

**THE HONORABLE ALVIN K. HELLERSTEIN
 UNITED STATES DISTRICT JUDGE
 UNITED STATES COURTHOUSE
 SOUTHERN DISTRICT OF NEW YORK
 500 Pearl Street, Room 1050
 New York, New York 10007
 Telephone (212) 805-0152
 Fax (212) 805-7942**

Date: 9/10/04

From: Chambers of Judge Hellerstein -- Nancy Wong - Judicial Secretary

TO	FAX NO.	Company/Phone No.
Gary Shaffer/Sonia Preston	212-676-2597	212-676-2740
Paul Napoli	212-513-7320	212-267-3700
Beth Goldman and Sarah Normand	212-637-2717 or 2730	212-637-2732 212-637-2709
Richard Williamson	212-964-9305	212-412-9500 X430
Paul Mazher	212-266-4141	212-732-9000

NUMBER OF PAGES TO FOLLOW (INCLUDING THIS COVER SHEET): 7

MESSAGE:

Re: Sept. 11 Litigation (21 MC 100)

It is ORDERED that counsel to whom this Order or Memo Endorsed is sent is responsible for faxing a copy to all counsel involved in this case and retaining verification of such in the case file. Do not fax such verification to Chambers.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JON J. MCGILLICK, ARLENE MCGILLICK,
FRANCIS LAVERY, KATHRYN LAVERY and
DEWARDRANTH SAMAROO

Plaintiffs,

-against-

WORLD TRADE CENTER PROPERTIES, LLC,
et al.,

Defendants.
-----X

MEMORANDUM AND ORDER

04 Civ. 3747 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

Plaintiffs filed the complaint in this action in New York State Court, seeking to recover damages for respiratory injuries allegedly incurred during the cleanup efforts at the World Trade Center site following the September 11, 2001 attacks. Defendants removed the case, asserting jurisdiction based on this court's exclusive jurisdiction over all actions resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001. See The Air Transportation Safety and System Stabilization Act 49 U.S.C. § 40101, Title IV Victim Compensation, § 408(b)(3), Pub. L. No. 107-42, 115 Stat. 230, 240 (Sept. 22, 2001), as amended by Pub. L. No. 107-71, § 201, 115 Stat. 597, 645 (Nov. 19, 2001) (the Act). World Trade Center Properties supplemented its Notice of Removal to assert jurisdiction based on 28 U.S.C. § 1442(a)(1). Plaintiffs then moved to remand the case to the Supreme Court of the State of New York pursuant to 28 U.S.C. § 1447 and § 1441.

Plaintiffs have parallel claims pending against The Port Authority of New York and New Jersey and The City of New York. See McGillick, 02 Civ. 9127, Lavery, 02 Civ. 9126, and Samaroo, 03 Civ. 2447. These were also brought in New York Supreme Court and

removed to this court. I held in connection with motions to remand to the state court made in those cases, see Hickey v. City of New York, 270 F. Supp. 2d 357 (S.D.N.Y. 2003), that:

claims for respiratory injury based on exposures suffered at the World Trade Center site between September 11, 2001 and September 29, 2001 "arise out of," "result from," and are "related to" the attacks of September 11, 2001 and must proceed exclusively under the Act and in this court. I also hold that claims based on exposures outside the World Trade Center or after September 29, 2001 fall beyond the pre-emptive reach of the Act, and remain governed by the New York Labor Law, to be applied in the New York Supreme Court as part of its traditional and historic jurisdiction over New York's labor laws, or in this court as part of its supplemental jurisdiction.

Id. at 361. As to these plaintiffs specifically, I denied the McGillicks' and Laverys' motions to remand and determined that further proceedings were needed to determine whether Samaroo's case should be remanded. Id. at 364, 380, Appendices B and C. I also certified the case for review by the Court of Appeals and stayed the remand orders pending a decision. Id. at 280-81

Plaintiffs present substantially the same facts and allegations in this remand motion as they alleged in the prior action. I reaffirm my previous holdings, and I certify this order for interlocutory appeal under section 1292(b) and stay further proceedings in Mr. Samaroo's case pending a decision in the Court of Appeals, and the issuance of a mandate thereafter. As my decision in Hickey is presently pending in the Court of Appeals, I order the parties to file notices of appeal within five days from the date of this order, and to inform the Court of Appeals that this case is related.

