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2nd Circuit Revives 9/11 Workers' Suit Against Battery Park City Authority

The appellate panel found the New York Court of Appeals' response to certified questions showed the Lower Manhattan authority had no ability to sue on state constitutional grounds.

By Colby Hamilton | June 06, 2018

A long-running legal battle between workers who say they became sick as a result of working in Lower Manhattan after the Sept. 11th terrorist attacks and the Battery Park City Authority was revived by the U.S. Court of Appeals for the Second Circuit Wednesday.

The panel, composed of Circuit Judges Gerard Lynch and Christopher Droney, along with U.S. District Judge Christina Reiss of the District of Vermont, sitting by designation, reversed and remanded [a summary judgment order](#)



**The World Trade Center on Sept. 17, 2001.
Photo courtesy of the U.S. Navy.**

(<https://www.law.com/newyorklawjournal/almID/1202678775587/jimmy-nolans-law-found-to-violate-ny-constitution/>) issued by U.S. District Judge Alvin Hellerstein of the Southern District of New York back in 2014. The appeal process had been on hold as the circuit court waited for clarification (<https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/22/ny-high-court-gives-ok-for-911-cleanup-crews-to-sue-over-asbestos-exposure/>) questions certified to New York's highest court to be answered.

The circuit court asked its state court counterparts to weigh in on two unsettled issues related to the Battery Park City Authority's argument in support of Hellerstein's summary judgment in its favor. The authority argued on state constitutional grounds that a 2009 law passed by the Legislature, named after recovery worker Jimmy Nolan, and which allowed 9/11 workers to sue, for a limited time, public corporations should be invalid.

After Hellerstein agreed with the BPCA, the appellate court said it needed clarification on substantive issues before it could decide if the workers' argument that local entities are barred from suing on constitutional grounds in all but a few exceptions was right.

The Court of Appeals determined that a public benefit corporation such as the BPCA is to be treated like any other state entity, subjecting it to the general rule that, absent narrow exception, it lacked the capacity to challenge the constitutionality of state statutes. The state court also determined that a claim-revival statute, such as the one passed by New York's Legislature allowing time-barred suits over 9/11-related illness to be filed, passes state due-process muster if it's a reasonable response "in order to remedy an injustice."

Given the Court of Appeals' response, the largest outstanding issue facing the appellate panel was whether the BPCA's claims qualified as one of the narrow exceptions to the capacity-to-sue rule for state entities. The BPCA's argument was that, under the proprietary-interest exception, it would be forced to use its general fund to pay claims if the suits were allowed to go forward.

The panel said that, unlike other areas where this exception was upheld, the BPCA faced “at most” an indirect effect on its general funds, while nothing in Jimmy Nolan’s Law specifically targets any authority’s funds, let alone the BPCA’s specifically. Since the authority failed to qualify for an exception, the panel said it didn’t even need to reach the due-process issue before vacating and remanding the case back to Hellerstein.

Napoli Shkolnik of counsel Paul Napoli, who represented a portion of the appellants, said the BPCA had “used every legal maneuver possible to avoid paying these claims,” and this result was not unforeseen given the Court of Appeals’ answer to the circuit’s certified questions.

“We’re happy that finally these plaintiffs might finally have their time in court in front of Judge Hellerstein,” Napoli said.

The handful of plaintiffs in the case are one of the few remaining claims out of an initial inventory of about 12,000. Most of the other claims, including tangential claims by some of the same plaintiffs, have been resolved through settlements, according to attorney Gregory Cannata, who represents the bulk of the plaintiffs who appealed.

Cannata, who said he and his clients are very happy with Wednesday’s decision, is reaching out to the BPCA to discuss resolving the case without going through “protracted litigation.”

Bracewell managing partner Daniel S. Connolly represented the BPCA on appeal. He did not respond to a request for comment.

A spokesman for the BPCA said there would be no comment on pending litigation.

The state, through the attorney general’s office, had intervened in the appeal on behalf of the plaintiffs to argue the authority lacked the capacity to challenge state law. In a statement for Attorney General Barbara Underwood, spokeswoman Amy Spitalnick said Underwood was pleased the court rejected the BPCA’s challenge.