316 Courtland Avenue, LLC v. Frontier Communications Corporation et al

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT 316 COURTLAND AVENUE, LLC, Plaintiff, v. FRONTIER COMMUNICATIONS CORPORATION, SNET AMERICA INC., Defendants.

Civil No. 3:17-cv-01336-JBA

September 12, 2022

RULING ON MOTIONS FOR SUMMARY JUDGMENT Plaintiff 316 Courtland Avenue, LLC brings this action against Defendants Frontier Communications Corporation and SNET America, Inc, former tenants of 316 Courtland Avenue. Frontier is the parent company of SNET. Plaintiff alleges S property contaminated the property and Defendants failed to reimburse Plaintiff for

environmental mitigation efforts. (Second Am. Compl. [Doc. #58].) Plaintiff specifically the Comprehensive Environmental Response, (Count One); were negligent per se ; violated the Conn. Gen. Stat. § 22a-452 (Count Three); violated the Connecticut Environmental negligent (Count Six); and breached the lease (Count Seven). (Id.)

Plaintiff moved for summary judgment on Count Seven [Doc. # 74]. Defendants cross- moved for summary judgment on all counts [Doc. # 75]. For the reasons that follow, the Court grants Defendants' summary judgment motion on Count One, declines supplemental jurisdiction over the remaining state law counts, and thus dismisses summary judgment without prejudice.

I. Background

A. Establishment Classification From 1972 to 2016, Defendant SNET leased a portion of the property, which Plaintiff purchased in 2013, ¶ 3, 7.) As part of its due diligence before purchasing the property, Plaintiff retained Fuss & l site assessment. (Id. ¶ 7.) During this assessment, Connecticut Department of Energy and Environmental hazardous waste manifest database listed a July 1997 shipment of 30 gallons of sulphuric acid from the property. (Id. ¶¶ 11-12.) Plaintiff asked both the then- owner, Sivan, and SNET for copies of the manifest for this shipment, but neither Sivan nor SNET were able to produce it. (Id. ¶¶ 13, 22.) f that because of this transfer of hazardous material, unless Plaintiff could provide documentation showing that the sulphuric acid was not generated within a single month, DEEP would likely consider the property to be an Establishment under the Connecticut Transfer

Act. (Id. ¶¶ 15-16.) The Transfer Act, Conn. Gen. Stat. § 22a-134 et seq., applies to the transfer of a property that is classified as an -134a, including any property or business at which more than 100 kilograms of covered hazardous waste is generated per month. Conn. Gen. Stat. § 22a-134(3). When an Establishment is transferred, one of several forms must be filed with DEEP. Conn. Gen. Stat. § 22a-134a(c). The form at issue in this case is Form III, which s or a hazardous substance has occurred at the establishment or the environmental conditions

the parcel in accordance with prevailing standards and guidelines and to remediate pollution

caused by any release of a hazardous waste or hazardous substance from the establishment n. Gen. Stat. § 22a-134(12).

Plaintiff claims it again asked SNET, both directly and through Sivan, to investigate the source of the acid and look for the manifest. (¶¶ 18-26.) SNET was unable to locate the original manifest. (Id. ¶ 27.) Defendants, however, dispute that Plaintiff sought this information from SNET directly, arguing that it instead sought the s. [Doc. # 84] at 11, n.14.) Plaintiff maintains that in its conversations with representatives of AT&T, the representatives were speaking on behalf of SNET. (Pl. Reply [Doc. # 85] at 6-7.) Ultimately, in order to avoid future liability if DEEP later classified the property as an Establishment, Plaintiff filed a precautionary Form III, with Plaintiff as the certifying party, and attempted to convince DEEP that the property should not be classified as an Establishment. (¶¶ 31, 35.) In 2014 DEEP nonetheless classified the property as an Establishment, stating that without other evidence DEEP would consider the sulphuric acid to have been generated within a single month. (Id. ¶ 36.) In 2019, after Plaintiff had carried out extensive remediation efforts, detailed below, Id. ¶ 68.) The manifest used the Id. ¶¶ 69-70.)

B. Remediation Efforts Once the property had been classified as an Establishment, the Transfer Act required .) to proceed with remediation. (Id. ¶ 39.) a Connecticut licensed environmental professional (LEP). (Hankins Decl. [Doc. # 74-24] ¶ 2.)

e property, environmental contamination. (Id. ¶ 38; Pl. Ex. 13 [Doc. # 75-15] at 19-21; Defs Case 3:17-cv-01336-JBA Document 104 Filed 09/12/22 Page 3 of 13 56(a)(1) Stmt. ¶ 26.) investigations to determine whether any of these AOCs would need to be remediated under

.) They determined that AOC-1 (southeastern fill area), AOC-4 (former hydraulic lift area), and AOC-8 (western storage area) would require remediation. (Id. ¶¶ 39-40, 47, 58.)

AOC-1 had been contaminated by petroleum, related to historic fill (Id. ¶ 41.) The contamination was under an existing paved parking lot, so to remediate Plaintiff repaved the AOC-1 without DEEP approval. (Id. ¶¶ 43, 44.) A small portion of AOC-1 contained

polychlorinated biphenyls, and this portion was excavated and removed. (Id. ¶¶ 45, 46.)

AOC-4, the area surrounding a hydraulic lift system used by SNET, was contaminated by petroleum. (Id. ¶ 49-50, 54.) Phase II sampling did not show any contamination, but in 2016 Plaintiff observed free-phase hydraulic oil at two of the lift locations when the lifts were removed as part of the SNET facility being decommissioned. (Defs. Ex. 18 (Doc. # 75-20] at 10.) petroleum contamination. (Id. at 23-24.) Id. at 24.) Defendants, however, argue that, with the exception

of the free-phase hydraulic oil, Plaintiff has not shown that the contamination is attributable to SNET. (Defs - Stmt. ¶ 49.) To remediate AOC-4, Plaintiff excavated the contaminated soil, ultimately

R. 56(a)(1) Stmt. ¶ 55.)

AOC-8 had soil contaminated with polycyclic aromatic hydrocarbons and heavy metals (arsenic and lead), soil contaminated with petroleum, and an area under the parking lot contaminated with petroleum. (Id. ¶ 59.) Plaintiff remediated AOC-8 by excavating the contaminated soil. (Id. ¶ 60.)

Following a final Transfer A of No Audit [Doc. # 74-14], stating that the submission had been accepted and the

commissioner did not intend to audit it.

According to Plaintiff, the total cost of remediation was $1,483,258. (Id. ¶ 66.) Broken down, the costs were $328,843 for AOC-1, $901,949 for AOC-4, $101,788 for AOC-8, and $150,680 in general costs. (Id. ¶ 66.) Defendants have paid Plaintiff $168,263 reimbursement. (Id. ¶ 67.)

II. Standard

favorable to the non-movant and [and] draw[ing] all reasonable inferences in the non-

movant's favor, [] the moving party is Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (internal ellipses, brackets, and quotation marks omitted). There is a genuine Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The initial

burden of showing that there is no genuine dispute of material fact rests with the moving party. Weinstock, 224 F.3d at 41. Once that showing is made, the non-moving party must . . setting forth specific facts showing that there is a genuine Gottlieb v. Cnty. of Orange, 84 F.3d 511, 518 (2d Cir. 1996).

To create a dispute of material fact, the non- allegations in [its] pleading, or on conclusory statements, or on mere assertions that

Id. (citations omitted); see also Nuchman v. City of N.Y. on mere speculation or conjecture or

conclusory allegations or denials, but instead must offer specific omitted)); Pinto v. Texas Instruments, 72 F. Supp. 2d 9, 11 (D. Conn. 1999) (explaining that to

defeat a motion for summary judgment, the non-

III. Discussion

A. Count One: CERCLA hazardous waste sites; and (2) to place the cost of that cleanup on those responsible for

W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 88 (2d Cir.2009) (internal brackets and quotation marks omitted). To and prevent future pollution at contaminated sites or to reimburse others for cleanup and

Consol. Edison v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005). Under 42 U.S.C. §§ 9607(a)

any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . necessary costs of response incurred by any other person consistent with the national contingency plan. Additionally, any other person who is liable or potentially liable under section 9607(a) of this title, during

or following any civil action . . . 42 U.S.C. § 9613(f)(1). In general, courts liberally construe CERCLA to further C law. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 132 (2d Cir. 2010).

To [under CERCLA] need not establish the precise amount of hazardous material discharged or prove with certainty that a [Potentially Responsible Party] Niagara Mohawk, 596 F.3d at 132. Case 3:17-cv-01336-JBA Document 104 Filed 09/12/22 Page 6 of 13 objectionable in basing findings solely on circumstantial evidence, especially where the passage of time has made direct evidence difficult or impossible to obtain, liability may be inferred from the totality of the circumstances as opposed to direct

Id. at 131, 136 (internal quotation marks omitted).

1. Petroleum Exclusion excludes petroleum, 42 U.S.C. § 9601(14), so CERCLA claims, barring a few narrow exceptions, generally cannot succeed if the claimed source of pollution is petroleum or a petroleum derivative. See White Plains Housing Auth. v. Getty Props. Corp., No. 13 CV 6282, 2014 WL 7183991 (S.D.N.Y. Dec. 16, 2014) (finding that the CERCLA petroleum exclusion would bar claims related to gasoline pollution but not benzene standing alone, since benzene is separately identified as a hazardous substance in CERCLA). Defendant, as the party asserting the petroleum exclusion, bears

the burden of proving that it applies. See Tosco Corp. v. Koch Indus., Inc., 216 F.3d 886, 896 97 (10th Cir. 2000); Johnson v. James Langley Operating Co., Inc., 226 F.3d 957, 963 n.4 (8th Cir. 2000).

As a threshold matter, Defendants claim under the petroleum exclusion. (Defs -1] at 27.) Because, as discussed

below, Plaintiff has failed to make out all the prima facie elements of a CERCLA claim, it is not necessary to reach this issue.

2. Conformance With the National Contingency Plan To prevail on a CERCLA claim, a plaintiff must make a prima facie showing of the following:

(1) the defendant is an U.S.C. § 9607(a)(1) 42 U.S.C. § 9601(9); (3) there has been a release or threatened

release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or the threat; and (5)

the costs and response conform to the National Contingency Plan. Price Trucking Corp. v. Norampac Indus., Inc., 748 F.3d 75, 80 (2d Cir. 2014). Defendants argue that mary judgment because, among other alleged issues, Plaintiff process did not provide the opportunity for public participation required to conform to the NCP . (Defs [Doc. # 75-1] at 28; Defs To demonstrate conformance, Plaintiff

relies on the fact that the property was brought into compliance with the Transfer Act and DEEP issued a no- Plaintiff also, at the August 8, 2022 oral argument, maintained , whose employees are state-licensed LEPs, provides sufficient state regulatory oversight to satisfy

The NCP steps the government must take to identify, evaluate, and respond to hazardous substances

in the environment. Niagara Mohawk, 596 F.3d at 136. Its creation was directed by CERCLA, and it was established through EPA regulation. United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992); 40 C.F.R. §§ 300-300.1105. Four factors are used to analyze whether remediation efforts conform to the NCP remedial alternatives; (2) compliance with the scoring, development and selection criteria

for removal and remedial actions; (3) selection of a cost-effective remedy; and (4) Abb. Indus. Sys., Inc. v. Prime Tech, Inc., 32 F. Supp. 2d 38, 43 (D. Conn. 1998). When a private party moves to recover its response costs under CERCLA, that party bears the burden of proving conformance with the NCP. Commerce Holding Co., Inc. v. Buckstone, 749 F. Supp. 441, 444 (E.D.N.Y. 1990).

[p]rivate parties undertaking response actions should

40 C.F.R. § 300.700(c)(6). Case 3:17-cv-01336-JBA Document 104 Filed 09/12/22 Page 8 of 13 public . . . have a strong interest in participating in cleanup decisions that may affect them, and their involvement helps to ensure that these cleanups which are performed without governmental supervision National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (Mar. 8, 1990)

However, while public comment is an important concern of the NCP, lack of public comment is not an absolute bar to CERCLA liability. See Bedford Affiliates v. Sills, 156 F.3d 416, 428 (2d Cir. 1998), overruled on other grounds by W.R. Grace & Co.-Conn., 559 F.3d at 89 90. The EPA expressly recognized that requiring strict compliance with a rigid set of rules would not encourage private parties to voluntarily clean up environmental hazards, adopting instead -by-case balancing approach that would evaluate the cleanup effort as a whole to ensure the quality of the cleanup while removing undue procedural obstacles Id.

Under this approach, lack of public comment may be ameliorated by significant government involvement in clean-up efforts. Id. In Bedford Affiliates, the court found that formal public comment was not necessary to demonstrate NCP conformance because of the consistent involvement of state officials in investigating and implementing remediation efforts. Id. charged with the protection of the public environmental interest is an effective substitute for

Id. Similarly, in NutraSweet Co. v. X L Eng'g Co. the court determined that NutraSweet had conformed to the NCP because of the extensive involvement of the state environmental agency, which approved the remediation plan, monitored the remediation plan, and determined when the remediation was complete. 227 F.3d 776, 791 (7th Cir. 2000). Another method to show conformance resolve CERCLA liability, is to complete remediation under a consent order with the state. Niagara, 596 F.3d at 137.

Plaintiff seeks to stretch these holdings one step further in claiming that the involvement of LEPs accomplishes the same function as oversight from the public or a state environmental agency. This argument is relaxed regulatory approach to LEPs. as they in fact did here (DEEP Letter of No Audit [Doc # 74-14]) approve LEPs remediation activities without an independent state investigation. report submitted to the commissioner for such a property by a licensed environmental

professional shall be deemed approved unless, within sixty days of such submittal, the commissioner determines, in his sole discretion, that an audit of such remedial action is . 1

Furthermore, when state involvement stands in for public participation, an element of public accountability is maintained, but substituting LEPs for state officials public servant [and] could make it more difficult for community activists to obtain full

Douglas A. McWilliams, Environmental Justice and Industrial Redevelopment: Economics and

Equality in Urban Revitalization, 21 Ecology L.Q. 705, 751 (1994).

