SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

x	**TRIAL/IAS, PART 8 NASSAU COUNTY**
MERCY VEGA, PROPOSED REPRESENTATIVE OF ESTATE OF SERGIO VEGA, JOHN LONGINOTTI, PROPOSED REPRESENTATIVE OF THE ESTATE OF FRANCES LONGINOTTI and ROBERT ESTAPE, individually,	**Index No. 603152/23**
Plaintiff(s),	**Motion Seqs. No.: 001 & 002**
	Motion 001 Submitted: 10/4/23
-against-	**Motion 002 Submitted: 10/3/23**
	XXX
ECOHEALTH ALLIANCE, INC, and PETER DASZAK,	
Defendant(s).	
x	

The following papers read on this motion:

Notices of Motion/Supporting Exhibits/Memorandum of Law.....XX
Memorandum of Law in Opposition.....X
Affirmation in Opposition.....X
Reply Affirmation.....X
Reply Memorandum of Law.....X[1]

Defendants, EcoHealth Alliance, Inc. (EcoHealth) and Peter Daszak (Daszak), move this court (Motion Seq. 001) for an order, pursuant to CPLR §§3211(a)(1) and (7),

[1]Plaintiffs' counsel sought oral argument on Motion Seq. 001. However, as the motion was thoroughly, if not expertly briefed, the court found that oral argument would be superfluous.

dismissing the complaint against them. Plaintiffs, Mercy Vega (Mercy), Proposed Representative of Estate of Sergio Vega (Sergio), John Longinotti (John), Proposed Representative of the Estate of Frances Longinotti (Frances), and Robert Estape (Estape), individually, oppose the motion. Plaintiffs move separately (Motion Seq. 002) pursuant to CPLR §3124 to compel Defendants to supply insurance information. Defendants oppose the motion.

Plaintiffs[2] commenced this negligence action accusing EcoHealth of causing them to contract COVID-19, by summons and complaint dated February 17, 2023, and then by undated amended complaint filed on April 14, 2023. Defendants brought this motion in lieu of an answer.

Sergio and Frances both contracted COVID-19 and, sadly, died due to complications from the disease. Estape has contracted COVID-19 multiple times and alleges he suffers from significant health issues as a result.

The amended complaint contains four causes of action, to wit: 1) common law negligence, 2) strict liability/dangerous activity, 3) common law nuisance and 4) civil conspiracy. Defendants now move to dismiss, alleging, *inter alia*, they owed no duty to Plaintiffs, and that the allegations in the complaint are too tenuous, if not based upon

[2]Though no party has raised it, Mercy Vega and John Loginotti lack capacity to bring this action as "proposed" representatives. Only a personal representative who has received Letters of Administration may commence a survival action or wrongful death action on behalf of a decedent. (*Shelly v. South Shore Healthcare*, 123 A.D.3d 797 [2nd Dept. 2014]). However, Plaintiff Estape is suing in his individual capacity, therefore the court will reach the merits of the motion.

conspiracy.

A motion to dismiss a complaint based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law (*Gosch v Mutual Life Ins. Co*. of N.Y., 98 NY2d 314, 326 [2002]; *Bibbo v 31-30, LLC,* 105 AD3d 791, 792 [2d Dept 2013]). To be considered documentary, for the purposes of a motion to dismiss based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," qualify as "documentary evidence" in the proper case. If the document does not reflect an out-of-court transaction, and is not essentially undeniable, it is not documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Neither affidavits, deposition testimony or letters are considered documentary evidence within the intendment of CPLR 3211(a)(1) (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co*., 82 AD3d 1160, 1163 [2d Dept 2011]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*,

98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.,* 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

A cause of action for negligence requires a showing that the defendant owed the plaintiff a duty, the defendant breached that duty, the plaintiff was injured as a result of the breach, and the plaintiff's injury was proximately caused by the defendant's actions.

(*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817 [2016]).

