Court of Claims
State of New York

ROBERT ABRAMS BUILDING FOR LAW AND JUSTICE
BOX 7344, CAPITOL STATION
ALBANY, NEW YORK 12224

Richard E. Sise
Acting Presiding Judge

Eileen F. Fazzone
Chief Clerk

July 25, 2016

Honorable Eric T. Schneiderman
Attorney General
The Capitol
Albany, New York 12224
Attn: Assistant Attorneys General Feldman and Mogor

Re: ALASKAN OIL, INC
Claim No. 116072 Motion No. CM-81863

Dear Counsel:

In connection with the above numbered and entitled motion(s), enclosed please find:

__✓__two conformed copies of Decision and Order (one paper)

_____one certified and two conformed copies of Decision and Order (one paper)

_____two conformed copies of an Order

You are required to serve a copy of the above document upon all appropriate parties.

Very truly yours,

Eileen F. Fazzone
Chief Clerk

Motion Unit
(518) 432-3416

Encon
D

ehm
enc.
cc: Neil M. Gingold, Esq.
5178 Winterton Dr.
Fayetteville, NY 13066
(w/attachment)

STATE OF NEW YORK COURT OF CLAIMS

ALASKAN OIL, INC.,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 116072
Motion No. CM-81863

Defendant.

BEFORE: HON. JUDITH A. HARD
Judge of the Court of Claims

APPEARANCES: For Claimant:
Neil M. Gingold, Esq.

For Defendant:
Hon. Eric T. Schneiderman, NYS Attorney General
By: Cornelia Mogor, Assistant Attorney General,
Of Counsel

Defendant moves this Court for an order granting it summary judgment on the grounds that the claim is untimely pursuant to Section 10 (4) of the Court of Claims Act, the State is immune from liability, the Court lacks subject matter jurisdiction, and the claim fails to state a cause of action, or in the alternative, for an order pursuant to CPLR 3124 or 3126 to compel claimant to provide complete answers to defendant's interrogatories.

The underlying claim seeks $1,300,000.00 for the alleged breach of contract of a Voluntary Cleanup Agreement (VCA) between claimant and defendant, due to alleged interference by Region 6 DEC employees with regard to the administration of VCA sites, where

the VCA provided that Region 7 DEC would administer the agreement. The claim was filed on November 21, 2008, after claimant was granted leave to file a late claim by this Court, pursuant to an Order filed on October 21, 2008.

Issue was joined with the service of defendant's Verified Answer on December 30, 2008. In its Verified Answer, defendant asserted the following affirmative defenses: (1) failure to state a cause of action; (2) untimeliness pursuant to Section 10 (4) of the Court of Claims Act; and (3) a lack of subject matter jurisdiction pursuant to Section 11 of the Court of Claims Act.

FACTS

In or about 1994, claimant became interested in acquiring a number of properties owned by Parrish Energy Fuels, Inc., and Webber Oil Company, many of which were suspected of being contaminated with petroleum product that may have been discharged, spilled or leaked over years of petroleum operations on the various properties. Claimant and the New York State Department of Environmental Conservation (DEC) began discussions in 1994 or early 1995 about a new program the DEC had created known as the Voluntary Cleanup Program. Claimant alleges that the Voluntary Cleanup Program was intended to assist the private sector in remediating petroleum contaminated properties that would have ordinarily been cleaned up by the public sector or left abandoned by the private sector.

After claimant acquired the subject properties, claimant and the DEC entered into a Voluntary Cleanup Agreement (VCA), dated February 5, 1996, which covered 40 sites in upstate New York. The VCA provided that claimant was to implement a program of cleanup, approved by the DEC as to its technical aspects and timeliness, and to reimburse DEC for actual administrative expenses up to $66,000.00 upon completion of the abatement. Although some of

the parcels were located in other regions, DEC's Region 7 office was given oversight responsibility.

