VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 547-6-19 Cncv

State of Vermont vs. 3M Company et al

ENTRY REGARDING MOTION

Title: **Motion in Limine; Motion for Partial Summary Judgment** (Motions 47; 54)
Filer: State of Vermont; Gregory A. Weimer
Filed Date: September 02, 2022; September 30, 2022

This case involves claims by the State against the manufacturers of per- and polyfluoroalkyl substances, known as PFAS. The amended complaint asserts that it "alleges clams based on contamination and injury caused by . . . seven specific PFAS chemicals . . . (PFOS, PFOA, PFNA, PFHxS, PFHpA, PFBS, and Gen-X).[1] First Amended Complaint ¶ 13. It goes on to say that while it alleges "claim based on these seven specific PFAS chemicals, PFAS contamination is a rapidly developing issue," and that information on other chemicals may come to light during the case. Id.

There are two motions before the court today. The first is a motion in limine by which the State seeks an order preserving for the future any claims based upon PFAS other than the seven listed above. Both 3M and the Dupont Defendants oppose that motion. The second is a motion for partial summary judgment filed by the Dupont Defendants seeking an order dismissing any such claims without prejudice. The court held oral argument on both motions on February 15.

[1] The last being rather unfortunately named.

Dupont's Motion

Dupont's motion argues that the complaint here addresses all PFAS, not just the seven expressly identified, and that despite much discovery the State has no evidence to tie Defendants to any injuries from the other PFAS (what Dupont refers to as "Generalized PFAS"). Dupont argues that those claims should be dismissed without prejudice. However, this is not what a motion for summary judgment is designed to do: such a motion seeks judgment on the merits. V.R.C.P. 56(a) ("The court shall grant summary judgment if the movant shows that . . . [it] is entitled to judgment as a matter of law."). The court does not see a match between the substance of the motion and the relief sought, nor a basis for dismissal under Rule 12, and thus denies that motion.

The State's Motion

Both 3M and Dupont argue that the State's motion is not really a motion in limine and is therefore improper. While it does not fill the usual role of such a motion, which is to limit or permit evidence rather than claims, it is the substance of the motion that is of significance here, not its title.

The State is concerned that if in the future it seeks to file a new case or cases based upon PFAS chemicals other than the seven expressly at issue here, Defendants will argue that the doctrine of claim preclusion (also known as res judicata) bars those cases. That doctrine bars future claims when "there is a final judgment in former litigation in which the parties, subject matter and causes of action are identical or substantially identical to those before the court in this case. It bars claims that were litigated and those which should have been raised in the prior litigation." State v.

Nutbrown-Covey, 2017 VT 26, ¶ 12 n. 2, 204 Vt. 363 (quoting Longariello v. Windham Southwest Supervisory Union, 165 Vt. 573, 574, 679 A.2d 337, 338 (1996) (mem.) (citation omitted)). The State seeks an order from this court preserving such claims, although it does not dispute that the doctrine of issue preclusion (generally known as collateral estoppel) could still be asserted as a defense.[2]

The State relies on Agency of Natural Resources v. Supeno, 2018 VT 30, 207 Vt. 108, for the proposition that this court can provide the protection it seeks. In that case, the Court "adopt[ed] an exception to claim preclusion for circumstances in which the court preserves the plaintiff's right to maintain a second action on a particular issue." Id. ¶ 18. There, the issue was equitable relief versus financial penalties for the same conduct, and the initial court's order deferred the penalty issue to allow equitable relief to proceed. The State argues that what it seeks here is essentially the same: that it is urgent that the alleged contamination from the seven PFAS be addressed now, but that sufficient evidence as to the other PFAS is not yet available because of, for example, a current "lack of data and sampling techniques" for those chemicals. Motion at 12 n. 23. The State represents that there are "literally thousands of additional chemicals on which the science is evolving" and that "validated testing methods exist only for a small fraction of all PFAS chemicals, meaning that most PFAS cannot even be reliably detected in the environment with current technologies." Id. pp. 2-3. On the other hand,

[2] Decisions of our Supreme Court have been somewhat inconsistent in their use of these terms. *See, e.g.*, In re Burns 12 Weston St. NOV, 2022 VT 37, ¶ 12 n.2 ("Res judicata refers both to claim preclusion and issue preclusion."); Daiello v. Town of Vernon, 2018 VT 17, ¶ 12, 207 Vt. 139 (as amended Mar. 19, 2018) ("Issue preclusion, also known as collateral estoppel, is a narrower concept than claim preclusion, also known as res judicata.").

the State appeared to concede at oral argument that it could potentially add additional PFAS claims to this case now, but that it would be unwieldy to do so.

Supeno certainly allows an order permitting claims that would otherwise be barred to be deferred to the future, but it does not set forth any case-specific parameters as to when that is appropriate. Likewise, other authorities refer to the power without defining its proper scope. *See, e.g.*, Restatement (Second) of Judgments § 26 (referring to, but not delineating what would constitute, "special reasons" for letting a plaintiff "litigate in a second action that part of the claim which he justifiably omitted from the first action"). The court's discretion on this issue thus appears to be broad.

In analyzing whether this is a proper case for application of that discretion, the court notes that there is a significant practicality aspect at play here. If there are truly thousands of other PFAS that *could* theoretically be added to this case even now, because there is sufficient data currently available from which the State could fashion claims against Defendants, this case—which is already almost four years old—would be entirely unmanageable and would likely go on for many more years. In this sense it is similar to Supeno, because the need to resolve the current claims justifies delaying the potential additional claims.

In Supeno, the Supreme Court found that the claim *would* have been barred by claim preclusion if the earlier court had not expressly deferred the possibility of a claim for penalties: it found that each element of claim preclusion was met, including that "although penalties were not sought in the [earlier action,] they could have been." 2018 VT 30, ¶ 15. Nonetheless, the Court held that allowing courts to order deferral of claims that would otherwise be barred was justified by, among other things, the following:

"Judicial resources are conserved by allowing the court to decide important, potentially more time-sensitive, issues while reserving other claims for later adjudication." Id. ¶ 18. That certainly applies here.

Unlike Supeno, it is not clear here that potential future claims *would* otherwise be barred. If in fact there is insufficient science at this time to identify, determine the effect of, or otherwise present evidence as to other PFAS, it seems clear that claims based upon such as-yet-nonexistent evidence could not be barred in the future by claim preclusion, because they could not have been presented now. *See, e.g.*, In re Burns Weston St. NOV, 2022 VT 37, ¶ 16 ("Claim preclusion 'does not bar a litigant from doing in the present what he had no opportunity to do in the past.'") (quoting Drake v. F.A.A., 291 F. 3d 59, 67 (D.C. Cir. 2002)). Likewise, the court has no way of knowing exactly what the developing science or future discovery will show, or whether a future complaint would look just like this one but with different PFAS listed, or might be something entirely different. The court cannot say now whether Defendants would or would not have a valid argument in the future that the science today is sufficient for the State to have brought the broader claims now. It is, therefore, hard to say whether claim prelusion would or would not be applicable in the future. This case is, then, an even more convincing case than Supeno—where there was no question that the later claims would have been barred—for application of the deferral power.

For all of these reasons, the court concludes that to avoid delay and assure that this case in its current form can reach resolution, it is appropriate to expressly allow the

State to bring claims in the future based on PFAS other than the seven expressly identified in the First Amended Complaint.[3]

Order

The State's motion is granted; Dupont's motion for summary judgment is denied. The court orders as follows:

(1) To the extent that it could be argued that the State asserted any claims in this case beyond those arising from the seven PFAS expressly identified, such claims are dismissed without prejudice to their being brought in a future lawsuit.

(2) To the extent that future claims are based upon PFAS other than the seven expressly identified here, those claims will not be barred by claim preclusion based on a judgment in this case and may be asserted in a future case or cases.

(3) This order is not intended to limit any of the parties from arguing for or against issue preclusion in a future case.

(4) This order is not intended to affect issues relating to discovery, admissibility of evidence, or the existing Confidentiality Order in this case.

[3] Defendants also argue that the relief the State seeks here is only appropriate at the time of judgment, not during the case. The court is not persuaded. Other courts have found interlocutory rulings to be sufficient. *See, e.g.*, Sklyarsky v. Means-Knaus Partners, L.P., 777 F.3d 892, 894-96 (7th Cir. 2015) (court's ruling denied motion to join a party and directed plaintiff to file a separate suit); Venuto v. Witco Corp., 117 F.3d 754, 758-59 (3d Cir. 1997) (denial of a motion to amend the complaint "without prejudice" deemed a reservation of the right to bring a later action).

Electronically signed on February 16, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge