

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 25, 2021

530633

JAY BURDICK et al., on Behalf
of Themselves and All Others
Similarly Situated,
Respondents,

v

MEMORANDUM AND ORDER

TONOGA, INC., Doing Business
as TACONIC,
Appellant.

Calendar Date: January 12, 2021

Before: Garry, P.J., Egan Jr., Lynch and Aarons, JJ., concur.

Greenberg Traurig, LLP, Albany (Henry M. Greenberg of counsel) and Hollingsworth LLP, Washington DC (Anne Marie Duffy admitted pro hac vice), for appellant.

Faraci Lange, LLP, Rochester (Steven G. Schwarz of counsel) and Weitz & Luxenberg, New York City (James J. Bilsborrow of counsel), for respondents.

Aarons, J.

Appeals from five orders of the Supreme Court (McGrath, J.), entered November 25, 2019 in Rensselaer County, which, among other things, partially denied defendant's motions to preclude the testimony of plaintiffs' experts.

The underlying facts are set forth in a prior appeal (179 AD3d 53 [2019]). Briefly, plaintiffs commenced this action

alleging that defendant, a manufacturing facility, improperly disposed of chemical compounds, thereby contaminating the water of private wells in the surrounding area. Following joinder of issue and discovery, defendant made five separate motions – each one seeking to preclude plaintiffs' expert witnesses from offering testimony on the basis that their testimony was inadmissible as speculative and conclusory and/or as failing to meet the standard articulated in Frye v United States (293 F 1013 [DC Cir 1923]). In one order entered November 25, 2019, Supreme Court granted the motion to the limited extent of precluding one of plaintiffs' experts from testifying as to certain issues and otherwise denied it. In four other orders, each entered November 25, 2019, the court denied the remaining motions in their entirety. These appeals ensued.

"[A]n order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (Hurtado v Williams, 129 AD3d 1284, 1284-1285 [2015] [internal quotation marks and citations omitted]; see Thornhill v Degen, 185 AD3d 982, 983 [2020]; Strait v Ogden Med. Ctr., 246 AD2d 12, 14 [1998]). The November 2019 orders addressed only the issue of the admissibility of the testimonies of plaintiffs' experts (see Thornhill v Degen, 185 AD3d at 983; Brindle v Soni, 41 AD3d 938, 939 [2007]; Ferrara v Kearney, 285 AD2d 890, 890 [2001]). Because the orders did not limit the scope of the issues or the theories of liability to be tried (see Lynch v Carlozzi, 121 AD3d 1308, 1310 [2014]; compare Brown v State of New York, 250 AD2d 314, 320-321 [1998]), the appeals must be dismissed (see C.H. v Dolkart, 174 AD3d 1098, 1099 [2019]; Hurtado v Williams, 129 AD3d at 1285; Brindle v Soni, 41 AD3d at 939).

Finally, we note that, after defendant sought preclusion, it moved for summary judgment dismissing the second amended complaint in an entirely separate motion. Supreme Court partially denied the summary judgment motion in a January 2020 order. Even though the court relied, in part, on plaintiffs' expert opinions in reaching its conclusion in the January 2020 order, defendant's appeal therefrom and our decision in that

appeal (Burdick v Tonoga, Inc., ___ AD3d ___ [appeal No. 531108, decided herewith]) does not alter the determination herein that the November 2019 orders are not appealable. Defendant did not seek preclusion and summary judgment in the same motion (compare Robinson v Bartlett, 95 AD3d 1531, 1532 [2012]; Jackson v Nutmeg Tech., Inc., 43 AD3d 599, 600 [2007]), nor did the court consolidate the preclusion motions and the summary judgment motion for disposition in a single order. Furthermore, the November 2019 orders did not resolve the summary judgment motion (see Lynch v Carlozzi, 121 AD3d at 1310). Viewing the November 2019 orders independently from the January 2020 order, the November 2019 orders, as mentioned, merely ruled on the admissibility of evidence. As such, they are not appealable (see id.).

Garry, P.J., Egan Jr. and Lynch, JJ., concur.

ORDERED that the appeals are dismissed, with costs.

ENTER:



Robert D. Mayberger
Clerk of the Court