After the execution of the VCA, a work plan and schedule were submitted and approved by DEC, which contemplated completion of the cleanup of the 40 sites by no later than December 1998. Defendant alleges, and claimant does not dispute, that the work was not completed by the end of 1998, and further that the abatement work slowed in 1999 and completely ceased by 2004. Defendant alleges that 19 of the subject sites were left without the requisite petroleum decontamination.

By letter dated October 11, 2005, Benjamin A. Conlon, Associate Attorney with DEC, advised claimant that the VCA would be terminated for non-compliance within thirty days, unless claimant comes into substantial compliance with the terms of the VCA. When no formal reply to said letter was remitted and no further attempt at compliance was made by claimant, Michael J. Lesser, Assistant Counsel in the Office of General Counsel of the DEC, on behalf of the DEC, advised claimant, by letter dated September 5, 2007, that the VCA was terminated for material breach of contract due to claimant's failure to perform its obligations.

Claimant thereafter brought this claim, alleging that despite the intent to make it easier for claimant to bring the 40 subject sites up to appropriate standards, and to have the VCA exclusively controlled by the Region 7 Office of the DEC, the VCA made it more difficult for claimant to upgrade the 40 sites to appropriate standards, the Region 6 technical staff constantly interfered with the VCA sites located within the Region 6 geographical sites, the interference caused tremendous problems for claimant in conducting day to day business with the DEC on

issues unrelated to the VCA, and that the interference and breach of the VCA by the DEC caused or contributed to claimant's inability to meet the terms and conditions of the VCA.

Defendant moves for an order granting it summary judgment on the basis that no genuine issue of fact exists and that the claim must be dismissed on the law.

LAW AND ANALYSIS

Summary judgment is a drastic remedy which should not be granted unless it is clear that there are no triable issues of fact (Andre v Pomeroy, 35 NY2d 361, 364 [1974]). The Court's function in a motion for summary judgment is not to resolve issues of fact, but to determine whether issues of fact exist (Barr v County of Albany, 50 NY2d 247 [1980]).

The proponent of a motion 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 [1986]). "Material" has been defined as "substantial; of consequence; important; going to the essence or the merits; relating to matter of substance, rather than form" (Wanger v Zeh, 45 Misc 2d 93, 96 [Sup Ct, Albany County 1965], citing Ballentine's Law Dictionary, affd 26 AD2d 729 [3d Dept 1966]). A moving party's failure to demonstrate that there are no material issues of fact requires denial of a summary judgment motion, regardless of the sufficiency of the opposing party's papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). However, once a moving party has demonstrated that there are no such material issues of fact, the burden shifts to the opponent of the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez, 68 NY2d 320); Winegrad, 64 NY2d 851; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The

evidence must be viewed in the light most favorable to the opponent of the motion, and that party should be given every favorable inference (McKinnon v Bell Sec., 268 AD2d 220 [1st Dept 2000]).

Timeliness

Defendant argues that the claim fails to set forth the dates of the alleged acts of interference, but that they appear, from a review of DEC records, to be from the 1990s and perhaps 2001, which renders this claim untimely.

This Court previously held, in its Decision and Order dated September 29, 2008, that the claim arose on the date the subject contract was terminated, specifically, on September 5, 2007, and that it was, therefore, timely for purposes of Article 2 of the Civil Practice Law and Rules. The Court granted claimant late claim relief and sees no basis upon which to now alter its determination herein.

Failure to State a Cause of Action

Defendant argues that the claim is deficient and fails to meet the specific jurisdictional pleading requirements of Court of Claims Act § 11 (b).

Court of Claims Act § 11 (b) states, in pertinent part:

> 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.

Defendant states that other than the reference to the 2007 termination for cause by the State of the VCA, no dates are set forth in the claim, and that other than a generic reference to alleged interference on the part of DEC Region 6 personnel, no facts or details are provided.

Defendant further states that no attempt is made in the claim to identify or distinguish VCA related actions from non-VCA related actions, and that the damages portion of the claim is deficient because it raises items of damage which appear to arise from general dissatisfaction on the part of claimant with having to comply with the directives of the DEC, rather than from the alleged breach of the VCA. Defendant argues that without more specific details, the State was unable to investigate the claims promptly and ascertain its liability.

