In a Case of First Impression in the Second Circuit, the District Court Clarifies When the Statute of Limitations Begins to Run on a Natural Resource Damages Claim Under CERLCA

Feb 17, 2022

Categories:

Development/Redevelopment

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A case that shares the elements of a crime thriller – massive illegal dumping of toxic construction debris in a public park and playground, corrupt public officials, a special grand jury investigation and criminal prosecutions – has broken new ground on when the statute of limitations runs on a natural resource damages claim. *Seggos v. Datre*, a case relating to the closure of a public park in an environmental justice area due to illegal dumping of hazardous waste, will proceed now that a federal judge has rejected a request brought by 17 law firms to find that it had been filed too late.

The complaint in the case, pending in the U.S. District Court the Eastern District of New York, alleged that in 2013 and 2014, tens of thousands of tons of construction and demolition debris and related waste ("C&D") were dumped in Roberto Clemente Park ("Park") in the hamlet of Brentwood, New York, an environmental justice community located in the Town of Islip on Long Island. The C&D was brought to the Park from construction sites throughout the New York City metropolitan area.

The New York Attorney General, suing on behalf of the New York State Department of Environmental Conservation (NYSDEC) Commissioner and the State of New York (together, the "State"), brought the case to recover the value of the public's lost use of the Park during the time it was closed for a cleanup. Matthew J. Sinkman was the lead Assistant Attorney General who litigated the case (the decision was issued just after he joined Gibbons as Counsel). The State asserted a claim for natural resources damages

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(NRDs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as "Superfund"). Under CERCLA, the NYSDEC Commissioner is an authorized trustee to bring claims for NRDs, and any NRDs the Commissioner recovers can be used only to "restore, replace, or acquire the equivalent of such natural resources." The State sued more than 30 defendants, including contractors at 13 construction sites who arranged with waste brokers for C&D to be removed from the sites, waste brokers, and haulers who brought the C&D to the Park and dumped it there. The contractors and waste brokers were sued as "arrangers," and the haulers were sued as "transporters" and "operators" under CERCLA. The Town of Islip, which owns the Park and paid for it to be cleaned up, separately sued for its remedial costs.

Similar NRD claims for lost recreational uses have been brought in other contexts. However, the time at which the statute of limitations (SOL) begins to run for these claims very rarely has been litigated, and this is the first known case in the Second Circuit to rule on the issue. Under CERCLA, the SOL for an NRD claim begins to run upon the "date of the discovery of the loss and its connection with the release [of the hazardous substances] in question." A Special Master appointed to the case recommended, and the court held, that the SOL turns on the "constructive" knowledge of a plaintiff of its loss, rather than actual knowledge. The court therefore held that the SOL in this case began to run when the State "first knew, or with reasonable diligence would have known, of the public's loss of use of the Park and that such loss was connected to the release of the hazardous substances in question."

The court ultimately found that there were disputed issues of material fact that precluded an award of summary judgment regarding the timeliness of the State's claim. As the court noted, all factual inferences must be construed in the light most favorable to a party opposing a motion for summary judgment.

The court found, among other things, that the defendants could not definitively show as a matter of law that:

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- The State failed to diligently investigate the dumping in the Park.
- The State's discovery of C&D in the Park meant that it knew or should have known the C&D contained hazardous substances, even though the State thought the C&D likely came from New York City and thus, it likely would have contained hazardous substances.
- An early and temporary closure of parts of the Park to investigate the dumping meant that the use of those areas had been lost due to "the release of the hazardous substances in question." Indeed it was not clear whether those parts of the Park had been in use before the dumping. Additionally, even if the Suffolk County District Attorney had learned of the presence of some hazardous substances in the Park over three years before the case had been brought, that knowledge could not be imputed to the State as its agent or otherwise.

Instead, the SOL might have begun running only when the Town of Islip announced that the Park would be closed indefinitely due to the finding of asbestos there. At that point, the State "must have known about the presence of hazardous substances in the Park" and the public's resulting lost use of the Park.

The case has garnered a lot of attention. Former New York Attorney General Eric Schneiderman announced the lawsuit at a press conference in May 2017 while standing outside of the Park. This past May, prior to the summary judgment decision, current New York Attorney General Letitia James held a press conference at the Park and announced settlements that had been reached with some of the defendants.

The dumping in the Park has also been a lightning rod for frustration within the community. The scheme, which involved a trucking company, corrupt local park officials, and others, led to criminal prosecutions by the Suffolk County D.A., several convictions, and jail time for some defendants. The incident also helped lead to a broad investigation into dumping across downstate regions, dubbed "Operation TrashNet," and a similar investigation, "Operation Pay Dirt," by the Suffolk County D.A. and police and NYSDEC on Long

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Island; the convening of a special grand jury and issuance of a grand jury report regarding dumping, which is a widespread problem; and passage of a new law to increase the penalties for dumping.

As illegal dumping becomes more of a priority for law enforcement, *Seggos v. Datre* serves as a caution for construction contractors and developers to pay closer attention to the waste streams they handle. That is particularly true for developers in areas with historic fill that may be contaminated with hazardous substances. The case also shows the increasing attention being paid to environmental justice issues. Finally, the court's decision also provides clarity regarding when the statute of limitations begins running on a claim for NRDs under CERCLA. Parties litigating NRDs claims should pay close attention to the type of NRD being sought, which will affect when a trustee had knowledge of NRDs and when the SOL began running.

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