For these reasons, the involvement of LEPs does not figure in the analysis of whether Plaintiff conformed to the NCP. DEEP Letter of No Audit. This letter reflects an agency decision to not review the final

remedial action, rather than an active review and affirmative approval. 1995 Conn. Pub. Acts 190, § 2. In fact, the letter explicitly states that work or application of the applicable regulations. (DEEP Letter of No Audit at 2.) Even if the

letter did represent affirmative final approval of Pla would not

1 the lack of state resources to devote to oversight, the states will often . . . find themselves rubber- remediation efforts. Joel B. Eisen, Challenges and Limits of Voluntary Cleanup Programs and Incentives, 1996 U. Ill. L. Rev. 883, 1022 (1996).

be equivalent to remediation effort that is necessary to show conformance with the NCP. Bedford Affiliates, 156 F.3d at 428. As a matter of law, Plaintiff has failed to show conformity with the NCP, a requirement for proving a CERCLA violation, and is, therefore, granted.

B. Jurisdiction Over Remaining Claims Soto v. United States, 185 F.3d 48, 52 (2d Cir. 1999). This Court federal question jurisdiction

over this case stems from the CERCLA claim. 28 U.S.C. § 1331. The Court may then exercise supplemental jurisdiction over the state law claims. 28 U.S.C. § 1367.

the

usual case in which all federal-law claims are eliminated before trial, that balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the remaining state- Carnegie Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). While the decision to decline supplemental jurisdiction is discretionary,

Oneida Indian Nation of N.Y. v. Madison Cnty., 665 F.3d 408, 437 (2d Cir. 2011). This is Oneida Indian Nation, 665 F.3d 408, 438-39 (2d Cir.

2011) (quoting Arizonans for Official English v. Ariz., 520 U.S. 43, 79 (1997)); see also 28 U.S.C. claim raises a novel or complex issue of

As the CERCLA claim is being dismissed, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. -law claims [been] Carnegie Mellon Univ, 484 U.S. at 350 n.7, but

many of the remaining

state law claims involve highly disputed questions of law that have not been resolved by the Connecticut Supreme Court. Among other issues, there is significant disagreement among superior courts and federal courts Connecticut over whether the WPCA can serve as the basis for a negligence per se claim. Compare Innis Arden Golf Club v. Pitney Bowes, Inc., 514 F. Supp. 2d 328, administrative measure, combined with the requirement that negligence per se actions be

based on a clear statutory standard of behavior aimed at individuals, this Court again conclude[d] that the broad proscription contained in § 22a 427 may not be used by and Einbinder v. Petro, Inc., No. AANCV116005353S, 2012 WL 1139032, at *9 (Conn. Super. Ct. Mar. 9, 2012) (finding that the WPCA cannot support a negligence per se claim) with Coastline Terminals of Connecticut, Inc. v. USX Corporation, 156 F. Supp. 2d 203, 210 (D. Conn. 2001) (finding that the WPCA can be the basis of a negligence per se claim) and Oxford Bd. of Educ. v. EnvironConsult, Inc., No. CV085011175S, 2010 WL 1493508, at *4 (Conn. Super. Ct. Mar. 12, 2010) (permitting a negligence per se claim based on the WPCA to proceed).

Superior courts are also divided over which statute of limitations should apply to Counts Three, Four, and Six. See Main St. Bus. Mgmt., Inc. v. Moutinho, No. FBTCV18- 6073550S, 2019 WL 4060738, at *5 n.5 (Conn. Super. Ct. Aug. 13, 2019) (reviewing the disagreement over which statute of limitations should apply to Conn. Gen. Stat. § 22a-452); Devino v. Waterbury Housewrecking Co., No. CV04-4002076, 2006 WL 337253, at *5 (Conn. Conn. Gen. Stat. § 22a-16 claim and highlighting the disagreement over whether Conn. Gen. Stat. § 52- 577 should instead apply); Cholewa v. Hill, No. KNLCV15-6025338S, 2016 WL 7974278, at *7 (Conn. Super. Ct. Dec. 19, 2016) (discussing the lack of clarity over whether the applicable statute of limitations for negligence claims related to environmental cleanup is Conn. Gen. Stat. § 52-584 or Conn. Gen. Stat. § 52-577c(b)). These discordant interpretations are more

appropriately resolved in state court. Given this disposition, judgment regarding Count Seven [Doc. # 74] is dismissed without prejudice

IV. Conclusion

75] is GRANTED on Count One, and the court declines supplemental jurisdiction over the remaining claims. The Clerk is requested to close this case.

IT IS SO ORDERED. _____/s/_____ Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 12th day of September 2022