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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3
4 In re WTC Disaster Site Litigation 21 MC 100 (AKH)

5 -----x

New York, N.Y.
March 12, 2010
3:00 p.m.

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8 Before:

8
9 HON. ALVIN K. HELLERSTEIN

9
10 District Judge

10
11 APPEARANCES

12
13 WORBY GRONER EDELMAN & NAPOLI BERN LLP

13 Attorneys for Plaintiffs

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15 MARK J. BERN

16 MICHAEL MACE

16
17 SCHIFF HARDIN LLP

18 Attorneys for Defendants Port Authority of New York and
18 New Jersey

19 BETH D. JACOB

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1 (Case called)

2 (In open court)

3 THE COURT: Let's have argument. Ms. Jacob, are you
4 ready?

5 MS. JACOB: Yes, your Honor.

6 THE COURT: I'll need quiet, please.

7 MS. JACOB: May it please the Court, I'm still Beth
8 Jacob representing the Port Authority of New York and New
9 Jersey, and after the previous proceedings, I feel we're going
10 from the sublime to the mundane.

11 THE COURT: That's a decision for the judge.

12 MS. JACOB: But nevertheless, your Honor, this is
13 critical to the Port Authority. We bring this motion under the
14 Port Authority suability statute, which is New York
15 Unconsolidated Law Sections 7107 and 7108, to dismiss all those
16 claims that do not comply with that statute's provisions,
17 because in that case this Court lacks subject matter
18 jurisdiction.

19 We brought specifically with respect not to all of the
20 thousands of cases brought against us, but just with respect to
21 46 of the 47 of those cases which have been identified pursuant
22 to the Court's order CMO8 as being expedited discovery and
23 potentially identified for trial.

24 This is a statute, as I said, of fundamental
25 importance to the Port Authority. In every litigation

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1 involving the Port Authority, the first question asked and the
2 first determination made by the Port Authority always is
3 whether that action complies with the suability statute. This
4 is not a point on which the Port Authority will compromise, and
5 one of the reasons we bring this motion is that we do need
6 clarity from the Court on this issue. It's a question of
7 subject matter jurisdiction and it sets forth the conditions
8 under which the Port Authority, which has the sovereign
9 immunity of the state under which that immunity is weighed.

10 Your Honor, going now to the specifics, between the
11 plaintiffs' concessions and this Court's previous rulings,
12 there's not really a lot left to decide. It's really on a
13 question now I believe of which of the plaintiffs' cases must
14 be dismissed because its legal principles have already been
15 established. The plaintiffs have conceded that in most of
16 their cases -- and we're talking now about the 46 specifically
17 brought by the motion -- that they have not complied with
18 requirements of Section 7107, and I should say also this is a
19 motion brought just under part of the suability statute,
20 Section 7107, which sets down certain time requirements. The
21 action must commence within a year of its accrual and there
22 must be a notice of claim which is served on the Port Authority
23 more than 60 days before the action commences.

24 THE COURT: The cause of action begins on either of
25 two instances, whichever is later, the breathing of the noxious

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1 substance or the ingesting of the noxious substance is one way
2 of defining the cause of action and its accrual date. Another
3 is when the plaintiff first has reasonable understanding of an
4 adverse health impact.

5 MS. JACOB: That is correct, and for the purposes of
6 this motion, your Honor, with respect to all except the one
7 plaintiff Bruganti we are accepting for the motion the dates
8 that the plaintiffs themselves have identified in their notices
9 of claim. Because if you look at the notice of claim and you
10 look at the complaints on their face, 46, including
11 Mr. Bruganti, in fact, 46 of these plaintiffs do not comply
12 with the suability statute, so we don't even need at this point
13 to get into a question of exactly what accrual means, because
14 we're accepting what the plaintiffs themselves said. For those
15 which survive from just what they pleaded in their notice of
16 claim and complaint, we believe a further review may identify
17 other infirmities, but we wanted to make this motion very clear
18 and very clean.

19 The plaintiffs also conceded in their papers that the
20 so-called Jimmy Nolan amendment to the General Municipal Law
21 does not apply to the Port Authority and they conceded this on
22 the grounds that there is not a parallel New Jersey statute. I
23 set forward or we set forward in our papers some of the other
24 reasons we think in addition it doesn't comply, but I don't
25 think we need to go through those unless the Court has

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1 questions.

2 The main issue that I wanted to discuss, unless the
3 Court wants me to go elsewhere, is the argument that under the
4 ATSSSA and under fairness considerations, this Court should
5 change its mind, change its previous rulings, finding that the
6 suability statute applies to ATSSSA cases and decide that it
7 does not.

8 There are a couple of points I want to make because I
9 think most are set out in our papers. First, that plaintiff's
10 predicate is wrong. Plaintiffs predicated their brief on an
11 argument that the suability statute is merely a procedural
12 statute. They cited to this Court numerous cases all of which
13 dealt with the tensions sometimes between procedural state
14 rules and federal causes of action or federal rules. The
15 suability statute is a question of substantive law, not
16 procedural law. It's a question of subject matter
17 jurisdiction.

18 The ATSSSA by its terms incorporates the substantive
19 law of the state and there doesn't seem to be much more to be
20 said. The exception is unless it conflicts with the ATSSSA but
21 there really is no conflict, there's nothing that prevents a
22 plaintiff from complying with the suability statute and still
23 bringing an action under the ATSSSA.

24 Plaintiffs point to disparate treatment, what they say
25 is disparate treatment. Again, that doesn't really apply on
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1 the facts, because similarly situated plaintiffs are treated
2 the same. All plaintiffs who comply with the rules can bring
3 their actions. Those who don't comply cannot. You don't have
4 a situation where plaintiffs are being, people are being
5 treated differently.

6 I also would bring the Court's attention to what we
7 cited in the papers, the Corcoran case which is the Second
8 Circuit deciding under the Price Anderson law they have dealt
9 with these arguments. They dealt with the argument that when
10 you bring an action in federal court under Price Anderson it
11 also says the substantive law of the state applies. A
12 plaintiff in that case complained that it wouldn't be fair
13 because plaintiffs who comply could bring an action, plaintiffs
14 who didn't comply could not. In that instance, they also
15 argued that plaintiffs can sue a private nuclear plant
16 operator, whereas they would not be able to sue a public and
17 the Second Circuit said none of that rises to a level which
18 would mean that you would not apply the suability statute,
19 which would mean that it is somehow inconsistent with the point
20 or the purpose in the federal statute. And that seems to be
21 about as close as we're going to get to controlling precedent
22 on this point in this circuit.

23 One other point I wanted to make also is that speaking
24 about consistency of treatment, the inconsistency I believe
25 here would be if the Court decided not to now apply the

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1 suability statute when it already has applied to in some cases
2 dismiss claims and block people from bringing their actions.
3 That decision has been made and fairness requires, I believe,
4 consistent application of that principle, not only to the cases
5 which have already been decided by this Court, but for the
6 cases which are coming along.

7 One last point which has to do with how strong the
8 state's interest is in upholding the suability statute. This
9 Court has already found that the General Municipal Law notice
10 of claim indicates a compelling state interest, and that is a
11 quasi-procedural, but it is a less strong interest than the
12 suability statute, because that's not an issue of subject
13 matter jurisdiction. It's clear because it's a question of
14 sovereign immunity. It's also clear because the New York
15 courts require such strict compliance with the terms of 7107
16 and 7108 and that in itself indicates how important it is for
17 the State of New York that the suability statute be upheld.

18 Your Honor, if there are no questions --

19 THE COURT: Ms. Jacob, New Jersey doesn't take the
20 same point of view as New York, does it?

21 MS. JACOB: New Jersey has an identical statute, but
22 the New Jersey courts have ruled that substantial compliance is
23 sufficient. But it's clear, one, that it is the New York
24 interpretation that governs this Court, which is sitting in New
25 York and as the Privot Air, I believe it's Privot Air, Private

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1 Air case indicated, that's an Eastern District case, the Court
2 identified that, but that would be, I suggest, an issue for the
3 New York courts to change, not something for the federal courts
4 to do.

5 THE COURT: It's a matter of interpretation. We're
6 dealing with a compact, so it's not clear that it's strictly
7 New York law, but rather some kind of perhaps fusion of the
8 two. It troubles me that there is a different approach between
9 New York and New Jersey in this respect, and it may be that
10 since we are dealing with a matter that has given rise to
11 federal jurisdiction under the ATSSSA law, that I need to look
12 at both state's interpretations and come up with what I think
13 is a reasonable view. I don't know the answer to my own
14 question. But it's kind of troublesome that the highest court
15 in New Jersey and the highest court in New York have different
16 interpretations about the same words and the same model
17 statute.

18 MS. JACOB: It may be, your Honor, but it's an
19 inconsistency which has co-existed for quite some time and the
20 New York court --

21 THE COURT: And it's been tolerated.

22 MS. JACOB: And it's been tolerated, and the New York
23 courts, both federal and state, have continued to affect the
24 New York interest in strict compliance with the suability
25 statute.

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1 THE COURT: We have a number of appellate division
2 cases, none of which are really overpowering in their
3 reasoning. We have a number of district court decisions, but
4 there's nothing really authoritative and nothing as high in New
5 York as the New Jersey Supreme Court in its elaboration on the
6 New Jersey statute.

7 MS. JACOB: You do have the New York Court of Appeals,
8 your Honor, in a couple of cases which we did cite which does
9 hold, which is about as high as you can get in New York.

10 THE COURT: That's true.

11 MS. JACOB: Which does comment on how important it is
12 that there be strict compliance with all of the provisions of
13 7107 and 7108.

14 THE COURT: And yet New Jersey is different.

15 MS. JACOB: It is and it may be --

16 THE COURT: One could argue that perhaps a New Jersey
17 resident who sued in New York, as he has to, might benefit from
18 the New Jersey law. The New Jersey plaintiff does not have the
19 choice of forum because the ATSSSA requires that he come before
20 me or this Court. One could argue that that New Jersey
21 resident should be governed by the New Jersey law, but that
22 would create a disparity between plaintiffs which would not be
23 too easily tolerable either.

24 MS. JACOB: I think also, your Honor, that this is not
25 a statute which such as the punitive damages or the damages,

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1 the state laws of damages which the Court dealt with before
2 where you have a state interest in protecting its citizens.
3 This is a situation where you have New York State interest in
4 protecting its sovereignty, so the state's interest is less on
5 the citizen and more on protecting the sovereignty.

6 THE COURT: But we're not talking about state
7 sovereignty. We're talking about the sovereignty of the Port
8 Authority, which has delegated authority for both New York and
9 New Jersey in a compact with the United States.

10 MS. JACOB: That's correct, your Honor, but it is an
11 aspect of New York State sovereignty and the New York courts
12 have so held and the New York courts discussed why strict
13 compliance is so required, why this is substantive. They have
14 referred to the fact that it is because it is an exception to
15 New York State sovereignty. So that is a point that the New
16 York courts have pointed to.

17 THE COURT: The other aspect of the case, and I did
18 not deal with this so much in my previous decision, but is that
19 this whole issue arises in a blow against the nation and the
20 states, and the iconic aspect of the Twin Towers of the World
21 Trade Center. There's mass litigation that follows, and one
22 could develop an argument that the particular features of 7107
23 relating to more mundane types of proceedings might need some
24 kind of fusion with New York and New Jersey and the overall
25 purpose of the ATSSSA. It's an argument that's hard to

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1 articulate, but nevertheless, it sticks in my mind, and I know
2 how you feel about it, because you've already said.

3 MS. JACOB: I would also say, your Honor, with due
4 respect, that that sort of a fusion and concern is probably
5 more legislative than judicial.

6 THE COURT: Well, I'm not sure.

7 MS. JACOB: And the New York legislature, which did
8 act with respect to the cases against the City chose not to act
9 with respect to cases against the Port Authority.

10 THE COURT: That may be because they didn't think
11 about it, but who knows? All right, what's the plaintiff's
12 point of view?

13 MR. MACE: Your Honor, I would say that that
14 particular issue is in fact judicial. The reason I say that is
15 because we're dealing with laws that conflict. When I read
16 Jimmy Nolan's law, I read the first line, I see notwithstanding
17 any other provision of law to the contrary, and I do realize
18 the Port Authority is governed by New York and New Jersey law
19 in certain matters, but what this Court has been presented with
20 is discrepancy in the law as it applies to these plaintiffs,
21 and we would urge the Court that Jimmy Nolan's law does apply
22 to survive these claims if 7107 is not complied with along the
23 lines that your Honor articulated.

24 THE COURT: All right, decision is reserved.

25 (Adjourned)

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