IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GOULD ELECTRONICS, INC. and AMERICAN PREMIER UNDERWRITERS, INC.	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA	:	NO. 99-1130

O'Neill, J. October ,1999

MEMORANDUM

Plaintiffs Gould Electronics, Inc. and American Premier Underwriters, Inc. have brought this action for either contribution or indemnification against the United States pursuant to the Federal Tort Claims Act (FTCA), §§ 1346(b), 2671-2680. They seek to recover $4.5 million paid in settlement of certain property and personal injury claims arising out of the operation of a battery manufacturing plant in Cold Springs, New York. These claims were the subject of a New York state court action entitled Cheryl Allen, et al. v. Marathon Battery, Co. et al.

Constructed in 1953, the Cold Springs plant was originally owned by the United States and operated by Sonotone Corp. (now Gould Electronics, Inc.). In 1962 Sonotone purchased the facility from the United States; it then sold the facility to Marathon Manufacturing Co. (now American Premier Underwriters, Inc.), which continued to operate the plant until 1979. During the battery manufacturing process, chemicals used in that process allegedly migrated from the plant onto the property of nearby residents.

Now before this Court is the United States' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the reasons

discussed below, I will grant the United States' motion.

I.

A motion under Rule 12(b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. See Mortensen v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977). In the case of a factual challenge, the court is free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on jurisdiction and to "satisfy itself as to the existence of its power to hear the case." Id. The plaintiff's allegations will not be presumed true, and disputed issues of material fact will not prevent the court from deciding the merits of jurisdictional claims. Id. However, "[a] factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted." Id. at 892 n. 17. In the case of a facial challenge, the court must accept as true all well-pleaded allegations. Id. at 891.

Because a court must address any factual and legal issues as jurisdictional issues, rather than on their merits, the threshold to withstand a motion to dismiss under Rule 12(b)(1) is lower than that required to withstand a Rule 12(b)(6) motion. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1280-81 (3d Cir.1993); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir. 1991). While it is the plaintiff who has the burden of proving that jurisdiction exists, Mortensen, 549 F.2d at 891, "[d]ismissal for lack of jurisdiction is not appropriate "merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 899 (3d Cir.1987), quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974).

II.

Sovereign immunity is a jurisdictional bar which, absent a waiver, shields the United States from suit. "Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994), quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Here, jurisdiction for plaintiffs' claims is based upon the Federal Tort Claims Act, which provides in relevant part:

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). The reference to the 'law of the place' means the 'whole law' of the state where the act or omission occurred. Richards v. United States, 369 U.S. 1, 11 (1962). Thus, in order for subject matter jurisdiction to attach to claims against the United States under the FTCA, a claimant must show that its allegations, taken as true, satisfy the necessary elements of a tort claim cognizable under the law of the state where the alleged act or omission took place.

III.

Before I can determine if the United States would be liable to plaintiffs for either contribution or indemnity under state law, I must first decide where the alleged acts or omissions occurred. Based on the allegations in the complaint, it appears that the alleged acts and/or omissions took place in New York. The Cold Springs battery manufacturing plant is located there. According to plaintiffs,

the United States is liable for either contribution or indemnity as a result of its design and construction of that plant, as well as its ownership and control of the plant from 1953 to 1962. The release of hazardous chemicals which allegedly contaminated areas adjacent to the plant also took place within the state of New York.

Even if I were to find that some of the acts or omissions occurred in Pennsylvania, as plaintiffs contend, New York's law of contribution and indemnification would still control. Where the laws of two jurisdictions may both have an interest in the litigation, Pennsylvania courts apply the law of the forum "having the most interest in the problem, and which is mot intimately concerned with its outcome." Allstate Ins. Co. v. McFadden, 595 A.2d 1277, 1279 (Pa. Super. Ct. 1991). To make this determination, state courts perform an "interest analysis" based on the following four factors:

> (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties is centered.

Laconis v. Burlington County Bridge Comm'n, 583 A.2d 1218, 1222-23 (Pa. Super. Ct. 1990). "Furthermore, in an action for personal injuries, the law of the state where the injury occurred normally determines the rights and liabilities of the parties, unless another state, applying the contacts test, has a more significant relationship to the occurrence and parties." Id. at 1223; see also Gaglioti v. Cummings, 55 F. Supp.2d 346, 348 (E.D. Pa. 1999).

An analysis of these principles shows that New York, not Pennsylvania, has a superior interest in whether plaintiffs have a right to either contribution or indemnification from the United States. First, all injuries allegedly caused by hazardous chemicals used in the Cold Springs plant

occurred in New York. In addition, plaintiffs' claims for contribution and indemnification arise from their payment of $4.5 million to settle the toxic tort claims alleged in Cheryl Allen, et al. v. Marathon Battery, Co. et al., a New York state court action. Second, even if, as plaintiffs contend, government employees in Pennsylvania designed the plant and then supervised its operations, conduct causing injury also took place in New York. The battery manufacturing plant was built there by the Army Signal Corps; the alleged release of hazardous chemicals from the plant also occurred there. The settlement which gave rise to plaintiffs' claims was entered into by the parties in that state. Third, no state contains a preponderance of contacts with the parties. Though plaintiff American Premier Underwriters, Inc. is incorporated in Pennsylvania, its principal place of business is in Ohio. Plaintiff Gould Electronics, Inc. is incorporated and has its principal place of business in Ohio. The United States is "domiciled" in all 50 states. All of the parties were doing business in New York. Fourth, the relationship between plaintiffs and the United States is clearly centered in New York. Plaintiffs' claims for contribution and/or indemnity arise from a settlement agreement entered in New York state court resolving tort claims for property and personal injuries suffered by certain New York residents and allegedly caused by the release of hazardous chemicals from a battery manufacturing plant in that state.

IV.

Section 15-108(c) of New York's General Obligations Law provides that a tortfeasor who has obtained a release from liability is not entitled to contribution from any other person. N.Y. Gen. Obilg. Law § 15-108(c). In return, the settling tortfeasor is himself relieved from liability for contribution to any other person. N.Y. Gen. Oblig. Law § 15-108(b). As the New York Court of

Appeals explains, "the statute establishes a quid pro quo arrangement: the settlor limits its liability but in exchange forfeits any right to contribution." Gonzales v. Armac Indus., Ltd., 611 N.E.2d 261, 263 (N.Y. 1993). By enacting these provisions, the state legislature sought to strike a balance between two, often conflicting goals: encouraging settlement and fairly apportioning liability among tortfeasors. See Mitchell v. New York Hosp., 461 N.E.2d 285, 289 (N.Y. 1984).

In the present action, plaintiffs contend that the United States waived the protections of § 15-108(c) when it entered into a consent decree with plaintiffs in 1993. The consent decree to which plaintiffs refer involved a civil action brought by the United States against plaintiffs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[1] Under Section XXIV, entitled "Covenants by Settling Parties," paragraph 108 of the consent decree states, in relevant part:

> Settling parties reserve, and this Consent Decree is without prejudice to (i) claims in the nature of contribution among settling parties which may arise from toxic tort claims, including those related to the pending action in Cheryl Allen, et al. v. Marathon Battery, Co. et al. . . . and
>
> (iv) actions against the United States based on negligent actions taken directly by the United States . . . that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

It is this language which plaintiffs argue constitutes a clear and unambiguous waiver.

A party may waive the protections offered by § 15-108(c). Mitchell, 461 N.E.2d at 289-90. Under New York law, however, "waiver is an intentional relinquishment of a known right and

[1] Sometime in 1991 the United States brought this civil action, entitled United States v. Marathon Battery Co. and Gould, Inc., in the United States District Court for the Southern District of New York.. The suit arose from the alleged contamination of the site of the Cold Springs battery plant itself.

should not be lightly presumed." Gilbert Frank Corp. v. Fed. Ins. Co., 520 N.E.2d 512, 514 (N.Y. 1988). Here, despite the language quoted above, plaintiffs have failed to show that the United States intentionally relinquished the statutory protections provided in § 15-108(c).

The language of the consent decree states that the settling parties "reserve their rights" to claims for contribution; it does not suggest that the United States has waived or relinquished any defenses it might have to such claims. No mention is made of § 15-108(c) or even of any settlement involving any toxic tort claims. Moreover, paragraph 5 of the consent decree states:

> . . .Settling Parties specifically reserve and do not hereby waive any defenses which they may have with respect to any asserted liability relating to the Site. Settling parties reserve all rights, defenses and legal contentions with respect to any third-party claims, including but not limited to, all claims asserted in Cheryl Allen, et al. v. Marathon Battery, Co. et al.

Viewed in its entirety, the consent decree falls far short of a clear and unambiguous waiver by the United States of its rights under § 15-108(c).

Just how far short is revealed by comparison to the agreements at issue in the case law cited by plaintiffs as support for the proposition that § 15-108(c) may be waived. In Mitchell all the named parties, including third-party defendants, agreed to a settlement of the underlying personal injury claims. Mitchell, 461 N.E.2d at 287 The stipulation provided, in relevant part, that:

> An application will be made to the Court to settle the third-party action so that New York Hospital may try its case for either indemnification or apportionment as against each of the named third-party defendants.
>
> The settlement is being placed on record . . . and the case will remain on the calendar . . . for trial of the third-party action.
>
> It is specifically agreed and understood by all of the Third-party Defendants here that no one waives any rights to contributions [sic] or indemnification by entering into

this settlement.

Id. In City of New York v. Black & Veatch, 1997 WL 624985 (S.D.N.Y. Oct. 6, 1997), the parties entered into a standstill agreement in which the City discontinued its third-party claims against defendant without prejudice. Paragraph 15 of that agreement stated, in relevant part, that:

> In the event that the Action results in an award of a final judgment against the city on behalf of any or all of the plaintiffs, or in the event that the City agrees to any settlement pursuant to which the City is obligated to make any payment to any or all of the plaintiffs . . . the City's claims against Black & Veatch for indemnification, contribution and/or apportionment shall be resolved as follows:
>
> (B) If ... the parties are unable to agree upon a final resolution of the City's claims within ninety (90) days of the entry of judgment of final execution of any settlement agreement, the parties agree that the City's claims against Black & Veatch shall be adjudicated in a separate plenary action ....

Black & Veatch, 1997 WL 624985 at 7-8. Clearly, the language quoted by plaintiffs does not approach the clear and express statements of waiver in these cases.[2]

Finally, I note that the consent decree was entered in 1993, four years before the toxic tort claims settlement which is the basis of plaintiffs' contribution and indemnity claims. This fact, together with the absence of any reference to any possible settlement of the Allen claims, suggests that the parties simply never considered this issue when negotiating the consent decree. The intent

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[2] In addition, plaintiffs cite to National Enterprises. Corp. v. Dechert Price & Rhoads, 181 A.D.2d 443 (N.Y. App. Div. 1992), and LNC Investments, Inc. v. First Fidelity Bank, N.A., 935 F. Supp. 1333 (S.D.N.Y. 1996). In National Enterprise, prior to settlement of the underlying federal action, plaintiffs and defendant law firm entered into a stipulation to settle the third party action which, inter alia, permitted plaintiffs to recommence their action against defendant following settlement of that underlying action. National Enters. Corp., 181 A.D.2d at 444. The state court found that by entering into that stipulation the parties "meant to postpone their litigation, preserve plaintiffs' contribution claim and render General Obligations Law § 15-108 inapplicable." Id. In LNC Investments, the district court held that the parties to a settlement concerning competing claims to trust collateral had explicitly waived the protections of § 15-108.

of the language quoted by plaintiffs was thus to set forth the limits of what was and what was not decided in that settlement. Liability under CERCLA was resolved; potential liability for the toxic torts alleged in Cheryl Allen, et al. v. Marathon Battery, Co. et al. was not. Moreover, there is nothing to suggest that the parties' respective contribution rights in a separate state tort action were so material to the settlement of the CERCLA action that absent an agreement as to those rights, a settlement might not have been reached.

For these reasons, I find that plaintiffs have failed to demonstrate that the United States waived the protections offered by § 15-108(c). Since the United States would not be liable to plaintiffs for contribution under New York law, the FTCA's waiver of sovereign immunity does not apply. This Court therefore lacks subject matter jurisdiction over such claims.

Plaintiffs' claims for indemnification must also be dismissed for lack of subject matter jurisdiction. Under New York case law, "common law indemnity is barred altogether where the party seeking indemnification was itself at fault, and both tortfeasors violated the same duty to the plaintiff." Monaghan v. SZS 33 Associates, 73 F.3d 1276, 1284-85 (2d Cir. 1995). The New York Court of Appeals has explicitly stated that:

> A party who has settled and seeks what it characterizes as indemnification thus must show that it may not be held responsible in any degree. The statutory bar to contribution may not be circumvented by the simple expedient of calling the claim indemnification....

Rosado v. Proctor & Schwartz, Inc., 484 N.E.2d 1354, 1356-57 (N.Y. 1985). Limiting tort liability to such situations is appropriate because indemnification permits a party who is compelled to pay for a loss to shift the entire loss to another person who was the actual wrongdoer. Id. at 1356.

Here, the underlying toxic tort claims alleged in Cheryl Allen, et al. v. Marathon Battery, Co.

et al. present a joint tortfeasor situation in which three successive landowners –the United States, Gould Electronics, Inc., and American Premier Underwriters, Inc.-- were liable for the plaintiffs' injuries. See Aetna Life & Cas. Co. v. Blue Bird Coach Co.,140 A.D.2d 476, 478 (N.Y. App. Div. 1980) ("In evaluating this claim for indemnification, an analysis of the underlying theory upon which recovery was sought by the [underlying plaintiff] as against [the putative indemnitee] is appropriate.") Plaintiff Gould Electronics, Inc. operated the plant as the contractor-operator for the United States from 1953 to 1962 and as the owner of the plant after purchasing it in 1962. Plaintiff American Premier Underwriters, Inc. owned and operated the plant from 1969 to 1979. As a result, each plaintiff's liability is predicated at least in part on its own negligence. See Glaser v. M. Fortunoff of Westbury Corp., 524 N.E.2d 413, 415-16 (N.Y. 1988) (holding that where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles are applied to shift the entire liability to one who is negligent but where a party is held liable at least partially because of its own negligence, contribution against the other culpable tort-feasor is the only available remedy.) Again, since the United States would not be liable to plaintiffs for indemnification under New York law, the FTCA's waiver of sovereign immunity does not apply.

An appropriate Order follows.

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O R D E R

AND NOW this day of October, 1999, upon consideration of the United States' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and plaintiffs' responses thereto, it is hereby ORDERED that said motion is GRANTED.

Plaintiffs' claims are DISMISSED.

THOMAS N. O'NEILL, JR., J.