Vermont Superior Court
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Chittenden Unit

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JOHN BELTER, et al., Plaintiffs v. CITY OF BURLINGTON, Defendant	Docket No. 21-CV-2985

SECOND RULING ON CITY'S MOTION TO DISMISS

Plaintiffs—South Burlington residents and owners of a dairy farm and multiple residences adjacent to and downgradient from the Vermont Air National Guard Base at Burlington International Airport (collectively, "the Belters")—bring this action against the City of Burlington in connection with the release of certain environmental contaminants from the National Guard's firefighting services at the airport. The City moves to dismiss all claims on grounds of failure to join a necessary and indispensable party under Rules 12(b)(7) and 19. Alternatively, the City moves to dismiss some of the claims as barred by municipal sovereign immunity and for failure to state a claim for vicarious liability. In an earlier ruling on this motion, the court concluded that the United States and National Guard were necessary parties and ordered the Guard's joinder for the limited purpose of determining its capacity to be sued in state court. *See* Decision on Motion to Dismiss, Belter v. City of Burlington, No. 21-CV-2985, 2022 WL 3027938 (Vt. Super. Ct. July 8, 2022) (Hoar, J.).[1] The parties have since agreed that the National Guard cannot be sued

[1] As court noted in its prior ruling, the Belters concede that United States cannot be joined pursuant to 28 U.S.C. §§ 1346(b)(1) and 1491(a)(1). *See* Decision on Motion to Dismiss, Belter, No. 21-CV-2985, slip copy at 7, 2022 WL 3027938, at *5.

in state court. Thus, the court now considers whether the Guard is an indispensable party.[2]

I. Alleged Facts

The Amended Complaint alleges the following facts. The City of Burlington owns the airport and has, since at least the 1950s, leased part of it to the National Guard. Since 1973, the City has delegated its duty to provide firefighting services at the airport to the National Guard. From 1970 until 2014, the Guard used aqueous film-forming foam ("AFFF"), a water-soluble fire suppressant that contains per- and polyfluoroalkyl substances ("PFAS"), as part of its firefighting activities. PFAS have been classified by the EPA as "Emerging Contaminants of Concern" and are listed by the Vermont Department of Environmental Conservation as "Hazardous Materials" because of their threat to human health and the environment.

From 1970 through 2014, the National Guard routinely released AFFF into the environment to treat fires at the airport during firefighting, training, equipment maintenance, storage, and other activities. PFAS leached into the soil at and around the airport, polluted the surrounding groundwater, and migrated offsite to the adjacent property owned by the Belters. The soil, water in the barn well, and surface water on the Belters' property are contaminated with PFAS. Testing at the Belters' property on numerous occasions over the last five years has confirmed PFAS levels well above the enforcement standard.

The Belters allege that the City knew or reasonably should have known that AFFF contained PFAS that would leach through the soil and into groundwater and migrate

[2] As in the prior ruling, the court refers to the United States and the National Guard interchangeably throughout this ruling. *See* July 8, 2022 Decision at 3 n.1.

offsite. They bring claims for negligence (based on a non-negligible duty) (Count I), Trespass (Count II), Private Nuisance (Count III), Taking (Count IV), violation of the Vermont Groundwater Protection Act (Count V), Increased Surface Water Drainage (Count VI), and direct negligence (Count VII). They seek damages but, pursuant to the amended complaint, no longer seek injunctive relief.

II. Discussion

A. Indispensable Party Analysis under Rule 19(b)

If a "necessary party" cannot be joined, "then the court under Rule 19(b) must determine whether or not he is 'indispensable' in the sense that the suit cannot proceed without him. The basic test of indispensability is one of 'equity and good conscience,' articulated in four factors to be considered by the court." Reporter's Note, V.R.C.P. 19. Those factors include:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

V.R.C.P. 19(b). These four factors "reflect the actual effect of the proceeding upon the interests of parties and nonparties." Reporter's Note, V.R.C.P. 19(b). The U.S. Supreme Court has interpreted the virtually identical Federal Rule 19(b) factors as implicating at least four interests: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in not proceeding without the required party; (3) the non-party's interest regarding "the extent to which the judgment may as a practical matter impair or impede [its] ability to protect [its] interest in the matter"; and (4) the interests of the courts and

the public in "complete, consistent, and efficient settlement of controversies." Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 109–10 (1968). The four factors enumerated in the rule are not exhaustive, nor is any one factor determinative. *See* B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc., 516 F.3d 18, 23 (1st Cir. 2008); Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1124 (2d Cir. 1990). The inquiry is fact-specific and left to the trial court's "careful exercise of discretion." Wright & Miller, 7 Fed. Prac. & Proc. Civ. § 1608 (3d ed.); *see also* Republic of Philippines v. Pimentel, 553 U.S. 851, 864 (2008) ("The case-specific inquiry that must be followed in applying the standards set forth in subdivision (b), including the direction to consider whether 'in equity and good conscience' the case should proceed, implies some degree of deference to the district court."). In sum, the indispensability analysis involves "the balancing of competing interests" and "must be steeped in pragmatic considerations." In re Olympic Mills Corp., 477 F.3d 1, 9 (1st Cir.2007) (citing Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 635 (1st Cir.1989)).

The City contends that all four of these factors favor concluding that the United States and/or the National Guard are indispensable parties. Def.'s Mot. to Dismiss at 18–23. Its analysis of the four factors raises many of the same concerns raised with respect to its Rule 19(a) "necessary party" analysis. It stresses the prejudice it would suffer from having to defend a case "based entirely on the actions of sovereign third parties . . . over whom it has no control," the potential effect on the multi-district litigation, the absent parties' interests in protecting their sovereignty, and that the Belters could still sue the absent parties in federal court. Id.

The Belters' argument as to why the United States is not an indispensable party under Rule 19(b) is also similar to their argument under Rule 19(a). They assert that

> as amended, all of Plaintiffs' legal claims—negligence (both direct and based on non-delegable duty), trespass, nuisance, Groundwater Protection Act, takings, and increased surface water—are framed to require no evaluation of the United States' conduct. Plaintiffs do not expect a serious dispute that the source of the PFAS contamination on their property originated at BTV. Further, Plaintiffs expect discovery to establish that the City knew, or should have known, that the water it collected through its various water collection and stormwater systems was contaminated with PFAS, and yet it continued to release such contaminated water offsite and onto the Plaintiffs' property. Therefore, a finding that the City is liable in this matter requires no evaluation of the United States' conduct, and thus cannot be prejudicial to Defendant.

Pls.' Opp'n at 19. The Belters further stress that their requested monetary relief does not injure the United States' interests. Id. at 20.

The City responds that the Belters' claims turn almost entirely on the United States' conduct in that it—through the National Guard—used and released AFFF in its firefighting activities. Def.'s Reply at 14. The City further contends that the Belters' "direct" claims will also require an "extensive inquiry into VTANG's activities," including the type and quantity of AFFF used over the years, location and quantity of spills and discharges, steps taken by the Guard to contain any spills or discharges, proportion of contamination from stormwater as opposed to direct groundwater, and the extent of ongoing mediation activities. Id. at 14–15.

i. Counts I—V, VII

The court concludes that the Rule 19(b) factors favor dismissal of all counts relating to PFAS (that is, all counts except Count VI). First, a judgment rendered in the absence of both the United States and the National Guard would almost certainly be prejudicial to the City and the absent parties. The Belters' bald assertion that addressing its claims would "require no evaluation of the United States' conduct" is, frankly, not credible. The

Belters can frame the complaint however they like, but the fact remains that the alleged conduct of the National Guard—releasing PFAS-contaminated foam as part of their firefighting activities on land leased and controlled by the United States—is central to all of these claims. Count I, for example, is expressly based upon the National Guard's negligence. Am. Compl. ¶¶ 36–39. "[R]espondeat superior, or vicarious liability, requires the agent to commit some wrongful act—a tort or contract violation, for instance—for which the principal could also be held liable. . . . Alleging respondeat superior based on tort thus requires a prima facie showing of all elements of the agent's tort, including the agent's legal duty." Buxton v. Springfield Lodge No. 679, Loyal Ord. of Moose, Inc., 2014 VT 52, ¶ 13, 196 Vt. 486. Other claims also expressly rely upon "VTANG's intentional use of AFFF," "VTANG's authorized firefighting activities," and "VTANG's contamination of the groundwater at and under Plaintiffs' property with PFAS." Am. Compl. ¶¶ 41, 45, 48, 54.

Thus, litigation of these claims against the City would essentially require a showing that the absent federal defendants did something wrong. "The City cannot reasonably be expected to defend the actions of an entirely different entity [i.e., the United States] over which the City had no control. Proceeding with this suit in the absence of the United States therefore would prejudice the City because the City by itself cannot defend effectively against the crux of Plaintiff's allegations, even though those allegations may be untrue." Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 1001 (9th Cir. 2011); *see also* Two Shields v. Wilkinson, 790 F.3d 791, 799 (8th Cir. 2015) ("If a defendant cannot be expected to articulate the government's position on its behalf in its absence, . . . the prejudice to the government is obvious.").

Moreover, even as to many of the counts more directly focused on the City, litigation will undoubtedly require extensive discovery of evidence controlled exclusively by the United States, which this court would likely be powerless to compel. *See* State v. Vance, 339 P.3d 245, 252 (Wash. Ct. App. 2014) (collecting cases); Pollock v. Barbosa Grp., Inc., 478 F. Supp. 2d 410, 413 (W.D.N.Y. 2007) (state court lacks jurisdiction to enforce subpoena on federal agency) (citing Smith v. Cromer, 159 F.3d 875, 878 (4th Cir. 1998); Boron Oil Co. v. Downie, 873 F.2d 67, 69–72 (4th Cir. 1989)); *see generally* Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1103 (8th Cir. 2012) (discussing challenges posed by subpoenas of third-party sovereign entities). The prejudice to the City weighs in favor of dismissal.

There is also potential prejudice to the absent parties. As the court noted in its prior ruling, numerous lawsuits arising from the military's use of AFFF in firefighting activities at military installations across the country have been consolidated as multi-district litigation (MDL) in the District of South Carolina. *See* In re Aqueous Film-Forming Foams Prod. Liab. Litig., 357 F. Supp. 3d 1391 (U.S. Jud. Pan. Mult. Lit. 2018) (initial consolidation order). Litigation of the present case "would practically impair the United States' interests by circumventing and interfering with the AFFF multi-district litigation . . . and could result in the adjudication of issues common to the AFFF claims raised against the United States across the country, without any input from the federal government." Belter, No. 21-CV-02985, slip copy at 3, 2022 WL 3027938, at *2–*3 (quotation omitted).

Here, given the multi-district litigation, the United States and National Guard surely have an interest in defending themselves against the allegation that they tortiously leached contaminants onto neighboring land. To succeed on its claims against the City,

the Belters must at least implicitly make such a showing as to those non-parties' conduct. There is no indication that the City and the absent defendants have shared interests in this litigation such that the City could adequately protect the non-parties' interests. As noted above, the City cannot be expected to articulate the federal government's position in its absence. Furthermore, "[a] case may not proceed when a required-entity sovereign is not amenable to suit. . . . [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." Republic of Philippines v. Pimentel, 553 U.S. 851, 867 (2008). The City points out that, in at least one of the AFFF cases in the MDL docket, the United States has indicated an intent to raise "discretionary function" sovereign immunity as a defense. *See* Def.'s Mot. to Dismiss at 20.[3]

As to the extent to which the prejudice can be lessened or avoided by the shaping of relief, the court is not persuaded by the Belters' argument. *See*, *e.g.*, Pimentel, 553 U.S. at 869–70 ("As to the second Rule 19(b) factor . . . there is no substantial argument to allow the action to proceed. No alternative remedies or forms of relief have been proposed to us or appear to be available."). In a new filing, the Belters suggest that the court "could order the execution of a covenant not to sue between the parties, or require Plaintiffs to

[3] The City also contends that the viability of the sovereign immunity defense in the MDL may have implications for the claims here, and that it "should not be expected to shoulder the entire burden of raising the United States' and VTANG's federal- and state-specific sovereign defenses here." Id. at 21 (citing M.J. ex rel. Beebe v. United States, 721 F.3d 1079, 1084 (9th Cir. 2013) ("Under Alaska law, [f]or vicarious liability to attach, some sort of underlying liability must be established for which the employer can be held liable.") (quotation omitted)). In Beebe, the Ninth Circuit held that under Alaska law, an employee's immunity from tort liability precluded the city-employer from being held vicariously liable for the employee's negligence. 721 F.3d at 1084–85. The court observed, however, that there is contrary authority on that issue. Beebe, 721 F.3d 1079, 1084 n.5 (citing Restatement (Second) of Agency § 217; 2A C.J.S. Agency § 467 [formerly § 438]). Vermont courts have apparently not addressed the issue of whether an agent's immunity destroys the principal's vicarious liability. Even assuming that the absent parties did not have potential sovereign immunity defenses, however, the prejudice to the City as discussed above still weighs in favor of dismissal.

execute a deed including such a restrictive covenant in their chain of title." Pls.' Supp'l Mem. at 6 (filed Mar. 15, 2023). However, they do not explain how the court has the power to unilaterally order the execution of such a covenant or deed. Covenants not to sue are, by their very nature, agreements between parties. See Black's Law Dictionary (11th ed. 2019) (defining "covenant" as "[a] formal agreement or promise, usu. in a contract or deed, to do or not do a particular act; a compact or stipulation"). The court cannot simply compel such an agreement. The Belters also repeat their argument that, as currently framed, the Amended Complaint requires "no evaluation" of the United States' or National Guard's conduct. Pl.'s Opp'n at 19. But the court sees no logical way to litigate these claims without examining those entities' conduct. The fact that the Belters now seek only monetary relief might strengthen their argument for proceeding without the two absent necessary parties, but it does not sufficiently lessen the prejudice that the City would endure through the litigation process.

The third factor—whether a judgment rendered in the person's absence will be adequate—implicates "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." Patterson, 390 U.S. at 111 ("We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them."); *see also* Pimentel, 553 U.S. at 870 (The "social interest in the efficient administration of justice and the avoidance of multiple litigation is an interest that has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants.") (quotation omitted). Clearly, proceeding here without the United

States or the National Guard would not settle the entire dispute. The role and liability of the absent federal defendants would not be resolved, leaving that issue for another day in a different court. At the very least, the City would likely have an outstanding indemnity claim against the United States, and a case that likely could have been resolved through an already existing MDL docket will have resulted in unnecessary judicial resources in state court.

The fourth factor is "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." V.R.C.P. 19(b). The City contends that the Belters can bring this action in federal court against the absent federal defendants, and the Belters do not dispute that contention. The stipulation the parties filed essentially acknowledges that the claims could be brought in federal court. *See* Stip. re: Capacity of the Vt. Air Nat'l Guard to be Sued ¶¶ 6, 7, 18 (filed Jan. 20, 2023). In their most recent filing, the Belters acknowledge that they "theoretically" have an alternative forum in federal court, but that "such a process would likely take years to come to a resolution" and would "bear little likelihood of success." Pls.' Supp'l Mem. at 6–7 (filed Mar. 15, 2023). It is understandable that federal court is not the Belters' preferred forum. Admittedly, a federal action would likely be transferred to the multi-district litigation docket, making a potential recovery more difficult and drawn out. The fact that an alternate forum might pose more obstacles, however, does not equate to the absence of an adequate remedy under the fourth factor of Rule 19(b). Litigation is inherently uncertain and unpredictable, and plaintiffs routinely must navigate obstacles to prove their case and, ultimately, obtain an appropriate remedy. It is not the court's job to assign civil litigation to whatever forum will be easiest for plaintiffs. In some cases, courts have dismissed under Rule 19 even where no alternative forum was currently available. *See*, *e.g.*, Paiute-Shoshone Indians,

637 F.3d at 1000–01 ("Even accepting Plaintiff's claim that it cannot obtain relief in any other forum today, the fact that Plaintiff at one time had a satisfactory alternative forum but failed to take advantage of it significantly lessens the strength of Plaintiff's interest in having this action go forward.") (quotation omitted); *see also* Wright & Miller, 7 Fed. Prac. & Proc. Civ. § 1608 ("Although the absence of an alternative forum creates a sympathetic climate for the federal court continuing the action, it should be remembered that this is only one of many factors to be considered under Rule 19(b). Thus, there may be situations in which the court will be obliged to dismiss an action even though plaintiff will not be able to assert his claim elsewhere."). Here, the Belters plainly have an alternate forum available in federal court, and thus this factor also weighs toward dismissal.

The court concludes that, under the factors articulated by Rule 19(b), the claims related to PFAS in this case "in equity and good conscience" cannot proceed without the joinder of the United States and/or National Guard. Accordingly, the court must dismiss all claims other than Count VI, and need not consider the City's additional arguments for dismissal as to those claims.

ii. Count VI

In Count VI, Plaintiffs bring a claim for "increased surface water drainage." Am. Compl. ¶¶ 58–61. " '[A]n upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge. But, in cases involving only increased flowage and not a change in the place of discharge, an upper owner may increase the flow as long as it causes no injury to the lower property." Powers v. Judd, 150 Vt. 290, 292 (1988) (quoting Swanson v. Bishop Farm, Inc., 140 Vt. 606, 610 (1982)) (alterations in original). Plaintiffs allege that the City's "stormwater facility and other

conduct as alleged has artificially increased the surface water flow on Plaintiffs' land, causing flooding and requiring the construction of drainage infrastructure," Am. Compl. ¶ 60, and that this has "unreasonably harmed" their land. Id. ¶ 61. As pled, this claim relates to water drainage from the City's stormwater facilities and, unlike the other claims, appears to require no analysis of chemicals in the water. Thus, the concerns about AFFF and PFAS evidence expressed above are not salient with respect to Count VI.

The City points to a 2017 Agency of Natural Resources permit issued to the National Guard which, it contends, shows that the Guard rather than the City was responsible for any stormwater discharges or increased surface water. *See* Def.'s Resp. to Pls.' Sur-Reply at 3 (citing Vt. Agency of Natural Res. Permit No. 3105-INDS.1, attached as Ex. A). However, the City fails to demonstrate that this permit can be properly considered on a Rule 12(b)(6) motion to dismiss. *See* Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 10 n. 4, 186 Vt. 605 (mem.). Moreover, even if the parties' competing permits could be considered at this stage of the case, they would not resolve the fact issue of responsibility for the alleged increased surface water drainage. Accordingly, Count VI survives the motion to dismiss.

B. Municipal Immunity

The City also argues that the doctrine of municipal immunity bars Counts I–III, V, and VII to the extent those claims sound in negligence, unless insurance coverage is available. The court will address this alternative argument for dismissal.

Pursuant to Vermont's common law of municipal immunity, "'[a]bsent insurance coverage, those functions which are governmental are protected by the doctrine of sovereign immunity, while, in contrast, the governmental unit will be liable for injuries caused or sustained in furtherance of its proprietary functions.'" Civetti v. Turner, 2020

VT 23, ¶ 8, 212 Vt. 185 (quoting Lorman v. City of Rutland, 2018 VT 64, ¶ 9, 207 Vt. 598). Governmental functions are "those performed when a municipality exercise[s] those powers and functions specifically authorized by the Legislature, as well as those functions that may be fairly and necessarily implied or that are incident or subordinate to the express powers." Sobel v. City of Rutland, 2012 VT 84, ¶ 14, 192 Vt. 538 (quotation omitted). Proprietary activities, meanwhile, are "commercial activities performed by a municipality in its corporate capacity, for the benefit of the municipality and its residents, and unrelated to its legally authorized activity." Id. (quotation omitted).

The contamination of the Belters' property allegedly arises from fire protection services at the airport. It is long established that firefighting is a governmental function. *See*, *e.g.*, Welsh v. Vill. of Rutland, 56 Vt. 228, 234 (1883) (finding immunity for negligent maintenance of fire hydrant because fire protection is governmental act "solely for the public benefit and protection" and remarking that "[t]he benefit accrues, not in any sense to the corporation, as such, but directly to the public"); Morgan v. Vill. of Stowe, 92 Vt. 338, 343 (1918) ("The great weight of authority is to the effect that hydrants and apparatus for the extinguishment of fire in a municipality are in their nature public or governmental property, and that for negligence in their use and maintenance for a public purpose no action will lie."); Marshall v. Town of Brattleboro, 121 Vt. 417, 423–24 (1960) (collecting cases and discussing policy rationale behind immunizing firefighting services). Other states that apply the common law governmental/proprietary distinction are in accord. *See*, *e.g.*, Massenburg v. City of Petersburg, 836 S.E.2d 391, 397 (Va. 2019) ("the firefighting function of the municipality . . . is quintessentially governmental"); Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 134 (N.Y. 2013) ("Police and fire protection are examples of long-recognized, quintessential governmental functions");

Westbrook v. City of Jackson, 665 So. 2d 833, 837 (Miss. 1995) ("fire fighting in general[] is a governmental function"); 18 McQuillin Mun. Corp. § 53:27 ("Fire protection . . . is a purely governmental function for purposes of the governmental immunity doctrine.").

The Belters contend, however, that because these firefighting services took pace in an airport, which serves a proprietary function, *see generally* 18A McQuillin Mun. Corp. § 53:190 ("the prevailing view is that the operation and maintenance of an airport is a proprietary function"), fire protection in this context is also a proprietary function. In other words, they assert that the proprietary function of operating the airport subsumes the typically governmental function of firefighting *within* the airport. They rely on Katz v. City of Burlington, No. 91–CV–35, slip op. (D.Vt. Mar. 11, 1992) (Magistrate Judge's Report and Recommendation) *adopted in toto,* Parker, C.J. (May 29, 1992) (cited in Gretkowski v. City of Burlington, 50 F. Supp. 2d 292, 295 (D. Vt. 1998), aff'd sub nom., 181 F.3d 82 (2d Cir. 1999)). Katz is not persuasive. There, the federal district court held only that the operation of an airport served a proprietary function even though it was authorized by the legislature through the City Charter.

More on point is Gregg v. City of Kansas City, 272 S.W.3d 353, 361 (Mo. Ct. App. 2008), which expressly held that the provision of security at an airport is a governmental function despite the proprietary nature of an airport. Id. ("While owning and operating an airport may, at least in some instances, be a proprietary function, airport security seems, notwithstanding the authorities on which Plaintiffs rely, to be prototypically a governmental function. It is akin to the act of policing."). Other states are in accord. *See*, *e.g.*, Cherry Creek Aviation, Inc. v. City of Steamboat Springs, 958 P.2d 515, 521 (Colo. App. 1998) ("In our view, the operation of the airport with respect to such essential functions is not for the particular benefit of the citizens of the municipality, but, rather,

for the public good in general."); City of Macon v. Powell, 213 S.E.2d 63, 65 (Ga. Ct. App. 1975) (driver of airport security vehicle acting in governmental capacity although municipal airport was proprietary in some other respects); *see also* 18A McQuillin Mun. Corp. § 53:190 (3d ed.) (noting that, while operating an airport generally is a proprietary function, "governmental functions may be involved in some phases of airport operation and maintenance").

The reasoning of Gregg is persuasive here. The provision of firefighting services at an airport is a governmental function despite the fact that the operation of an airport more broadly might be proprietary. *See* Marshall v. Town of Brattleboro, 121 Vt. 417, 425 (1960) (presenting the inverse situation in holding that "the operation of a mechanical rope ski tow in a public park by a municipality is a proprietary activity to which no immunity for tort liability attaches" even though a public park more broadly served a governmental function). Thus, even if the court were not dismissing Counts I–III, V, and VII on other grounds, the City would be immune from liability for those claims to the extent that they sound in negligence unless insurance coverage were available. *See* Def.'s Reply at 19 n.12 (noting that the City has not yet resolved the issue of insurance coverage with potential insurers).

Order

The court grants the City's motion to dismiss as to all counts except Count VI. The City shall file its answer within 14 days, and the parties shall file a proposed discovery schedule within 30 days thereafter.

Electronically signed on March 24, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge