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

Decided and Entered: February 25, 2021 531108

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.

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.

Appeal from an order of the Supreme Court (McGrath, J.), entered January 29, 2020 in Rensselaer County, which, among other things, partially denied defendant's motion for summary judgment dismissing the second amended complaint.

The underlying facts are set forth in a prior appeal (179 AD3d 53 [2019]). Briefly, defendant has operated a

manufacturing facility in Rensselaer County since 1961. Plaintiffs, who live within the area of the facility, commenced this action alleging that defendant improperly disposed of perfluorooctanoic acid and its predecessor, ammonium perfluorooctanoate (hereinafter jointly referred to as PFOA), among other chemical compounds, thereby contaminating the water of private wells in the surrounding area. In the second amended complaint, plaintiffs alleged causes of action for negligence, private nuisance, trespass and strict liability. Following joinder of issue and discovery, defendant moved for summary judgment dismissing the second amended complaint. Supreme Court granted the motion to the extent of dismissing the strict liability cause of action and otherwise denied it. Defendant appeals. We affirm.

As to whether Supreme Court should have dismissed the second amended complaint under the doctrine of primary jurisdiction, this doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views" (Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 156 [1988] [internal quotation marks and citation omitted]; see Lauer v New York Tel. Co., 231 AD2d 126, 129-130 [1997]). Defendant argues that the various regulatory agencies, who have the requisite expertise, have been investigating the matter at issue and that the recovery sought by plaintiffs is already being provided by these agencies. We disagree. Although defendant points to an announcement that the Department of Health will be providing medical monitoring, this announcement merely stated that a study was being proposed and that, if funded, the study would last for five years. Contrary to defendant's representation, there was no definitive statement that the medical monitoring would be provided. As to the remediation of plaintiffs' private wells, the consent order and other announcements, upon which defendant relies, do not address all of the relief requested by plaintiffs

in the second amended complaint. Accordingly, defendant's argument is without merit.

Defendant argues that it owed no duty of care to plaintiffs and, even if it did, there was no breach of that duty. We disagree with defendant on both points. Regarding the former, whether defendant owed a duty to plaintiffs in the first instance is a legal determination for the trial court (see Di Ponzio v Riordan, 89 NY2d 578, 583 [1997]; Parke v Dollar Tree, Inc., 155 AD3d 1489, 1490 [2017]). In our view, defendant, as a landowner who engaged in activity that could cause injury to individuals in adjoining areas, owed a duty of care to plaintiffs to take reasonable steps to prevent injury to them (see 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 290 [2001]).

Regarding the latter, defendant may be liable if it "failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that [it] knew or should have known that such conduct could result in contamination" (Strand v Neglia, 232 AD2d 907, 907 [1996] [internal quotation marks, ellipsis and citation omitted], lv dismissed 89 NY2d 1086 [1997]; see Ivory v International Bus. Machines Corp., 116 AD3d 121, 127 [2014], lv denied 23 NY3d 903 [2014]; see generally Phillips v Sun Oil Co., 307 NY 328, 331 [1954]). The record reflects that defendant, among other things, provided bottles of water to affected community members, voluntarily tested the water through an independent laboratory prior to the promulgation of regulatory guidance, installed water treatment systems and provided testing results to appropriate governmental agencies. With the foregoing, defendant met its burden of establishing that it did not breach its duty of care.

In opposition thereto, plaintiffs submitted evidence that defendant was aware of the potential harmful effects of PFOA at a time when it could have taken remedial action but nonetheless continued to discharge contaminated wastewater into the neighboring areas. Additionally, one of plaintiffs' experts opined that defendant failed to comply with applicable standards

governing pollution control. Plaintiffs' proof likewise demonstrated an issue of fact as to whether defendant failed to disclose to regulatory agencies or the surrounding communities that the discharged water was contaminated, especially when considering the proof that it engaged in some mitigation efforts with its own employees. Because plaintiffs tendered sufficient evidence to raise an issue of fact as to when defendant knew of the harms of PFOA and whether it took reasonable steps to address those harms, the motion was correctly denied on the issue of whether defendant breached its duty of care to plaintiffs (see Plainview Props. SPE, LLC v County of Nassau, 181 AD3d 731, 734 [2020]; Ivory v International Bus. Machines Corp., 116 AD3d at 127; Murphy v Both, 84 AD3d 761, 762 [2011]).

