State of New York v Covanta Hempstead Co.
2017 NY Slip Op 33575(U)
December 7, 2017
Supreme Court, Nassau County
Docket Number: Index No. 007549/2013
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 26
Present: Hon. Sharon M.J. Gianelli, J.S.C.

X

THE STATE OF NEW YORK, TOWN OF HEMPSTEAD, TOWN OF BROOKHAVEN, INCORPORATED VILLAGE OF GARDEN CITY, and LONG ISLAND POWER AUTHORITY Ex. Rel. EPR CORP. and PATRICK FAHEY,

Plaintiffs,

Index No. 7549/13

-against-

Mot Seq. No. 01

COVANTA HEMPSTEAD COMPANY and COVANTA HOLDING CORPORATION,

Defendants.

X

Papers submitted:
Defendant's Notice of Motion X
Plaintiff's Affirmation/Affidavits in Support X
Plaintiff's Affirmation in Opposition X
Defendant's Affirmation in Reply X

Motion (Seq. No. 1) by the attorney for defendants Covanta Hempstead Company (Covanta Hempstead) and Covanta Holding Corporation (Covanta Holding) (collectively Covanta or Defendants) to dismiss the Second Amended Complaint (Complaint) pursuant to CPLR § 3211(a)(7) and CPLR § 321(a)(1) is DENIED.

Plaintiffs, the State of New York, Town of Hempstead (Hempstead), Town of Brookhaven (Brookhaven), Incorporated Village of Garden City (Garden City), and Long Island Power Authority (LIPA) ex rel. EPR Corp. (Relator or EPR) (collectively, the Municipal Plaintiffs) and Patrick Fahey (Fahey) (collectively, with the Municipal Plaintiffs, (Plaintiffs) bring this action against defendants regarding the operation and maintenance of the Hempstead Resource Recovery Facility (the Facility) an incinerator owned and operated by defendant Covanta Hempstead at 600 Merchants Concourse in Westbury, New York.

Defendant Covanta Hempstead owns and operates the energy-from-waste facility (Complaint, ¶ 2). The facility is located in Westbury, in the Town of Hempstead, Nassau County, New York (Complaint, ¶ 2). The Facility processes approximately 3,000 tons of waste daily, and the Town contracts with Covanta Hempstead to have the Facility dispose of their municipal waste (*Id.*). The residue resulting from the combustion process (ash) is mixed and then transported to a landfill located in Brookhaven (the Landfill), while the electricity the Facility's 78-megawatt turbine generates from the heat produced in the combustion process is sold to LIPA (*Id.*).

The Complaint alleges that, in its contracts with the Municipal Plaintiffs, Covanta Hempstead made forward-looking statements representing that it would comply with applicable laws and regulations (*id.* ¶¶ 69, 71-72, 74-77) and – in the contract with Hempstead – with "Good Industry Practice" (*Id.* ¶¶ 69-71). The Complaint also alleges that the Hempstead contract required Covanta Hempstead to submit yearly certification that the company "was in compliance in all material respects with the provisions" of the contract. Plaintiffs allege that every claim for payment submitted by Covanta Hempstead to the Municipal Plaintiffs contained an explicit or implied certification of compliance with environmental law (*Id.* ¶ 12).

The Facility is regulated by New York State Department of Environmental Conservation (NYSDEC) and the federal Environmental Protection Agency (EPA) (*Id.* ¶ 41). In addition to applicable federal and state statutes and regulations, the Facility must comply with the conditions in its solid waste permit and its "Title V" air permit, which are both issued by NYSDEC and which set out conditions regulating the Facility's operations (*Id.* ¶¶ 34-35, 41). The Complaint further alleges that plaintiff Patrick Fahey (Fahey) was employed at the Facility between 2012 and 2014 (*Id.* ¶ 5). Plaintiffs allege that over the course of his employment, Fahey observed that the Facility routinely engaged in practices that violated the Facility's environmental obligations (*Id.*).