To determine if strict liability, based upon an activity being abnormally dangerous, should apply, the court should consider the following factors, none of which are determinative: 1) is there a high degree of risk of some harm to person, land or chattels of others, 2) is there a likelihood that harm caused by the activity will be great, 3) is there an inability to eliminate risk by use of reasonable care, 4) is the activity a matter of common usage, 5) was it inappropriate for the activity to take place where the incident occurred, and 6) is its value to the community outweighed by the dangerousness of the activity. (*Doundoulakis v Town of Hempstead*, 42 NY2d 440 [1977]).

Common law nuisance, or a public nuisance, requires proof of ..."substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons." (*532 Madison Ave. Gourmet Foods v. Finlandia Ctr*, 96 NY2d 280, 292 [2001]). A public nuisance can be pursued by a private person only if that person suffered a special injury different from that suffered by the public at large. *Id.*

There is no independent tort of civil conspiracy in New York. (*McSpedon v. Levine*,158 AD3d 618 [2d Dept 2018]). However, a plaintiff may plead a civil conspiracy exists in connection with an underlying, cognizable tort. *Id.* The plaintiff must plead that the defendants made an agreement regarding the underlying tort, and made an overt act in

furtherance of the underlying tort. *Id.*

For the purposes of these motions it is necessary to know that EcoHealth conducts scientific research studying new coronaviruses in bats, and tries to determine if any of these viruses can be transmitted to humans. EcoHealth receives grants from the National Institutes of Health (NIH) to conduct its research, and partners with entities and governments around the world to do so. One such partner was the Wuhan Institute of Virology (WIV) in China. The most recent grant was renewed in July, 2019, but in April, 2020, NIH instructed EcoHealth to not provide any grant funds to WIV. EcoHealth confirmed receipt of that directive, and further confirmed that no funds had yet been provided to WIV from the renewed grant. It is believed that SARS-CoV-2, the virus that causes COVID-19, escaped from WIV. Plaintiffs allege that EcoHealth's research resulted in WIV having possession of SARS-CoV-2, and that WIV allowed SARS-CoV-2 to escape their lab which caused the worldwide pandemic, and eventually would lead to the death of Sergio and Frances, as well as to the deteriorating health of Estape.

Perhaps the most significant defect in the amended complaint, and in Plaintiffs' entire case, is that they must try to pin the alleged carelessness of WIV on EcoHealth. Other problems related to WIV is that EcoHealth's last contract with the WIV never took effect, and the partnership ended in April 2020. Regardless, the court will address each cause of action.

Common Law Negligence

The court agrees with Defendants that Plaintiffs' expansive view on EcoHealth's liability would open the door to a limitless number of claims. According to the World Health Organization, over 100,000,000 people in the United States have contracted COVID-19, and over 1,100,000 people have died from it.[3] Over 81,000 New Yorkers have died from the disease.[4] From late March, 2020 through mid-May, 2020, the number of deaths from COVID-19 per day in New York alone was in the hundreds, peaking in early April with the death toll exceeding 500 per day.[5] The number of plaintiffs, when just taking into consideration derivative claims and wrongful death claims by aggrieved family members would be overwhelming, likely reaching, nationwide, into the hundreds of millions of people.

The New York Court of Appeals directs courts to take numbers like these into consideration. Courts are to "fix the duty point" to prevent the "likelihood of unlimited or insurer like liability..." *(532 Madison Ave. Gourmet Foods v. Finlandia Ctr., supra* at 289, *quoting Palka v Servicemaster Mgt. Servs. Corp*, 83 NY2d 579, 586 [1994]). Plaintiffs argue in response is that the statute of limitations will run soon, assuming March, 2020 is when the claims accrued, and there has been no influx of said cases yet. This argument is faulty for a number of reasons. First, this court is not certain that

[3]https://covid19.who.int/region/amro/country/us

[4]https://coronavirus.health.ny.gov/fatalities-0

[5]https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a2.htm

March, 2020 would be the cut off date. Many people did not contract the disease until after March, 2020, if not long after March, 2020. How could a person who was not made sick by EcoHealth's alleged negligence until, hypothetically, May of 2023, or after, be told that their statute of limitations had already run despite them not having been injured yet? Second, there have been numerous "waves" and new strains of COVID-19 each year, and it is not clear to this court that with each new wave or each time a person became ill by a new strain that the statute of limitations would not commence until that moment, making it possible that every time a new strain was discovered, EcoHealth's liability would start anew. For this one reason alone, the complaint can be dismissed.

Third, Plaintiffs allege that "most people" who contract COVID-19 recover "without serious health consequences". The court does not know what Plaintiffs mean by "most" but as discussed *supra*, more than a million people have died thus far, and health care officials remain flummoxed by those suffering from "long Covid", which impacts 6.9% of adults[6]. Plaintiffs seem to be arguing that only those who become seriously ill from COVID-19 would have the right to recover should suits such as these be allowed to continue. Again, the court does not know on what Plaintiffs base this opinion. But it is hard to imagine telling a person who had to be quarantined from their family, friends and place of employment for up to 10 days who eventually recovered that what they suffered was not "serious" or actionable.

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[6] https://www.cdc.gov/nchs/products/databriefs/db480.htm
https://www.yalemedicine.org/conditions/long-covid-post-covid-conditions-pcc

The court agrees with Defendants that Plaintiffs have failed to establish either that EcoHealth owed them a duty, and if such a duty existed, that it was breached. Plaintiffs seem to argue that EcoHealth needlessly conducted research on bats, and had they just left the bats alone, COVID-19 would never had taken place. However, if this myopic view of scientific research were pervasive, then scientists would likely have very little to do, and would have discovered very little over the years. Plaintiffs seem to ignore that NIH encouraged EcoHealth to conduct this research by giving them grants to do so. This argument also ignores how scientific breakthroughs occur. Should the scientists who discovered the vaccine for COVID-19 not have performed their research because of the risks involved and because most people would eventually recover?

Plaintiffs and EcoHeath had no connection to one another, or had the same connection as EcoHealth had with every other person on Earth. Organizations like EcoHealth perform research in an attempt to make life safer from disease, not to cause it. Plaintiffs are alleging that simply by doing work that could in some way impact them, Defendants owed them a duty. Of course, this would mean that every scientist in the world who conducts some kind of research owes them a duty. But all of this aside, the culprit, if Plaintiffs' allegations are to be believed, is WIV, not EcoHealth. Plaintiffs try to tie EcoHealth to WIV's alleged failure to follow proper precautions, but there are too many gaps in their theory to make that work, assuming that doing so was even possible. As a result, the court finds EcoHealth did not owe a duty to Plaintiffs. And if they did,

Plaintiffs offer nothing other than conjecture that EcoHealth breached any duty.

The only purported proof of a breach is the "Declaration of Dr. Andrew G. Huff, Phd, M.S.", a former employee of EcoHealth. This declaration, which is on the letterhead of an Ohio-based law firm, was executed in September, 2022, for use in an unrelated case or cases. Mr. Huff claims to have raised concerns to Daszak that there were biosafety and biosecurity risks in some of the foreign laboratories with which EcoHealth contracted. In Mr. Huff's opinion, neither EcoHealth's executive team nor Daszak took his concerns seriously. The court does not cast aspersions on Mr. Huff or his claims, but assuming the Declaration is in admissible form despite being unnotarized, the court does not know the context in which the Declaration was made, and must take into consideration that it is simply his opinion that the laboratories were being careless with these dangerous viruses. His opinion, offered in an unrelated matter, does not mean that EcoHealth breached a duty.