Defendant also asserts that causation was lacking and, in doing so, assails the sufficiency of the expert opinions offered by plaintiffs concerning the effects of PFOA. Defendant, however, as the party seeking summary judgment, bore the initial burden of establishing that any alleged negligence did not proximately cause the alleged injuries (see O'Connor v Aerco Intl., Inc., 152 AD3d 841, 842-843 [2017]; see generally Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). This burden is not met by pointing to gaps in plaintiffs' proof (see Baity v General Elec. Co., 86 AD3d 948, 950 [2011]; Rothbard v Colgate Univ., 235 AD2d 675, 678 [1997]). In other words, "defendant cannot prevail on a motion for summary judgment merely by correctly arguing that the record before a court on the motion would be one which, if presented at trial, would fail to satisfy . . . plaintiff[s'] burden of proof and the court would be required to direct a verdict for defendant" (O'Connor v Aerco Intl., Inc., 152 AD3d at 842-843 [internal quotation marks, brackets and citation omitted]). Because this is precisely what defendant does in seeking summary judgment, it did not satisfy its moving burden on the issue of causation.

Regarding the private nuisance cause of action, as relevant here, liability attaches "where the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable" (Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570 [1977]; see Pilatich v Town of New Baltimore,

133 AD3d 1143, 1145 [2015]). "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d at 571 [internal quotation marks and citations omitted]; see Christenson v Gutman, 249 AD2d 805, 807-808 [1998]). In support of its argument that it was not the source of the alleged PFOA contamination, defendant submitted, among other things, an affidavit from an expert who indicated that PFOA was used in other facilities within the area of defendant. As noted by Supreme Court, however, the expert failed to exclude defendant as a source of PFOA. Even if the expert did express such an opinion, the proof submitted by plaintiffs raised an issue of fact on this particular point.

Defendant further argues that the evidence showed that it did not unreasonably and intentionally dispose of materials containing PFOA in a manner such that it knew that PFOA entered plaintiffs' land. Defendant tendered evidence concerning its handling of materials with PFOA, its compliance with regulatory permits governing the disposal of such materials, its testing of PFOA levels and the installation of filtration systems. Plaintiffs, however, submitted evidence calling into question the reasonableness, timing and efficacy of defendant's measures, including its testing, whether defendant ignored warnings about the harmful effects of PFOA and whether defendant knew that PFOA would enter or entered the land in the surrounding area. As such, viewing the evidence in the light most favorable to plaintiffs, defendant's motion, to the extent that it sought summary judgment on the nuisance claim, was correctly denied. For similar reasons, defendant was not entitled to summary judgment on the trespass claim (see Ivory v International Bus. Machines Corp., 116 AD3d at 129; Hilltop Nyack Corp. v TRMI Holdings, 264 AD2d 503, 505 [1999]).

Finally, defendant's contention that Supreme Court should have dismissed plaintiffs' claim for punitive damages is without merit. "Punitive damages are intended as punishment for gross misbehavior for the good of the public" (Trudeau v Cooke, 2 AD3d

1133, 1134 [2003] [internal quotation marks and citation omitted]). Such damages may be awarded "where the conduct in question evidences a high degree of moral culpability, or the conduct is so flagrant as to transcend mere carelessness and constitutes willful or wanton negligence or recklessness" (Reed v New York State Elec. & Gas Corp., 183 AD3d 1207, 1209 [2020] [internal quotation marks and citations omitted]). The record discloses a triable issue of fact regarding whether defendant knew or should have known of the potential adverse effects of PFOA, whether defendant willfully failed to share this information with the community in a timely manner and whether defendant unreasonably and intentionally contaminated the wells in the surrounding area. Noting that "[w]hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts" (Nardelli v Stamberg, 44 NY2d 500, 503 [1978]), the court correctly denied that part of defendant's motion seeking dismissal of the claim for punitive damages (see Baity v General Elec. Co., 86 AD3d at 950). Defendant's remaining arguments, to the extent not specifically discussed herein, have been examined and are unavailing.

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

ORDERED that the order is affirmed, with costs.

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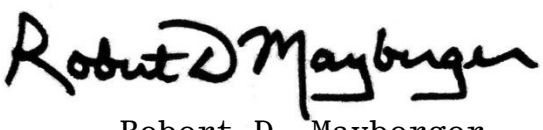

Robert D. Mayberger
Clerk of the Court