

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SARA M. MULLIGAN, individually, as personal :
representative and administratrix of the Estate of :
Peter James Mulligan, and on behalf of all others :
similarly situated, GREG DE VERNA, individually :
and on behalf of all others similarly situated, :
WILSTON PARRIS, individually and on behalf of :
all others similarly situated, and RODNEY :
PATRICK WOOTEN JR., by his mother, Patricia : ORDER
Wooten, individually and on behalf of all others :
similarly situated, : 02 Civ. 6885 (AKH)
:
Plaintiffs, :
:
-against- :
:
THE PORT AUTHORITY OF NEW YORK :
AND NEW JERSEY, :
:
Defendant. :
-----X

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs having moved by Order to Show Cause dated August 29, 2002, pursuant to Sections 7107 and 7108 of the Unconsolidated Laws of New York, seeking leave on behalf of four individual plaintiffs and others similarly situated to serve late Notices of Claim and for extensions of time until September 10, 2004 to commence lawsuits against the Port Authority of New York and New Jersey (the "Port Authority"), and the Court having ordered the parties to show cause why such relief or, in the alternative, such other relief "as may be appropriate to preserve meaningful choice to the claimants, either to file and prosecute claims with the Victim Compensation Fund, or to file and prosecute lawsuits in this Court," should not be granted,

Now, having read and considered the Affidavit of Paul J. Hanly, Jr., in Support of Application for Leave to Serve Notices of Claim and for an Extension of Time to Commence an

Action Against The Port Authority of New York and New Jersey, sworn to on August 29, 2002, and the exhibits to the affidavit; Plaintiffs' Memorandum of Law in Support of Application for Leave to Serve Notices of Claim and for an Extension of Time to Commence an Action Against The Port Authority of New York and New Jersey; the Affidavit of Richard A. Williamson in Response to Plaintiffs' Order to Show Cause, sworn to on September 3, 2002, and the exhibits to the affidavit; The Port Authority of New York and New Jersey's Memorandum of Law in Response to Plaintiffs' Application for Leave to Serve Notices of Claim and for an Extension of Time to Commence Suit Against The Port Authority, dated September 3, 2002; and having heard oral argument on September 3, 2002,

IT IS HEREBY ORDERED that:

1. The applications of the four named plaintiffs, on their behalf and on behalf of those similarly situated, to serve late notices of claim and for an extension of time until September 10, 2004, to file suit against the Port Authority, are denied.
2. Any summons and complaint filed with the Clerk of this Court against the Port Authority by any individual (or representatives of a deceased individual) for wrongful death, personal injury or property damage arising out of or in connection with the terrorist-related aircraft crashes of September 11, 2001 shall be deemed timely filed if filed on or before September 10, 2002 provided that a Notice of Claim shall have been served upon the Port Authority of New York and New Jersey in satisfaction of the requirements of Sections 7107 and 7108 of the Unconsolidated Laws of New York.
3. Any plaintiff who has not filed a timely Notice of Claim with the Port Authority can file an application for leave to file a late Notice of Claim, accompanied by a summons and complaint, with the Court with a copy sent to the Port Authority by certified mail,

return receipt requested to Stephen F. Kern, Esq., Chief, Claims Division, The Port Authority of New York and New Jersey, 225 Park Avenue South, 13th Floor, New York, N.Y. 10003, and with a copy to Richard A. Williamson, Esq., Flemming, Zulack & Williamson, LLP, One Liberty Plaza, New York, N.Y. 10006, PROVIDED that:

a. Each application for leave to file a late notice of claim shall be accompanied by an affidavit by the claimant. The affidavit shall include the following information:

- i. The name and post office address of the claimant and of his or her attorney, if any;
- ii. The nature of the claim;
- iii. The time when, the place where, and the manner in which the claim arose;
- iv. The items of damage or injuries claimed to have been sustained as far as then practicable;
- v. Which of the four possible exceptions set forth in Section 7108 of the Unconsolidated Laws of New York the claimant relies upon as justification for why the claimant did not timely file a notice of claim with the Port Authority;
- vi. How and why that particular circumstance caused the notice of claim not to be filed timely, including all facts which caused the delay, including but not limited to affidavits and/or records from treating psychologists, psychiatrists, medical doctors or any other physicians as to the disability suffered and the effects of such condition of the claimant's ability to

comply with the conditions precedent to suit; and

vii. Why the claimant has not previously, after the initial period of any claimed incapacity, filed a notice of claim until the time of the present application.

b. Each such application shall be accompanied by a copy of the proposed Notice of Claim and may be accompanied by such other supporting documentation and evidence as claimant wishes to submit to justify the application. There must be a separate application for each claimant; no applications may be filed listing “John Doe and other persons presently unknown” or similar references to unnamed persons.

c. All such applications for claimants known to counsel at present shall be filed and served as provided above no later than October 30, 2002.

d. Within twenty days of receipt of any such application for leave to file a late notice of claim, the Port Authority shall acknowledge receipt of such claim in writing. If the Port Authority has no opposition to an application, the Port Authority and claimant’s counsel will enter into a mutually agreeable stipulation to be so ordered. The Port Authority shall notify each applicant whose application it opposes within 45 days of receipt of the application, and shall state its reasons for so opposing the application. Each such applicant shall elect whether to pursue his or her application for leave to file a late notice of claim or whether to abandon the application; if the claimant abandons the application for leave to file a late Notice of Claim, then, pursuant to § 7108 of the Unconsolidated Laws of New York, the claimant shall be barred from suing The Port Authority of New York and New Jersey. Any claimant who elects to pursue his or her application with this Court shall move the Court on notice, for an order granting leave to file a late Notice of Claim within 20 days of receiving the Port Authority’s notice of

opposition to the application. The Court will establish a briefing schedule for any such motions, and a date for oral argument if required.

4. Service of summons and complaints referred to in paragraphs 2 and 3 above shall be made in accordance with Rule 4 of the Civil Rules of Procedure.

5. After service of the summons and complaint is made upon the Port Authority, the lawsuit shall be suspended and shall remain dormant until the earliest of the following:

(a) December 23, 2003,

(b) the service of a notice by or on behalf of the named plaintiff in the lawsuit upon the Port Authority, and filed with the Court, that he or she intends to activate the lawsuit and proceed with the litigation, or

(c) the date upon which the named plaintiff in the lawsuit against the Port Authority adds any additional party defendant to the lawsuit or commences any other lawsuit for personal or property damage, injury or death as a result of the terrorist-related airplane crashes of September 11, 2001, except a lawsuit against nations, entities or persons who perpetrated the terrorist acts of September 11, 2001 or conspired, aided and abetted or participated in them in any manner as those terms are elucidated in Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002).

6. The Port Authority shall not answer, and shall not be obligated to serve or file any motions to dismiss or otherwise, in response to any complaint filed as herein provided until the lawsuit is activated as specified in paragraph 5 above, and, if required to answer or move, the Port Authority shall be entitled to raise any and all defenses available to it under the law as if the Port Authority had just been served with the summons and complaint.

7. The filing and service of a complaint against the Port Authority for personal or property damage, injury or death arising out of the terrorist-related air crashes of September 11, 2001 shall not constitute an election of remedies so as to prevent the named plaintiff from seeking compensation from the Victim Compensation Fund administered by Special Master Kenneth R. Feinberg. As long as any such lawsuit remains dormant and in suspense, the named plaintiff may proceed to file a claim for compensation from the Victim Compensation Fund, and the claimant shall not be deemed ineligible to receive an award from the Victim Compensation Fund by reason of the pending lawsuit against the Port Authority. However, the filing of a claim for compensation with the Victim Compensation Fund by a named plaintiff shall preclude such person from proceeding with any lawsuit against the Port Authority as presented in § 405(c)(3)(B)(i). Within 10 days of filing a claim for compensation from the Victims Compensation Fund, the plaintiff shall discontinue its suspended action against the Port Authority, or suffer dismissal by order of the Court.

8. Any plaintiff who commences an action against the Port Authority and thereafter elects to have the case treated as dormant pursuant to the provisions hereof shall be deemed to have agreed to any proceedings and discovery in any other civil actions against the Port Authority or any other defendant for personal or property damage, injury or death as a result of the terrorist-related aircraft crashes of September 11, 2001.

9. Nothing herein shall be deemed to affect the rights of persons otherwise provided pursuant to § 7108 to file notices of claims and to commence actions against the Port Authority within three years of the date upon which causes of action against the Port Authority accrued.

10. This Order is the result of efforts to deal with extraordinary circumstances

and nothing contained herein is to be deemed to be a waiver of any of the provisions of statute governing suits against the Port Authority and cannot be used as any type of precedent by any individual. Nothing contained herein should be read as applicable to any other potential defendant for personal or property damage, injury or death resulting from the terrorist-related airplane crashes of September 11, 2001.

SO ORDERED.

Dated: New York, New York
 September 6, 2002

ALVIN K. HELLERSTEIN
United States District Judge