The Court disagrees. The claim clearly sets forth details regarding the accrual of the alleged cause of action, the nature of the same and the damages sought, including the total sum claimed. In addition, as the Court previously concluded in its Decision and Order dated September 29, 2008, the State had timely notice of the essential facts constituting the claim, notice of claimant's intention to bring an action, and an opportunity to investigate the matter, based upon an article 78 proceeding that had been instituted shortly after the date of accrual, and was not prejudiced.

Immunity

Defendant argues that because the claim is based on allegations of breach of contract of the VCA, which is an agreement pursuant to DEC's authority under Navigation Law § 170 et seq., the State's sovereign immunity is preserved and the Court of Claims is deprived of subject matter jurisdiction.

In support of its position, defendant relies on Navigation Law § 176 (2) (b), which states:

> Section eight of the court of claims act or any other provision of law to the contrary notwithstanding, the state shall be immune from liability and action with respect to any act or omission done in the discharge of the department's responsibility pursuant to this article; provided, however, that this subdivision shall not limit any

> liability which may otherwise exist for unlawful, willful or malicious acts or omissions on the part of the state, state agencies, or their officers, employees or agents or for a discharge in violation of section one hundred seventy-three of this article.

In opposition, claimant argues that defendant's actions are not immune because they constitute unlawful, willful or malicious acts or omissions. Specifically, claimant alleges that the Regional Spill Engineer in DEC Region 6 (Gary McCullough) and the technical staff at Region 6 held claimant to a higher standard of environmental compliance than other similarly situated regulated entities (Gingold Aff., dated August 7, 2012, at ¶¶ 35-36). As an example, claimant refers the Court to a proposed administrative Consent Order, R6-20000825-63, which Region 6 sent to claimant in 2000. Said Order called for claimant to pay a civil penalty to the DEC for failing to timely register the sites in claimant's name after they were transferred from Parish Land to claimant (id. at ¶¶ 40-46). Claimant argues that because the sites had previously been registered under a different name, and not simply unregistered, they should not have been cited by Region 6, particularly because the VCA provided that Region 7 was to regulate them (id.). Defendant argues that the cited violations had nothing to do with the VCA, because they pertained to PBS (petroleum bulk storage) compliance as opposed to the remediation of spills (Conlon Affidavit, August 22, 2012, ¶ 19). Notably, the parties both state that as of the filing of the pending motion, this issue was unresolved.

In addition, claimant alleges that it received a "demand for payment" letter dated April 11, 2001 from the NYS Attorney General, requesting $261,223.58 for monies spent by Region 6 on a clean up from which the VCA had specifically indemnified Alaskan. The cleanup conducted by DEC Region 6 was for a spill in 1988 (#8800368), which was eight years prior to claimant's

purchase of the VCA properties. Claimant argues that it understood the VCA to indemnify it from past claims unless specifically acknowledged and agreed upon, but that the DEC headquarters in Albany viewed it differently (Neugebauer Aff., dated August 7, 2012, at ¶ 8). As a result, a lawsuit was commenced, which also remained unresolved at the time of defendant's motion (id.)

Finally, claimant argues that Region 6 was inconsistent with its remediation of two of its sites (361 W. Main Street, Gouverneur, and Route 342, Watertown), thereby further exemplifying how it held claimant to a higher standard (Neugebauer Aff., dated August 7, 2012, at ¶¶ 9, 11). The Court notes, however, that both sites are non-VCA sites and had nothing to do with the alleged breach of the VCA.

After reviewing the multiple submissions of the parties, the Court concludes that defendant has set forth its prima facie showing of entitlement to judgment as a matter, having tendered sufficient evidence showing that the State, through DEC, was discharging its responsibilities under Article 12 of the Navigation Law in a lawful, non-willful and non-malicious manner, and therefore is shielded from liability for the actions alleged herein. The Court further concludes that claimant has failed to raise a genuine issue of material fact warranting a trial of the same. The alleged unlawful, malicious or willful acts claimant complains of relate not to the termination of the VCA, but to non-VCA related events, including the allegations that defendant held claimant to a higher standard.[1]

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[1] Mr. Brazell testified at his deposition and stated in a supplemental affidavit that Region 6 had no decision-making authority relating to the VCA, and that all of those decisions were made by himself or by Region 7 staff directly reporting to him, such that any Region 6 activities were unrelated to the VCA (Mogor Aff., dated November 4, 2015, Exhibit L at pp. 32-33; Brazell Affidavit, sworn to December 4, 2015, ¶ 13). In addition, Mr. Brazell stated that he never said that he held claimant to a higher standard, and that it was the Regional Engineer for Region 6 who had mentioned

CONCLUSION

Based upon the foregoing, the Court grants defendant's cross-motion for summary judgment and dismisses Claim No. 116072.

Albany, New York
July 1, 2016

Judith A. Hard

JUDITH A. HARD
Judge of the Court of Claims

Papers Considered:

1. Notice of Cross-Motion for Summary Judgment or Motion to Compel, dated July 11, 2012; Affirmation of Cornelia Mogor in Opposition to Claimant's Motion to Compel and in Support of Defendant's Motion for Summary Judgment, dated July 11, 2012; Affirmation of Benjamin A. Conlon in Opposition to Claimant's Motion to Compel and in Support of Defendant's Motion for Summary Judgment, dated July 11, 2012, with Exhibits A through K.
2. Affidavit in Opposition to Defendant's Cross-Motion for Summary Judgment and in Further Support of Claimant's Motion to Compel, sworn to by Neil M. Gingold, Esq., on August 7, 2012, with Exhibits A through I; Affidavit in Opposition to Defendant's Cross-Motion for Summary Judgment and in Further Support of Claimant's Motion to Compel, sworn to by Richard A. Neugebauer on August 7, 2012, with Exhibit; and Memorandum of Law in Opposition to Defendant's Cross-Motion for Summary Judgment, dated August 7, 2012.
3. Reply Affirmation of Benjamin A. Conlon in Support of Defendant's Motion for Summary Judgment, dated August 22, 2012; and Reply Affirmation of Cornelia Mogor in Support of Defendant's Motion for Summary Judgment, dated August 22, 2012.
4. Supplemental Reply Affirmation of Benjamin A. Conlon in Support of Defendant's Motion for Summary Judgment, dated August 1, 2013.

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holding entities that own numerous gas stations to a higher standard than a mom and pop entity which owns only one gas station, and even then, that the statement was made prior to the signing of the VCA (id. at ¶ 14).

5. Supplemental Reply Affirmation of Cornelia Mogor in Support of Defendant's Motion for Summary Judgment, dated November 4, 2015, with Exhibit L.
6. Affidavit in Opposition to Defendant's Motion for Summary Judgment, sworn to by Neil M. Gingold, Esq., on November 4, 2015, with Exhibits A through E; Affirmation of Roger W. Bradley, Esq., dated November 3, 2015, with Exhibit A; Affidavit of Eric Murdock, sworn to on November 2, 2015, with Exhibit A; Affidavit of Patrick Leone, sworn to on November 3, 2015; Affidavit of Fred Karam, sworn to on October 27, 2015.
7. Reply Affidavit in Opposition to the Supplemental Reply Affirmation of Cornelia Mogor in Support of Defendant's Motion for Summary Judgment, sworn to by Neil M. Gingold, Esq., on December 4, 2015.
8. Supplemental Reply Affidavit of Richard Brazell in Support of Defendant's Motion for Summary Judgment, sworn to on December 4, 2015; and Supplemental Reply Affirmation of Benjamin A. Conlon in Support of Defendant's Motion for Summary Judgment, dated December 4, 2015, with Exhibit M.

Papers Filed:

Claim, filed on November 12, 2008; Verified Answer, filed on January 5, 2009; and Decision and Order of Hon. Judith A. Hard, J.C.C., filed on August 3, 2015.