The alleged practices that Plaintiffs assert violate applicable law relates to the Facility's handling of ash and to its reuse of storm water from a recharge basin on the Facility site, which the Complaint calls the "Weir." The Complaint makes the following distinct allegations: Unrepaired openings in the exterior siding of the Ash House (where ash from the combustion is stored before being transported to the Brookhaven Landfill) allowed ash to be released into the surrounding land and air (*Id.* ¶¶ 11[3], 52, 65[b], 93); the Facility "failed to properly and adequately enclose its ash conveyor system and the associated ash water run-offs," causing "ash to escape into the atmosphere, and ash sludge and muds to be released onto the grounds of the Facility" (*Id.* ¶ 11[6]); the Facility did not properly mix "fly ash" (Lighter ash that is captured by the Facility's air pollution control system) and "bottom ash" (heavier ash that is collected from the boiler grates following the combustion process) prior to transportation, to "neutralize" fly ash's "high pH" and to prevent fly ash from being released into the environment (*Id.* ¶¶ 44, 61 85); the Facility failed to wet or "quench" the ash to "minimiz[e] the release of ash into the environment . . . during transportation" (*Id.* ¶¶ 60, 65[e]); the Facility failed to treat, or undertreated, the ash "with lime and other chemicals" to neutralize hazardous contaminants and make the ash non-hazardous for disposal in a landfill, allowing the hazardous ash to be transported and disposed in the landfill as non-hazardous ash (*Id.* ¶¶ 6, 11[1], 42-43, 64, 65[d], 67); the combustion of waste at the Facility was "incomplete," resulting in more toxic ash (*id.* ¶¶ 49, 51); the Facility failed to remove ash "tracked out" of the Ash House and the Facility by "Covanta vehicles" and trailers transporting the ash to the Landfill (*Id.* ¶¶ 11[4], 11[5]); the Facility failed to ensure that the trucking companies that transported ash to the Landfill did not overfill and "properly covered" their trailers "to reduce the amount of ash that falls off the trucks during the trip" (*Id.* ¶¶ 62-63); the Facility "failed to implement a required drainage plan," resulting in ash that escaped from the Ash House draining into the Weir and contaminating the stormwater there (*Id.* ¶¶ 54-55); the Facility "secretly" pumped contaminated Weir stormwater to the basin that supplies water for the Facility's cooling towers releasing "hazardous emissions" or "toxic steam" into the atmosphere (*Id.* ¶¶ 7, 11[2], 23, 55); and to address "a shortage of clean water" and save money, the Facility "secretly" pumped contaminated Weir stormwater to the Ash House for use in the combustion process (*Id.* ¶¶ 15-16, 22, 24).

The Complaint links the allegedly hazardous emissions from the last two allegations to complaints from workers at a Federal Aviation Administration (FAA) facility next door that the Facility was emitting "white particulate matter" (*Id.* ¶¶ 17-18). On February 18, 2014, Senator Charles Schumer held a press conference at the FAA facility to call upon the EPA to "test the air quality, test the plant, make sure everything is healthy" (*Id.* ¶ 19). The Complaint alleges that, spooked by the media attention, Covanta removed the offending pump within hours of the press conference, "in the dead of night" (*Id.* ¶ 22). Plaintiffs contend the alleged practices violate "best practices" in the solid waste industry (*Id.* ¶¶ 61, 88, 92, 100, 104, 105).

Plaintiffs also allege that parent company Covanta Holding issued a guarantee to the Town of Hempstead for the performance of Covanta Hempstead, including its compliance with all its undertakings (*Id.* ¶ 200). Plaintiffs further allege that Covanta Holding permitted Covanta Hempstead to knowingly or recklessly certify its compliance with applicable environmental laws, and in so doing, defrauded the Municipal Plaintiffs and/or aided and abetted the alleged fraud (*Id.* ¶ 201). Plaintiffs allege that Fahey was wrongfully terminated from Covanta in November 2015 after having been transferred away from the Hempstead Facility in 2014 (*Id.* ¶ 110). The Complaint alleges that over the course of the NYAG investigation prompted by the filing of this suit, Covanta Hempstead determined that Fahey was the source of the allegations and fired him in retaliation (*Id.* ¶¶ 109, 111). Plaintiffs assert that the reasons Fahey was given – including that he had been late to work too often – were "an obvious pretext" (*Id.*)

On June 20, 2013, Fahey formed Plaintiff- Relator EPR Corp. that commenced this *qui tam* action against Covanta on behalf of the Municipal Plaintiffs (¶8, *id.*). The phrase "qui tam" is shorthand for "qui tam pro domino rege quam pro se imposo sequitur," interpreted as "who sues on behalf of the King as well as for himself." *Qui tam* plaintiffs are frequently referred to as "relators." (Black's Law Dictionary 1281 [8th Ed 2004] quoted in *United States ex rel. DeCarlo v Kiewit/AFC Enters.*, 937 F. Supp 1039). The statutory provisions governing qui tam actions mandate that such actions be initiated by the filing of the complaint in camera or "under seal" with the court. The NYAG investigated the allegations. On February 6, 2017, the State notified the court of its decision not to participate in this action. On March 16, 2017, plaintiffs filed the Second Amended Complaint.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88; *Sokol v Leader*, 74 AD3d 1180, 1181). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v Leader, supra* at p. 1181). When evidentiary material is considered on a motion to dismiss a petition pursuant to CPLR § 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

"To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR § 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Gould v Decolator*, 121 AD3d 845, 847; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Leon v Martinez, supra*).

Article XIII of State Finance Law, known as the New York False Claims Act (FCA), sections 189(1)(a) at 189(1(b), provide that to prove a false claim a relator must demonstrate that the defendant "(1) made a claim, (2) to the government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the [government] treasury" *(United States ex rel. Quartararo v Catholic Health Sys. of Long Island, No.* 12-CV-4425, 2107 U.S. Dist. LEXIS 50696, at *23 [E.D.N.Y. Mar. 31, 2017]) (citations omitted). The complaint alleges Covanta made claims for payments on its invoices under the contracts (Complaint ¶¶ 177, 185); the claims were made on the plaintiff municipalities (*id.* ¶¶ 177, 185); the certifications of compliance with applicable environmental law, both express and implied, made to the plaintiff municipalities in connection with the claims, were false (*id.* ¶¶ 177-78, 184-85); Covanta knew such certifications were false at the time they were made (*id.* ¶¶ 177-78, 184-185); and the claims sought payment from the government treasury (*id.* ¶¶ 180-186).

Moreover, a party must knowingly make a false statement or knowingly file a false record. FCA defines "knowingly" to mean "that a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information" (*People v Sprint Nextel Corp.*, 26 NY3d 98 106-07) (citing State Finance Law § 188[3][a]). The complaint contains allegations setting forth Covanta's knowledge of the material violations of applicable environmental law and the alleged Ash Mixing Fraud and Weir Water Fraud.

The CPLR § 3016(b) requirement that fraud claims be "stated in detail," does not apply to NYFCA claims (*see:* N.Y. State Fin. Law § 192[1-a]). Rather, "in pleading an action [under NYFCA], the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of [the NYFCA] are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or local government effectively to investigate and defendants fairly to defend the allegations made." The complaint alleges the defendant ignored the 2011 Ash Plan mandate that only "combined ash" be transported from the facility. Plaintiffs further allege that mixing the testing sample of "combined ash" created in the laboratory was a wrongful attempt to deceive the regulators into believing that the sample was "representative" of the "combined ash" being mixed at the facility when in reality no such mixing occurred. Plaintiffs allege actual violations of the regulations with respect to solid waste incinerators such as the subject Facility (*see* Environmental Conservation Law [ECL], Article 27, Title 7; ECL § 27-0701[2]) (defining "Solid waste management facility"), that are set forth in 6 NYCRR § 360 ("Solid Waste Management Facilities") ("Part 360"). Part 360 provides a regulatory framework with respect to the management of ash residue "generated by solid waste incinerators providing energy recovery from mass burning of solid waste," and is the regulatory framework pursuant to which Covanta Hempstead obtained a permit (the "Part 360 Permit") to operate the Facility.

The affidavits of Larry Evans, sworn to May 19, 2017; the affirmation of Remi J.D. Jaffre Esq., dated August 25, 2017; the letter dated June 23, 2010 from Scott M. Wheeler, the Facility's Environmental Engineer; a copy of the Facility's 2011 Ash Residue Management Plan and provided to NYSDEC and approved by it as part of Covanta Hempstead's solid waste permit; a copy of a letter dated April 14, 2014 from Scott M. Wheeler to NYSDEC, which the complaint quotes and refers as to the "Wheeler Letter"; a copy of a letter dated July 2, 2014 to NYSDEC "the Evans letter"; a copy of an inspection of report by the Facility's NYSDEC monitor dated October 18, 2012; and a representative example of the report generated by the monitor for every inspection, wherein the first page of the report requires the monitor to state whether ash residue at the Facility "is wetted or contained to ensure that dust emissions are controlled" are not "documents" as contemplated by CPLR § 3211(a)(7) sufficient to prevail on a motion to dismiss the complaint. These submissions do not utterly refute the plaintiffs' allegations or conclusively establish a defense as a matter of law (*Attias v Costiera*, 120 AD3d 1281, 1283).

The attorney for defendants argues that the claims against Covanta Holding be dismissed since a parent company is not liable for the false claims of its subsidiary, unless the parent "is directly liable for its own role in the submission of false claims" or it is appropriate to pierce the subsidiary's veil (*see United States ex rel. Hockett v Columbia/HCA Healthcare Corp.*, 498 F. Supp 2d 25, 60). At this stage of the proceedings, it would be improvident to dismiss the action against Covanta Holding without discovery regarding the relationship between Covanta Holding and Covanta Hempstead Company vis-a-vis the Facility.

It is premature for the court, as a matter of law, to conclude that Covanta Holding's written guaranty with respect to the "performance and fulfillment of all obligations, covenants and agreements of [Covanta Hempstead] under the Service Agreement" does not encompass claims under the FCA that Covanta Hempstead submitted fraudulent certifications to plaintiffs that it had indeed "perform[ed] and fulfill[ed] all [of its] obligations, covenants and agreements of under the Service Agreement."

The complaint states a viable course of action (CPLR § 3211[a][7]) that the reasons given for firing Fahey were pretextual fabrication, rather than other issues with his job performance. The complaint alleges:

> In or about November 2015, in retaliation for his protected whistleblowing activities, Covanta terminated Fahey from his employment. *As a pretext for such termination, Covanta advised Fahey that he was being fired for arriving late to work and parking his car in an improper location* (emphasis added).

Nor does the submission by the defendants of a "spreadsheet" of Fahey's employment history satisfy the pleading requirements of CPLR § 3211(a)(1) (documentary evidence) (*Attias v Costiera, supra*).

The motion is DENIED. Defendants shall serve a Verified Answer within twenty [20] days of receipt of a copy of this decision with Notice of Entry.

All applications not specifically addressed herein are DENIED.

This foregoing constitutes the decision and Order of the Court.

DATE: December 7, 2017
Mineola, New York

Hon. Sharon M.J. Gianelli,
Justice of the Supreme Court

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE