

Hutley v South Country Cent. Sch. Dist.
2024 NY Slip Op 35670(U)
November 7, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 625774/2023
Judge: Vincent J. Martorana
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Short Form Order

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

NACOLE HUTLEY and JOSEPH LAVALL
COLEMAN, on behalf of the Estate of J.C.,

Plaintiffs,

- against-

SOUTH COUNTRY CENTRAL SCHOOL
DISTRICT and THE TOWN OF BROOKHAVEN,Defendants.

ORIG. RETURN DATE: 04/25/24

ADJOURNED DATE: 05/23/24

MOTION SEQ. NO.: 001 - MD

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Upon efiled documents numbered 5-10, 18-41, 43-45; it is

ORDERED that the summary judgment motion by the Town of Brookhaven (001) seeking dismissal of Plaintiffs' claims against it is denied as premature pursuant to CPLR§3212(f), without prejudice.

The within action asserts claims of wrongful death and strict liability arising from the death of Plaintiffs' thirteen year old son ("J.C.") in October of 2022. Plaintiffs assert that their son J.C. contracted non-Hodgkin lymphoma at age ten as a result of attending Frank P. Long Intermediate School for 5 ½ months of the 2019-2020 school year (prior to the school's temporary closure due to the Covid-19 pandemic). Plaintiffs allege in their complaint that toxins emanated from the Brookhaven Landfill and contaminated the nearby school, causing their child's illness and death. Issue has been joined as to both defendants. Defendant Town of Brookhaven ("Town") now moves for summary judgment, seeking dismissal of the claims against it, pursuant to CPLR §3212.

Plaintiff's first cause of action asserts wrongful death as against the Town. A wrongful death claim requires the plaintiff to establish "(1) the death of a human being, (2) the wrongful act, neglect

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or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent” (*Proano v. Gutman*, 211 AD3d 978, 982–83, 180 NYS3d 279, 284 [2d Dept. 2022]) (quoting *Chong v. New York City Tr. Auth.*, 83 A.D.2d 546, 547). Plaintiff’s second cause of action alleges wrongful death against South Country School District, and is not the subject of this motion.

Plaintiff’s third cause of action asserts strict liability and appears to be asserted only against the Town. Certain activities may give rise to claims for strict liability, due to the activity’s “abnormally dangerous” nature (*Nicholson v. KeySpan Corp.*, 65 AD3d 1025, 1026, 885 NYS2d 106, 108 [2d Dept. 2009]). “The policy consideration may be simply put: those who engage in activity of sufficiently high risk of harm to others, especially where there are reasonable even if more costly alternatives, should bear the cost of harm caused the innocent” (*Doundoulakis v. Town of Hempstead*, 42 NY2d 440, 448, 398 NYS2d 401 [1977]) (citing *Restatement, Torts 2d, s 519, Comment d*). No one factor is determinative, and an activity found to be abnormally dangerous in one context, may not be abnormally dangerous under other circumstances (*Doundoulakis v. Town of Hempstead*, *supra*). However in determining whether or not an activity is “abnormally dangerous” for strict liability purposes, “[p]articularly useful are the six criteria listed in Restatement of Torts Second (s 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” (*Doundoulakis v. Town of Hempstead*, *supra* at 448).

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O’Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Stonehill Capital Mgmt., LLC v. Bank of the West.*, 28 NY3d 439, 448, 45 NYS3d 864 [2016]) (quoting *Alvarez v Prospect Hosp.*, *supra* at 324). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept.

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1990)). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93[1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 512 NYS2d 419, 420 [2d Dept. 1987]).

Pursuant to CPLR §3212(f), summary judgment may be precluded under circumstances where discovery is incomplete; however, the discovery sought must be more than a fishing expedition. It may not be predicated upon speculative hope that evidence supporting a theory may be uncovered (*Greenberg v McLaughlin*, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]; *Zarzona v. City of New York*, 208 AD2d 920, 920, 617 NYS2d 534, 535 2d Dept 1994]; *Price v. Cty. of Suffolk*, 303 AD2d 571, 756 NYS2d 758 [2d Dept 2003]). Where facts essential to justify opposition may exist but cannot be fully stated due to the need for discovery, summary judgment may be denied on this basis (CPLR§3212[f]; *Jones v. American Commerce Ins. Co.*, 92 AD3d 844, 845, 939 NYS2d 115, 116 [2d Dept. 2012]).

The Town argues that Plaintiffs lack sufficient evidence of both general causation (that the toxin at issue is capable of causing non-Hodgkin lymphoma) and specific causation (that J.C. was exposed to sufficient levels of the toxin to cause his illness). The Town further argues that Plaintiffs cannot establish their case through the use of expert testimony based upon generally accepted methodologies. The Town raises J.C.'s relatively brief exposure (5 ½ months) as well as an expert report that was used in a related case, Klaus et al v The Town of Brookhaven (Index 606376/2019). The report used in the Klaus case was provided by toxicologist Brent D. Kerger, Ph.D, DABT ("Kerger"). Kerger states that he was tasked by Counsel for the Town (in the Klaus action) to answer two questions: "Have the Plaintiffs in this case put forward any meaningful scientific proof that Plaintiffs developed clinically demonstrated injuries or diseases related to chemical emissions from the municipal landfill operated by the Town of Brookhaven?" and "Has the available scientific literature on municipal landfill emission revealed any substantial new evidence since 1999 that would support Plaintiffs' claims that nearby residents or workers developed clinically demonstrated injuries or diseases related to chemical emissions from the municipal landfill operated by the Town of Brookhaven?" Kerger answers both questions with "No." Kerger's conclusion is based upon measurements of alleged toxins present and methodology used and comparison to regulatory values. He states that available scientific studies do not establish a causal link between environmental exposure to municipal landfills generally or the specific chemicals alleged by Plaintiffs in the Klaus case. Kerger also cites a New York State Department of Health ("DOH") report issued in 2019. He asserts that the DOH found that cancer rates among employees of Frank P. Long Intermediate School were equivalent to typical cancer rates in new York State. Kerger also notes that relevant scientific literature on landfill emissions indicate weaknesses in research design.

Plaintiff counters that the Town's motion is premature, because more discovery is needed. Plaintiff's expert toxicologist, William R. Sawyer, PhD ("Sawyer"), opines that

...a fair inference can be drawn that the certain toxic substances released from the Landfill would be expected to have accumulated within the dust at the Frank P. Long Intermediate School ("Long"). For example, the presence of PCBs (very similar chemical characteristics to chlorinated dioxins and dibenzofurans) in soils and indoor dusts is of concern because

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children have relatively high rates of soil and dust ingestion (citations omitted).

Sawyer further asserts that “several studies (citations omitted) have shown that significant amounts of soil/dust sorbed PCBs in indoor dust are bioavailable into circulatory blood lipid through dust and soil ingestion” and that the brevity of J.C.’s attendance at the school is not dispositive because, “...carcinogenic dioxins and dibenzofurans are well known to induce non-Hodgkin’s lymphoma (NHL) in humans and that they accumulate in blood lipid with an extraordinary long half-life, with some congeners up to 10 years. Accordingly, the Town’s contention, as a matter of law, that the toxins released from the Landfill were not the cause of J.C.’s death, is incorrect. In fact, the Town’s own expert does not even make that assertion.”

Sawyer argues that more information that is in the possession of Defendants must be reviewed before a definitive opinion can be given as to the cause of J.C.’s death. He describes the various types of existing data and information that is sought and additional testing that should be conducted, including “testing within the Long School for chlorinated dioxins and dibenzofurans as well as heavy metals...within the indoor dust.” Sawyer further points out that some of the exposure levels that were focused on in the Klaus matter were of materials that are short-lived and volatile, rather than long-lived chemicals.

“In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff’s exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)” (*Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 808, 28 N.Y.S.3d 656 [2016]; see also *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584 [2006]; *Buist v. Bromley Co., LLC*, 226 AD3d 740, 209 NYS3d 98, 100 [2d Dept. 2024]). “[I]t is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community” (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584 [2006]; see also *Nemeth v. Brenntag North America*, 38 NY3d 336, 342, 173 NYS3d 511 [2022]). “[T]here may be several ways that an expert might demonstrate causation, for example by using mathematical modeling, but...any method used must be “generally accepted as reliable in the scientific community” (*Nemeth v. Brenntag N. Am.*, *supra* at 343 quoting *Parker v Mobil Oil*, *supra* at 449). Although precise quantification is not required to make a showing of specific causation, it is still a plaintiff’s “burden to establish sufficient exposure to a substance to cause the claimed adverse health effect” (*Cornell v. 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 784, 986 NYS2d 389 [2014]; see also *Nemeth v. Brenntag N. Am.*, *supra*; *Buist v. Bromley Co., LLC*, *supra*).

“To prove specific causation, it is not enough for a plaintiff’s expert to testify that “exposure to a toxin is ‘excessive’ or ‘far more’ than others,” or to offer testimony “that merely links a toxin to a disease or ‘work[s] backwards from reported symptoms to divine an otherwise unknown concentration’ of a toxin” (*Buist v. Bromley Co., LLC*, *supra* at 102 (quoting *Nemeth v. Brenntag N. Am.*, *supra* at 343 quoting *Parker v Mobil Oil*, *supra* at 449). Nor is it sufficient “to show that a certain ... agent sometimes causes the kind of harm that [a plaintiff] is complaining of. At a minimum, ... there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to

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have suffered.” (*Cornell v. 360 W. 51st St. Realty, LLC*, *supra* at 784 (quoting *Wright v. Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir.1996]); *see also Buist v. Bromley Co., LLC*, *supra*).

Plaintiff argues that the Town’s motion relies on an expert report in a separate matter which does not actually address the claims here at issue and that the Town has failed to establish the lack of a factual issue with respect to causation. Plaintiff further argues that discovery is needed in order for the issue of causation to be fully briefed.

Defendant Town counters that traditional notions of causation do not apply, because of a different standard imposed in toxic tort cases, that Defendant has made a *prima facie* case such that Plaintiff must now establish specific and general causation, and that Plaintiff is not entitled to discovery because data was published on the school website and Plaintiffs already have responsive documents. Plaintiff’s counsel contests these assertions in correspondence requesting oral argument. The court does not find oral argument to be necessary.

Upon consideration of the claims here at issue and the type of information that may be necessary to prosecute them, the court finds the Town’s motion to be premature. Plaintiffs have raised issues in opposition to the motion that necessitate discovery. Plaintiffs should be given the opportunity to conduct such discovery prior to the Court’s consideration of whether or not summary judgment is appropriate (CPLR§3212[f]; *Valdivia v. Consol. Resistance Co. of Am.*, 54 AD3d 753, 755, 863 NYS2d 720 [2d Dept 2008]; *Harvey v. Nealis*, 61 AD3d 935, 936, 877 NYS2d 459, 460 [2d Dept. 2009]; *Churaman v. C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485, 486–87, 35 NYS3d 716, 718 [2d Dept. 2016]; *Magee v. Cty. of Suffolk*, 14 AD3d 664, 664–65, 789 NYS2d 289 [2d Dept 2005]; *Gruenfeld v. City of New Rochelle*, 72 AD3d 1025, 1026, 900 NYS2d 144 [2d Dept. 2010]). Accordingly, Defendants’ summary judgment motion is denied as premature pursuant to CPLR§3212(f), without prejudice.

Dated: November 7, 2024
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: _____ FINAL DISPOSITION x NON-FINAL DISPOSITION