Strict Liability/Abnormally Dangerous Activity

By weighing the factors elucidated, *supra*, the court finds this cause of action must be dismissed. Initially, the court finds that the value to the community of the work being performed by EcoHealth outweighed the dangerousness of the activity. EcoHealth explained that its research was part of an effort to determine the dangerousness of these viruses, and to test them with an eye toward creating vaccines to either avoid or quell future pandemics. It is not known how many lives the COVID-19 vaccines saved, nor

can we know the impact of the pandemic had the vaccines had been available at the beginning. But if the goal is to have a vaccine ready before the next pandemic occurs, the court sees that as a necessary and vital function that could save lives worldwide, and therefore is worth the associated risks. The court also notes that Plaintiffs have not established that the risks could not have been avoided by use of reasonable care. The exact manner in which COVID-19 escaped WIV is still unknown, but if it was due to carelessness, or the failure to follow proper protocols, then it follows logically that if those protocols were followed, or if proper care was taken, the risks would have been controlled. Finally, there is no proof that WIV was not an appropriate place for this work to be performed. Based upon these factors, the court finds the Strict Liability cause of action must be dismissed.

Common Law Nuisance

This cause of action must be dismissed as Plaintiffs are unable to establish that EcoHealth's work interfered with the public or that Plaintiffs suffered a special injury different from the type suffered by the public at large. (*532 Madison Ave. Gourmet Foods v. Finlandia Ctr*, *supra*.). Further, there is no proof that EcoHealth was even the party that caused the alleged nuisance. Plaintiffs cite to a number of cases that hold that personal injuries satisfy the different-in-kind element, and one case in particular involved gun-related injuries. In *Johnson v, Bryco Arms*, 304 F.Supp.2d 383 (E.D.N.Y. 2004), the plaintiff was injured when he was shot during an attempted robbery. The weapon was

purchased legally, but then eventually landed in the hands of one of the robbers, who did not legally possess the gun. The gun was recovered, and as a result the plaintiff was able to discover who manufactured the gun, who sold it, who marketed it and who distributed it. These entities were the parties plaintiff sued for, *inter alia*, public nuisance. The court found that the plaintiff's injuries were different in kind than the general public's based upon his specific injuries and trauma related to the robbery. What this court finds compelling about *Johnson*, however, is how that court distinguished the case from "...a situation in which plaintiff is unable to separate and quantify the contribution of each party to the public nuisance." *Id.* at 399.

It is not clear to this court whether one person contracting COVID-19 is different in kind than another, the way some courts have found personal injuries are different in kind. People can be injured in countless ways when being shot by a gun, from a minor injury or grazing to being paralyzed or killed. It is true that people also react very differently to contracting COVID-19, with some being asymptomatic and others facing more dire consequences, such as Plaintiffs herein. But based upon what we know so far, the virus attacks the human body in the nearly the same way, with a specific impact on the lungs. Regardless, what is clear is that there is no way to know to what extent, if at all, EcoHealth contributed to the Plaintiffs' injuries, other than working with the party-WIV- who might have been the cause of the release of the virus into society. EcoHealth cannot be held strictly liable under such circumstances.

Civil Conspiracy

As it has already been established that there is no independent tort of civil conspiracy, this cause of action must be dismissed. Plaintiffs have also failed to plead a civil conspiracy because the court finds EcoHealth did not conspire with anyone, and did not take an overt act in furtherance of some underlying cognizable tort, and that the amended complaint fails to allege an underlying cognizable tort. (*McSpedon v. Levine, supra*).

Accordingly, it is hereby

ORDERED, that Defendants' motion (Motion Seq. 001) to dismiss the complaint is GRANTED. The complaint is dismissed; and it is further

ORDERED, that the Plaintiffs' motion (Motion Seq. 002) to compel is DENIED as moot.

This constitutes the Decision and Order of the Court. The court has considered all of the other arguments raised by the parties and finds them to be without merit.

Dated: December 1, 2023
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
Dec 05 2023
NASSAU COUNTY
COUNTY CLERK'S OFFICE