accrual date is from the date of contact with the plaintiffs. It is an intentional tort. Defendants submit the affidavit of Mark Kamholz to aver that the release of gas from the pressure relief valve was not intentional and that the violations of the RCRA were not intentional. However, the verdict sheet clearly asks the jurors on each of the questions for which defendants Tonawanda Coke and Kamholz were found guilty, if the defendants “did knowingly operate and cause to be operated . . . in violation of” the sections of the CAA and the RCRA. From the court’s perspective this raises a question of fact as to whether there was intent in terms of contact. As the activities of the defendants occurred through 2009, the jury will need to determine if there was intentional conduct by the defendant and if it resulted in contact with the plaintiffs.

Furthermore, as to the statute of limitations argument on the battery claim, there was a criminal complaint filed in federal court against two of the defendants. CPLR 215(8)(a) provides one year from the termination of the criminal action in which to commence the civil action for cases of intentional tort. This applies even if the criminal action is in federal court versus state court as in this action. [See, *Dynamic Chemicals, Inc. v Ackerman Mechanical, Inc.*, 58 AD3d 153 (4<sup>th</sup> Dept. 2008) ]. Therefore, the statute of limitations argument fails, leaving a question of

fact as to whether this was an intentional act causing contact with the plaintiffs. Therefore, the defendants' motion to dismiss the battery cause of action is denied.

**Expert Disclosure.**

On the issue of the adequacy of expert disclosure, the court finds all disclosures are adequate except for the defendants' expert, Howard P. Schultz. (Parenthetically, these are incorrectly identified in Dkt. Nos. 235 and 236 as the affidavit of someone named "Schwartz"). While an expert's report need not be disclosed, more is needed with respect to Mr. Schultz. Unlike the very detailed disclosure of plaintiffs' experts, the Schultz disclosure on the "market study" is insufficient. In a case with this many potential claims, there should be least some parameters of the "market" that he studied. This would include the dates of sale he reviewed and the geographic areas reviewed. With that additional disclosure, the court finds all expert disclosures sufficient.

Therefore, it is hereby

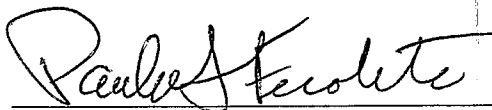
ORDERED, defendants motions are denied in their entirety, and while the court has not addressed dismissal against the individual defendants in the decision the request to dismiss the individual defendants is also denied; and it is further

ORDERED, plaintiffs motions for summary judgment are denied in their entirety; and it is further

ORDERED, the motion on preclusion of defense expert Schultz is granted, unless the defendants provide greater detail as referenced above by December 15, 2017.

Buffalo, NY

Dated: November 17, 2017

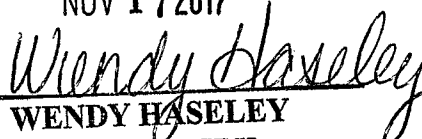


HON. PAULA L. FEROLETO, J.S.C.

Granted: November \_\_\_\_\_, 2017.

**GRANTED**

NOV 17 2017

BY   
WENDY HASELEY  
COURT CLERK

\_\_\_\_\_  
Court Clerk