United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7169 **September Term, 2019**

FILED ON: DECEMBER 27, 2019

MARQUETTA R. MILLER, ET AL.,
APPELLANTS

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00840)

Before: SRINIVASAN, KATSAS and RAO, *Circuit Judges*.

JUDGMENT

The Court has considered this appeal on the record from the United States District Court for the District of Columbia, and on the parties' briefs. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED that the judgment of the district court be affirmed.

Plaintiffs' homes were flooded when a sewer main ruptured. Plaintiffs sued the D.C. Water and Sewer Authority and several of its contractors. The only issue on appeal is whether the district court properly dismissed claims under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, which "creates a cause of action through which entities that have incurred costs cleaning up contaminated sites may sue to recover cleanup costs," *Lockheed Martin Corp. v. United States*, 833 F.3d 225, 227 (D.C. Cir. 2016).

Defendants argue that this case is jurisdictionally barred because plaintiffs failed to provide the advance notice required for citizen suits under section 310 of CERCLA, 42 U.S.C. § 9659. We disagree. Plaintiffs seek to proceed under section 107, which provides a separate cause of action "for private parties to seek recovery of cleanup costs," *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994). The section 310 notice requirements thus do not apply.

To state a claim for response costs under section 107, plaintiffs must allege that they incurred such costs "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Plaintiffs failed to do so, for the complaint does not even mention the plan, let alone plead compliance with it. Moreover, the complaint alleges no facts that could support a plausible inference of compliance. For example, 40 C.F.R. § 300.700(c), the portion of the plan that addresses actions for response costs, states that "[p]rivate parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action." *Id.* § 300.700(c)(6). The complaint does not allege that plaintiffs provided such an opportunity. Similarly, section 300.700(c)(5) makes nine further provisions of the plan "potentially applicable to private party response actions," including procedures for documenting recovery costs, notifying EPA of contamination, and evaluating potential cleanup sites. *Id.* § 300.700(c)(5)(ii), (iv), (vii). The complaint does not allege that plaintiffs complied with any of these provisions. Because the complaint thus failed to state any valid claims for response costs, the district court correctly dismissed those claims.

The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk