FILED

MAR 23 2009

Carol E. Higbee, P.J.Cv.

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SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, P.J.Cv.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE:	**In re Bristol-Myers Squibb Environmental Litigation**
DOCKET #:	**Case No. 281**
DATE:	**March 23, 2009**
MOTION:	**Defendant's Motion to Dismiss Spill Act Claims for Failure to Provide Notice**
ATTORNEYS:	**Michael A. Tanenbaum, Esq., - Defendants**
	Elizabeth H. Hamlin, Esq., - Plaintiffs

Having carefully reviewed the papers submitted and any response received, and the oral arguments of the parties, I have ruled on the above Motion as follows:

On May 13, 2008, Plaintiffs ("Plaintiffs") filed this suit against Bristol-Myers Squibb ("BMS"). Plaintiffs are 106 current and former residents of the City of New Brunswick who allege that BMS discharged toxic and hazardous substances onto their New Brunswick property. Plaintiffs claim that the discharge caused contamination to their homes, environment, and bodies. Plaintiffs seek clean up costs, and other equitable and injunctive relief under the Spill Compensation and Control Act ("Spill Act").

On July 16, 2008, BMS filed this motion to dismiss Plaintiffs' Spill Act claims. BMS contends that Plaintiffs failed to provide notice to the New Jersey Department of Environmental Protection and Energy ("DEP") as required by N.J.S.A. 2A:35A-11 of the Environmental Rights Act ("ERA"). N.J.S.A. 2A:35A-11 directs plaintiffs to provide the DEP with at least thirty days notice prior to commencement of a lawsuit. N.J.S.A. 2A:35A-11 reads,

> No action may be commenced pursuant to this act unless the person seeking to commence such suit shall, at least 30 days prior to the commencement thereof, direct a written notice of such intention by certified mail, to the Attorney General, the Department of Environmental Protection, the governing body of the municipality in which the alleged conduct has, or is likely to occur, and to the intended defendant; provided, however, that if the plaintiff ... can show that immediate and irreparable damage will probably result, the court may waive the foregoing requirement of notice. N.J.S.A. 2A:35A-11.

Complaints for the 106 plaintiffs were filed between May 13, 2008 and June 2, 2008. The original complaints did not include the ERA claim, but Plaintiffs have amended the master complaint to include the ERA claim in early August 2008. Notice was sent to the DEP and BMS identifying an intention to commence suit pursuant to ERA as to twenty-seven plaintiffs on May 21, 2008.

BMS argues that the thirty-day notice provision is a mandatory condition precedent to the commencement of an action under the ERA, and indicates that Plaintiffs provided the DEP and BMS with notice a few weeks late.

Plaintiffs argue that the ERA claim should not be dismissed because Plaintiffs substantially complied by with the notice provision. Plaintiffs aver that the DEP already had notification of the contamination, because it took action to clean the BMS site in the past. According to Plaintiff's Master Complaint, in 1988, the DEP commenced its own action against BMS and required BMS to investigate and remediate any contamination of the BMS Site. Plaintiffs contend that it would be an empty gesture for each new plaintiff

who joins this lawsuit to give notice to the DEP, since the DEP was aware of the contamination and of the claims of property owners living near the site after the first notification. Finally, Plaintiffs assert that the Spill Act claim cannot be dismissed because dismissal of an ERA claim is inappropriate on the pleadings.

Background

A. Spill Compensation and Control Act

The Spill Act is a New Jersey environmental statute, originally enacted in 1976 to regulate the remediation of contaminated sites by requiring responsible parties to clean up hazardous substances. Mark K. Dowd, New Jersey's Reform of Contaminated Site Remediation, 18 SETON HALL L.J. 207, 211 (1993). In enacting the statute, the Legislature expressed its intent,

> to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by *requiring the prompt containment and removal* of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.
> [Superior Air Prod. Co. v. NL Ind., 216 NJ Super. 46, 59 (1987).]

The Spill Act is enforceable primarily by the DEP and imposes a standard of strict liability for costs upon any party responsible for the discharge of hazardous substances. The Spill Act allows the DEP to either remediate the site and sue for the cost of clean up, or order a party responsible for the contamination to clean the site. The Spill Act also permits the DEP to intervene should the responsible parties fail to clean the site.

N.J.S.A. 58:10-23.11f(a) provides,

> Whenever any hazardous substance is discharged, the department may, in its discretion, act to clean up and remove or arrange for the cleanup and removal of the discharge or may direct the discharger to clean up and remove, or arrange for the cleanup and removal of, the discharge. If the discharge occurs at any hazardous waste facility or solid waste facility, the department may order the hazardous waste facility or solid waste facility closed for the duration of the cleanup and removal operations.

[N.J.S.A. 58:10-23.11f.]

The Spill Act imposes joint and several liability on responsible parties. N.J.S.A. 58:10-23.11(v) states,

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing ... shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.
> [N.J.S.A. 58:10-23.11.]

The scope of the Spill Act is broad, permitting the DEP to recover costs from parties who are even remotely responsible for contamination. Per N.J.S.A. 58:10-23.11(x), the Spill Act should be construed liberally. The statute states, "This act, being necessary for the general health, safety, and welfare of the people of this State, shall be liberally construed to effect its purposes." N.J.S.A. 58:10-23.11(x). The Spill Act is available as an additional remedy to other legal remedies that may be available. N.J.S.A. 58:10-23.11(v) states, "[t]he remedies provided in this act are in addition to those provided by existing statutory or common law." N.J.S.A. 58:10-23.11(v). The Spill Act allows a private party to bring an action against another party for contribution towards costs of clean up. No notice is required.

In this case, plaintiffs are not presently liable for any clean up costs so that private right of action doesn't apply to them. The only way they can make a claim under Spill Act is through the Environmental Rights Act.

B. Environmental Rights Act

The ERA was originally enacted in 1974 to ensure that private citizens have a remedy for abuses against the state's environment. The DEP is primarily responsible for enforcing environmental legislation. However, the ERA allows a citizen to bring a private action to enforce a New Jersey environmental statute. Case law has limited this right to instances where

the DEP chose not to remediate or where the court determined that the DEP did an inadequate job of remediating.

> The ERA was enacted following the legislature's determination, that the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.
> [N.J.S.A. § 2A:35A-2.]

If the conduct complained about violates an environmental statute or ordinance, the courts will enforce that statute. If the conduct does not violate an environmental statute, the ERA establishes a more general standard to protect the environment. *NJ Environmental Law* APPX, 3. Courts may provide either injunctive or equitable relief under the ERA. *NJ Environmental Law* 6.11. N.J.S.A. 2A:35-4 states,

> (a) Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.
> (b) Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may commence a civil action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment.
> [N.J.S.A. 2A:35-4.]

Like the Spill Act, ERA is intended to be an additional remedy to any regulatory procedure, civil or criminal remedy that may already be available. N.J.S.A. 2A:35A-12. ERA does not require that the citizen bringing the claim have suffered an injury distinct from injury suffered by the public at large. *NJ Environmental Law* APPX, 3.

The only relief allowed under ERA is injunctive relief enforcing or restraining the defendant to comply with the terms of the Spill Act. This relief is different than a claim for

contribution. Only if the plaintiffs are granted injunctive relief does the ERA statute allow for some attorney fees and expert costs.

ERA Notice Requirement

At issue is whether Plaintiffs provided proper notification to the DEP and BMS prior to filing suit under ERA. As stated above, ERA requires at least thirty days notice prior to the commencement of an action to both the DEP and the intended defendant.

BMS maintains that Plaintiffs' ERA claim should be dismissed because the thirty-day notice requirement is a mandatory precondition to filing suit. Plaintiffs contend that they have substantially complied with the ERA notice requirement and that the notice provided was sufficient notification to the DEP. The defendant does not dispute proper notice was sent but only for 27 plaintiffs out of the 106 complaints filed, and not thirty (30) days before the original complaint was filed.

This Court finds the substantial compliance doctrine should apply to the ERA notification provision. The substantial compliance doctrine is an equitable remedy that cures technical defects so that a meritorious claim will not be dismissed where the plaintiff can show that he has substantially complied with a statute. The New Jersey Supreme Court indicates that the substantial compliance doctrine requires the non-complying party to establish the following:

> (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of the petitioner's claim, and (5) a reasonable explanation why there was not a strict compliance with the statute. [Cornblatt v. Barow, 153 N.J. 218, 239 (1998).]

This Court recognizes that there is no New Jersey on whether the notice requirement is a mandatory precondition to filing an ERA claim such that substantial compliance would or would not apply. However, New Jersey has a long-standing tradition of applying the substantial compliance doctrine where there has been technical non-compliance with a notice provision.

The substantial compliance doctrine has been extended by New Jersey to notice provisions in numerous areas of the law.

In Wunschel v. Jersey City, 96 N.J. 651 (1984), Justice O'Hern opined that the lower court improperly dismissed defendant's claim, where defendant failed to strictly comply with a New Jersey Tort Claims Act provision requiring notice to a public entity within 90 days of commencement of a suit. There, Justice O'Hern commented,

> Is it not a waste of judicial and administrative resources not to resolve in one hearing an issue in which all of the parties have notice and the opportunity to be heard and then in the second hearing have the course rerun with inconsistent results? Law does not serve abstract goals. It serves the needs of parties to resolve disputes.
> [Id. at 664.]

Likewise, in Ferrerira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003), the Court extended the substantial compliance doctrine where the plaintiff's attorney filed an affidavit of merit eighteen days after the 120 day period required by the statute. The Court indicated that the Legislature did not intend to give a medical malpractice defendant the power to destroy a legitimate claim where there was only technical defect but no prejudice to the defendant. Justice Albin stated, "We have recognized--consistent with our understanding of its legislative intent -- ... equitable remedies that temper the draconian results of an inflexible application of the statute. The statute was not intended to encourage gamesmanship or slavish adherence to form over substance." Id. at 151-153.

In applying the elements of the substantial compliance doctrine, the Court noted that plaintiff's counsel had the affidavit of merit in his possession within 10 days of filing the answer. Defendant complied with the purpose of the statute by having an expert verify his claims. The Defendant also did not suffer prejudice by the eighteen day delay, because the delay did not affect his ability to form a defense and there was no unnecessary expense incurred. Id. at 153.

Similarly, in Horton v. DEP, 383 N.J. Super. 405 (App. Div. 2006), Judge Skillman determined that the substantial compliance doctrine applied to administrative actions. There, Horton received notice of an $18,000 penalty for alleged violations of the Freshwater Wetland Protection Act and requested a hearing four days after the twenty day period required by the statute. The Court declared that there was no basis for inferring that legislative history intended that a hearing be denied where a request for a hearing was filed only a few days after the twenty day period. Id. at 408. See Fink v. Thompson, 167 N.J. 551 (2001) (where the Court found substantial compliance where plaintiff filed an expert report and a timely served affidavit despite failing to name the defendant doctor.) See also Negron v. Llarena, 156 N.J. 296 (1998) (where the Court determined that the two-year statute of limitations period for filing a wrongful death action is subject to the substantial compliance doctrine.)

Given New Jersey's history of curing technical defects with the substantial compliance doctrine, this Court finds that the substantial compliance doctrine must also apply to the ERA notice requirement.

To dismiss the claims where there has been substantial compliance is inconsistent with the overall purpose of the thirty-day notice requirement. In Howell v. Waste Disposal, Inc., 207 N.J. Super. 80 (App. Div. 1986), Judge Scalera explained the purpose of the ERA notice provision,

> [T]his notice requirement was designed to allow the agency to *exercise value judgments* in individual cases, *e.g.*, whether it will join in that litigation or enforcement proceeding, whether other actions it may have taken already with respect to the particular problem or offender would render the litigation subject to collateral estoppel or res judicata principles, whether its expertise would assist the court, whether broad state interests would be sacrificed unduly to regional or personal interests by the instigators of that litigation, etc. Obviously, if the DEP expresses no interest and elects not to join that action, in the absence of a court ordering it to be made a party ... the action may proceed in accordance with the rights accorded in the Environmental Rights Act.
> [Id. at 95.]

The thirty-day notice requirement affords the DEP an opportunity to intervene in a private action to enforce the Spill Act, because the DEP is charged as the "primary and supervisory" power in enforcing environmental legislation. Thus, the DEP has the right to intervene in any suit brought by a private citizen, even if the DEP had previously entered into litigation regarding the site.

Here, the DEP was provided with notice that 27 private citizens had brought claims for damages. The DEP had an opportunity to intervene in the litigation. The DEP could still request to intervene if they wish to take this action. Thus, non-compliance with the notice requirement by providing notice a little late has not prejudiced the DEP in asserting its supervisory power in overseeing private environmental litigation.

In addition, the Legislature did not intend the notice requirement to provide the defendant a means to escape the burden of defending a legitimate claim. If that were the case, a responsible defendant can avoid remediation costs if it is lucky enough that the plaintiff did not provide notice to either the defendant or the DEP thirty days prior to commencement of the suit. Such a result would defeat the purpose of the statute which is to protect the environment. A strict interpretation of the notice requirement dismissing the claim could also deprive a plaintiff of the resources to remediate a site, which is contrary to the purpose of New Jersey environmental legislation and even though if the dismissal is without prejudice, it wastes the parties and the court's time in the refiling process.

BMS supports its assertion that there must be strict compliance with the ERA notice requirement by relying upon Player v. Motiva, 240 Fed. Appx. 513 (3rd Cir. 2007), where Judge Jordan opined that the ERA thirty-day notice provision was a mandatory precondition to filing suit. There, plaintiffs alleged that Motiva contaminated their drinking water and filed a private

right of action under ERA to enforce the Spill Act. Motiva appealed on the ground that plaintiffs failed to comply with the thirty-day notice provision. Id. at 518. In reaching its decision, the Third Circuit Court, with no analysis of New Jersey law, deferred to the U.S. Supreme Court's decision in Hallstrom v. Tillamook County, 493 U.S. 20 (1989), 110 S. Ct. 304 (1989), 107 L. Ed. 2d. 237 (1989), where Justice O'Connor opined that absent an exception from the Legislature, a Court cannot deviate from the plain meaning of the statute. Justice O'Connor maintained that if the legislature intended a flexible, pragmatic construction, it would have carved out an exception in the statute. Id. at 26.

The Third Circuit applied the U.S. Supreme Court's analysis for interpreting a notice provision, rather than looking to New Jersey's approach to interpreting a notice statute. As described above, New Jersey takes quite a different approach and recognizes substantial compliance. The U.S. Supreme Court takes a literal, strict approach to interpretation, while New Jersey has traditionally taken a flexible approach, applying equitable remedies to cure technical non-compliance. ERA is a New Jersey environmental statute, so New Jersey's flexible approach must apply to non-compliance with the ERA thirty-day notice provision.

Applying the substantial compliance doctrine to this particular case, this Court finds Plaintiff's notice upon the DEP and BMS to be adequate.

First, Plaintiffs' late notice of the ERA claim did not prejudice either BMS or the DEP and both have now had more than 30 days notice. Here, where notice provision has been substantially complied with in 27 cases, the court denies the request to dismiss or bar the claims of plaintiffs to enforce the Spill Act through the ERA.

As to all other cases where no notice has been given, any claim field under the ERA and the Spill Act is dismissed, without prejudice. Plaintiffs must provide proper notice of their claim

at least 30 days before an amended complaint asserting such a claim in these cases can be filed. Timely notice must be provided for any future complaints filed in this coordinated action.

The defendant's request to dismiss Spill Act and ERA claims is denied as to those complaints where a late notice has been given but in substantial compliance with ERA requirements. Any such claims in cases where notice has not been previously given are stricken, without prejudice. In all other cases filed to this date and for all cases filed in the future in this coordinated litigation, timely notice must be given before filing a complaint, or an amended complaint asserting claims under the ERA.

CAROL E. HIGBEE, P.J.Cv.