Defendant World Trade Center Properties LLC (WTCP) also argues, for the first time in this case, that subject matter jurisdiction is proper because it was acting under federal authority. See 28 U.S.C. § 1442(a)(1). Plaintiffs claim that WTCP was negligent in failing to protect them from toxic airborne contaminants that caused their respiratory illnesses. WTCP denies that it acted at all in regard to plaintiffs claims, but asserts that if it took actions at the World Trade Center site, it did so under the direction of the Occupational Safety and Health Administration (OSHA). WTCP argues that the City of New York declared a state of emergency, assumed control of the World Trade Center Site and placed OSHA in charge of worker safety at the site.

Section 1442(a)(1) provides:

A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

This statute provides a method to remove cases brought in state court against federal officers, or persons acting under federal officers, where a federal question appears only in defendants' responsive pleading, overcoming the well-pleaded complaint rule. Mesa v. California, 489 U.S. 121, 136 (1989). To remove, WTCP must establish three elements: (1) that a colorable federal

defense exists to plaintiffs' claims; (2) that WTCP was acting under a federal officer's direction, and (3) that a causal nexus exists between plaintiffs' claims and WTCP's acts under color of federal office. Id. at 124-25, 128, 134-36.

As a threshold matter, I note that WTCP qualifies as a "person" under the statute. Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 398 (5th Cir., 1998) (corporate entities qualify as "persons" under § 1442(a)(1)).

Regarding the first element, stating a colorable federal defense, Courts are instructed to interpret this provision broadly and not to require a showing that the defense is likely to succeed. Jefferson County v. Acker, 527 U.S. 423, 431 (1999). Thus, I find WTCP's asserted defense acceptable for section 1442 purposes, that it may be entitled to OSHA's immunity from personal tort liability. Yalkut v. Gemignani, 873 F. 2d 31, 34 (2d Cir. 1989); McManus v. McCarthy, 586 F. Supp. 302, 305 (S.D.N.Y. 1984) (cadets granted immunity for following a federal officer's order to prepare a report).

To establish that it was acting under a federal officer's direction, and that a causal nexus exists between acts under that direction and plaintiffs claims, the second outlined criteria, WTCP argues that OSHA was in charge of a comprehensive program of worker safety at the World Trade Center site after the City of New York declared a state of emergency. According to WTCP, any actions it took at the World Trade Center site were under the control of OSHA. WTCP's only support is an October 28, 2003 Statement of Patricia K. Clark, Regional Administrator, OSHA, Before the House of Representatives Subcommittee on National Security, Emerging Treats, and Intergovernmental Relations. Def. Ex. D.

Ms. Clark's Statement categorizes OSHA's responsibilities at the World Trade Center site as "providing assistance and consultation," in particular to "conduct personal air monitoring to characterize exposures, distribute and fit respirators along with other personal

protective equipment, and conduct safety monitoring.” Id. at 1-2. The statement explains that OSHA “recommended” appropriate safety equipment that it “selected jointly with other safety and health professionals . . . including private contractors, and other organizations.” Id. at 2. The statement reflects, at most, a high degree of collaboration between OSHA and numerous other organizations in attempts to keep workers safe. The statement does not evince the substantial degree of direct and detailed federal control over the working conditions that courts have required to assert section 1442 jurisdiction. See Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387 (5th Cir., 1998) (jurisdiction found where the government “maintained strict control over the development and subsequent production” of agent orange); In re “Agent Orange” Product Liability Litigation, 304 F. Supp. 2d 442, 446 (2004) (same). Courts generally have not found jurisdiction where the government officer did not directly require a purported agent to take specific actions. See Arness v. Boeing North Amer., 997 F. Supp. 1268, 1275 (5th Cir. 1998) (no removal where government required that engines be cleaned with a toxic substance but did not specify disposal and plaintiff’s claims related to disposal); Good v. Armstrong World Indus., 914 F. Supp. 1125, 1129 (D. Pa., 1996) (no removal for asbestos claim where the Navy was involved with design and manufacture of turbines, but it did not specify use of asbestos); cf. Crocker v. Borden, Inc., 852 F. Supp. 1322, 1326 (D. La., 1994) (permitting removal where it was uncertain that plaintiffs claims for asbestos involved marine turbines which were under control of the navy).

WTCP makes only conclusory arguments that their actions were directed by OSHA and fails to allege any detailed or specific directions that they were given. And Ms. Clark’s statement does not state that OSHA gave any such direction. I find, therefore, that WTCP has not shown that it was acting under a federal officer’s direction or that a causal nexus exists between this direction and plaintiffs’ claims. Jurisdiction on this ground is denied.

Conclusion

For the reasons stated in this Memorandum and Order, plaintiffs' motion to remand is denied. Except as to my holding relating to 28 U.S.C. § 1442(a)(1), with respect to which a certificate of interlocutory appealability is not issued, this case is certified for interlocutory appealability on the grounds stated in Hickey v. City of New York, 270 F. Supp. 2d 357 (S.D.N.Y. 2003). Plaintiffs shall immediately apply to bring this motion within the proceedings as directed in this Order.

SO ORDERED.

Dated: New York, New York
September 9, 2004



ALVIN K. HELLERSTEIN
United States District Judge

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 UNITED STATES DISTRICT JUDGE
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James Schermerhorn	212-608-8039	212-267-0520

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MESSAGE:

Re: Sept. 11 Litigation (21 MC 100)

It is ORDERED that counsel to whom this Order or Memo Endorsed is sent is responsible for faxing a copy to all counsel involved in this case and retaining verification of such in the case file. Do not fax such verification to Chambers.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
JASON MAKSIMOWICH,	:
	:
Plaintiff,	:
	:
-against-	:
	:
THE CITY OF NEW YORK,	:
	:
Defendant.	:
-----X	

ORDER

03 Civ. 2067 (AKH)

-----X	
JOSEPH BERARDI,	:
	:
Plaintiff,	:
	:
-against-	:
	:
THE CITY OF NEW YORK,	:
	:
Defendant.	:
-----X	

03 Civ. 2623 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

These motions concern claims by two New York City Police Detectives for injuries suffered while working in the rescue and cleanup following September 11, 2001 at the World Trade Center and at Fresh Kills, the Staten Island landfill. Defendant the City of New York (the City) removed the cases from New York State Court and moved for summary judgment against the above-captioned plaintiffs on the ground that they waived their right to maintain these actions by submitting claims to the Victim Compensation Fund (VCF). Plaintiffs oppose summary judgment, arguing that this court lacks jurisdiction and the cases should be remanded to state court. For the reasons stated below, I deny the motion for summary judgment as premature, without prejudice to renew once the Second Circuit Court of Appeals renders a

decision in the appeal of my opinion in Hickey v. City of New York, 270 F. Supp. 2d 357 (S.D.N.Y. 2003); consolidated on appeal under docket number 03-9157.

Plaintiffs Maksimowich and Berardi are New York City Police Detectives who responded to Ground Zero in the aftermath of the terrorist attacks and subsequently worked at Fresh Kills. Both plaintiffs filed separate complaints in the Supreme Court of the State of New York, County of Richmond on February 27, 2003, alleging injuries as a result of work performed at Fresh Kills between September 24, 2001 and August 10, 2002. Thereafter the City removed both actions to this court claiming jurisdiction pursuant to section 408(b)(3) of the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2001) (the Act) (vesting original and exclusive jurisdiction in the Southern District of New York for "all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."). These cases were consolidated with similar cases involving respiratory claims under 21 MC 100, In re World Trade Center Disaster Site Litigation.

In deciding motions in two earlier cases in the litigation, I held that section 408 of the Act did not preempt state court cases involving injuries common to construction and demolition sites generally. See Graybill v. City of New York, 247 F. Supp. 2d 345 (S.D.N.Y. 2002); and Spagnuolo v. Port Auth. of N.Y. and N.J., 245 F. Supp. 518 (S.D.N.Y. 2002). Motions were then brought to remand many of the consolidated cases. In deciding these motions, I found that the nature of the work at Ground Zero changed from rescue to recovery on September 29, 2001, and held "that claims alleging respiratory injuries suffered at the World Trade Center site, up to and including September 29, 2001, are preempted by section 408 of the Act, and that claims incurred after that date or at different sites are not preempted." Hickey, 270 F. Supp. 2d at 374. Appendices following the opinion categorized individual cases according to

the ruling. Plaintiff Maksimowich's and Berardi's cases appeared to not be preempted by the Act, but neither made a motion to remand. Thus, I ordered further proceedings to determine if the cases should be remanded, which I stayed, along with remand, pending interlocutory appeal to the Second Circuit. Hickey, 270 F. Supp. 2d at 380-81. The Second Circuit accepted jurisdiction over the cases and argument is expected to be heard this autumn. See Hickey v. Port Authority of New York and New Jersey, 03-8023, Order (2d Cir. Nov. 12, 2003).

Plaintiffs Maksimowich and Berardi also filed claims with the VCF prior to December 22, 2003 for compensation. See 28 C.F.R. 104.2 (a claimant is eligible for VCF awards if, inter alia, he was injured in the immediate aftermath of the crashes, which is defined as the first 12 hours after the crashes for a non-rescue worker and the first 96 hours after the crashes for rescue workers). Both Maksimowich and Berardi submitted complete medical records, and signed the waiver provision, acknowledging "that by submission of a substantially complete Personal Injury Compensation Form I am waiving the right to file a civil action (or be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001." Def. Ex. C and D, pg. 16; see § 405(c)(3)(B)(i). The VCF has granted both plaintiffs compensation awards, and they accepted these awards.

Defendants have now filed summary judgment motions in both cases claiming that plaintiffs voluntarily and statutorily waived their rights to maintain these actions by filing substantially complete claims with the VCF and accepting awards. See the Act § 405(c)(3)(B)(i) (claimants to the VCF waive the right to maintain a lawsuit for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001), and § 408(a)(3) (extending waiver to claims against the City of New York made by claimants who file with the VCF). Plaintiffs

argue that they did not waive their right to maintain state claims for injuries resulting from work at Fresh Kills pursuant to my decision in Hickey.

In Hickey, I held that federal jurisdiction under section 408 of the Act extended to injuries occurring at the World Trade Center site prior to September 29, 2001. 270 F. Supp. 2d at 379. I further held that more information needed to be learned regarding the factual circumstances of allegations, including those at bar, prior to determining if they should be remanded, and I stayed further proceedings regarding such determinations pending the interlocutory appeal. Id. at 380-81. Thus, this court continues to exercise jurisdiction over the claims until such determinations are made.

Defendants now raise questions regarding whether plaintiffs waived all of their claims. Such questions are dependent upon the outcome of the appeal currently before the Second Circuit. Hickey, 270 F. Supp. 2d at 381 (stating that one reason for certifying the interlocutory appeal was to prevent illegitimacy in further proceedings should "preemption and the scope of federal jurisdiction [be deemed] more extensive or more limited than I have held"). I therefore deny defendant's summary judgment motion as premature without prejudice to renew the motion once the Court of Appeals renders its decision.

SO ORDERED.

Dated: New York, New York
September 9, 2004


ALVIN K. HELLERSTEIN
United States District Judge

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 UNITED STATES DISTRICT JUDGE
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Andrew Carboy	212- 266-4141 ⁵²¹⁻³⁷⁰³	212-732-9000
	266-4141	

NUMBER OF PAGES TO FOLLOW (INCLUDING THIS COVER SHEET): 4

MESSAGE:

Re: Sept. 11 Litigation (21 MC 100)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
 JOHN MISKANIC and JILL MISKANIC :
 :
 Petitioners, :
 :
 -against- :
 :
 THE CITY OF NEW YORK, :
 :
 Respondent. :
 -----X


ORDER
04 Civ. 6727 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

The parties appeared before me on September 8, 2004 for oral argument on petitioners' motion to deem their notice of claim timely. For the reasons stated on the record of that date, as part of the general status conference held in 21 MC 100, World Trade Center Disaster Site Litigation, I find that petitioners have made a sufficient showing to file a late notice of claim, pursuant to New York C.P.L.R. § 214-c. Petitioners have withdrawn their application for respondent to provide them with medical records. All other issues raised are premature at this juncture.

SO ORDERED.

Dated: New York, New York
September 9, 2004


 ALVIN K. HELLERSTEIN
 United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ROBERT GALLAGHER,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.
-----X

ORDER

04 Civ. 6889 (AKH)

-----X
FRANK HASKELL,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.
-----X

04 Civ. 6890 (AKH)

-----X
JAMES KADNAR,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.
-----X

04 Civ. 6892 (AKH)

-----X
MICHAEL MACKO,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.
-----X

04 Civ. 6893 (AKH)


-----X
ALFRED RETUNDIE, :
: Petitioner, :
: -against- : 04 Cv 6891 (AKH)
: THE CITY OF NEW YORK, :
: Respondent. :
-----X
-----X
JOSEPH EIVERS, :
: Petitioner, :
: -against- : 04 Cv 6894 (AKH)
: THE CITY OF NEW YORK, :
: Respondent. :
-----X

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

The above-captioned petitioners seek a determination that each has timely filed a late notice of claim for respiratory injuries resulting from the alleged failure of respondent, the City of New York, to provide them with proper equipment while working at the World Trade Center following the terrorist attacks of September 11, 2004. Petitioners have withdrawn their application for respondent to provide them with medical records. Respondent has not opposed the motions. I find that petitioners' have made a sufficient showing to file a late notice of claim, pursuant to New York C.P.L.R. § 214-c.

SO ORDERED.

Dated: New York, New York
September 9, 2004


ALVIN K. HELLERSTEIN
United States District Judge