*2005 U.S. Dist. LEXIS 21778, **

GERSH KORSINSKY, Plaintiff, - against - U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA); N.Y.S. DEPARTMENT OF ENVIRONMENTAL CONSERVATION; N.Y.C. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendants.

05 Civ. 859 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 21778

September 28, 2005, Decided
September 29, 2005, Filed

SUBSEQUENT HISTORY: Affirmed by Korsinsky v. United States Epa, 2006 U.S. App. LEXIS 21024 (2d Cir. N.Y., Aug. 10, 2006)

DISPOSITION: [*1] Defendants' motions to dismiss granted in their entirety, and all claims against defendants dismissed.

CASE SUMMARY

PROCEDURAL POSTURE: Pro se plaintiff, a New York resident, sued defendant U.S. Environmental Protection Agency (EPA), the N.Y. Department of Environmental Conservation (NYSDEC), and the N.Y. City Department of Environmental Protection (NYCDEP), alleging "public nuisance" for the phenomenon of global warming and seeking injunctive relief. Defendants moved to dismiss all of plaintiff's claims.

OVERVIEW: Plaintiff sought an order holding defendants liable for the contributions to global warming and preventing them from contributing further and to implement plaintiff's own invention to eliminate carbon dioxide emissions. Because the court found that subject matter jurisdiction was lacking, it did not consider any of defendants' other arguments. After alleging no injury in his complaint, plaintiff alleged in his response that he was more vulnerable to disease and that he had developed a mental sickness from learning of the danger of pollution. Neither of plaintiff's alleged injuries was sufficient to confer standing. The allegations fell more within the realm of the hypothetical and conjectural than the actual or imminent. If plaintiff's allegation regarding mental illness was interpreted to mean that he had some continuing apprehension from the dangers of pollution, then it was clearly a generalized grievance. If the allegations were interpreted to mean that he actually developed some form of mental illness from the knowledge of the danger, it nonetheless did not confer standing because the requested relief would have redressed the alleged injury.

OUTCOME: The court granted defendants' motion to dismiss for lack of subject matter jurisdiction.

CORE TERMS: warming, global, confer, carbon dioxide, subject matter jurisdiction, pollution, pro se, requested relief, environmental, vulnerable, invention, disease, illness, public nuisance, emissions, environmental pollution, federal case, failure to state a claim, factual allegations, drinking water, injury-in-fact, contributing, hypothetical, conjectural, redressed, imminent, enhanced, suffice, chronic, redress

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Parties > Self-Representation > Pleading Standards

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

HN1 In considering a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim, a court must accept as true all material factual allegations in the complaint. In addition, the complaint of a pro se litigant should be liberally construed in his favor. However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. A motion to dismiss may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact

HN2 The issue of standing is the threshold question in every federal case, determining the power of the court to entertain the suit. At a minimum, a plaintiff must satisfy three elements in order to establish standing: 1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; 2) a causal connection between the injury and the alleged conduct; and 3) likelihood that the injury will be redressed by a favorable decision. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. More Like This Headnote

Civil Procedure > Justiciability > Standing > General Overview

HN3 The U.S. Court of Appeals for the Second Circuit has held that enhanced risk may in some circumstances qualify as sufficient injury to confer standing. More Like This Headnote

Civil Procedure > Justiciability > Standing > General Overview

HN4 The probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm. When the risk at issue is the transmission of a deadly disease with no known cure or treatment, even a moderate increase in the risk of transmitting such a disease would be sufficient to confer standing. More Like This Headnote

Civil Procedure > Justiciability > Standing > General Overview

Patent Law > Inequitable Conduct > General Overview

HN5 To establish Article III standing, a plaintiff must allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief. More Like This Headnote

COUNSEL: For Plaintiff: Gersh Korsinsky, Brooklyn, NY.

For Defendant United States Environmental Protection Agency: Lawrence H. Fogelman, Esq., Assistant United States Attorney, Office of the United States Attorney, New York, NY.

For Defendant New York State Department of Environmental Conservation: Simon Wynn, Esq., Assistant Attorney General, New York, NY.

For Defendant New York City Department of Environmental Protection: Michael Burger, Esq., Assistant Corporation Counsel, Law Department, New York, NY.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINION BY: NAOMI REICE BUCHWALD

OPINION

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Pro se plaintiff Gersh Korsinsky, a New York resident, has brought this action against the United States Environmental Protection Agency ("EPA"), the New York State Department of Environmental Conservation ("NYSDEC") and the New York City Department of

Environmental Protection ("NYCDEP") (collectively, "defendants"), alleging "public nuisance" and seeking injunctive relief. Defendants now [*2] move to dismiss all of plaintiff's claims. For the reasons set forth herein, defendants' motions to dismiss are granted.

BACKGROUND

[1]

FOOTNOTES

[1] The following facts are drawn from plaintiff's complaint and, as is appropriate on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) , are assumed herein to be true.

On January 25, 2005, plaintiff filed his complaint in this action, seeking relief under the federal common law of public nuisance, or alternatively under state law of public nuisance, for the phenomenon of global warming. [2] Plaintiff alleges that defendants have contributed to global warming both by annually emitting "approximately 6,500 million tons of carbon dioxide" and by failing to implement "practical, feasible and economically viable options for eliminate [sic] carbon dioxide emissions." Compl. PP2, 5. The only such option identified in the complaint is plaintiff's own invention, for which he apparently has sought a patent, and which he asserts will "eliminate [*3] carbon dioxide emissions without significantly increasing the cost of process activities." *Id.* at P5.

FOOTNOTES

[2] The complaint contains a lengthy recitation of the harms of global warming. Ironically, the vast majority of this discussion appears to have been copied verbatim from the complaint in a separate case brought by the New York defendants and others against companies that allegedly are among the nation's five largest emitters of carbon dioxide.

Plaintiff seeks an order holding defendants jointly and severally liable for their contributions to global warming. He also requests an order enjoining each defendant from contributing further to global warming by eliminating its emissions of carbon dioxide. Finally, plaintiff appears to request an order requiring defendants to implement his invention. Defendants NYSDEC and NYSDEP (collectively, "New York defendants") moved to dismiss the complaint on March 16, 2005, after which the EPA moved to dismiss the complaint on May 12, 2005. Defendants have moved to dismiss [*4] the complaint in its entirety on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. [3]

FOOTNOTES

[3] The EPA has also moved to dismiss under Fed. R. Civ. P. 8 . We do not consider this argument in light of our conclusion that subject matter jurisdiction is lacking in this case.

DISCUSSION

HN1 In considering a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim, the Court must accept as true all material factual allegations in the complaint. *Levy ex rel. Immunogen Inc. v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001); *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)). In addition, "the complaint of a *pro se* litigant should be liberally construed in his favor." *Salahuddin v. Cuomo*, 861 F.2d 40, 42-43 (2d Cir. 1988) (citation [*5] omitted). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (quoting *Gebhardt v. Allspect, Inc.*, 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000)). A motion to dismiss may be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

Defendants argue that plaintiff's complaint must be dismissed for several reasons. Because we find that subject matter jurisdiction is lacking in this case, we need not consider any of defendants' additional arguments. *See Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990).

I. Standing

HN2 The issue of standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498-99, 45 L. Ed. 2d 343, 95 S. Ct. 2197, (1975); *see also Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 14-15, 159 L. Ed. 2d 98, 124 S. Ct. 2301 (2004) [*6] ("In every federal case, the party bringing the suit must establish standing to prosecute the action."). At a minimum, plaintiff must satisfy three elements in order to establish standing: 1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; 2) a causal connection between the injury and the alleged conduct; and 3) likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Heldman v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).

After alleging no injury in his complaint, plaintiff alleges for the first time in his memorandum

of law that he has been, or will be, injured in two ways. [4] First, plaintiff asserts that he is "more vulnerable to disease-causing environmental pollution than general [sic] population" because he allegedly is "suffering from sinuses related diseases [sic] pathology and chronic during [*7] its entire life (affects [sic] similar to allergic nature)." Opp. at 3. Second, plaintiff claims that he "developed a mental sickness" from learning of the danger of pollution. *Id.* at 4-5. Neither of these alleged injuries is sufficient to confer standing.

FOOTNOTES

[4] In light of plaintiff's *pro se* status, such allegations are appropriately considered. *See* *Burgess v. Goord*, 1999 U.S. Dist. LEXIS 611, 1999 WL 33458, at *1 n.1 (S.D.N.Y. Jan. 26, 1999) ("The policy reasons favoring liberal construction of pro se pleadings warrant the Court's consideration of the allegations contained in plaintiffs' memorandum of law, at least where those allegations are consistent with the allegations in the complaint." (citing *Donahue v. United States Dep't of Justice*, 751 F.Supp. 45, 49 (S.D.N.Y. 1990))).

While HN3 the Second Circuit has held that enhanced risk may in some circumstances qualify as sufficient injury to confer standing, *see* *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003), the enhanced risk [*8] of illness alleged in this case is insufficient. [5] Plaintiff alleges that over time, global warming will enhance the risk of contaminated drinking water. Plaintiff alleges that he is more vulnerable to environmental pollution generally and also cites a report stating that some people may be more vulnerable to microorganisms in drinking water. Such allegations fall more within the realm of the hypothetical and conjectural than the actual or imminent and therefore are insufficient for purposes of standing. *See* *Defenders of Wildlife*, 504 U.S. at 564 n.2 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is *certainly* impending." (internal quotations omitted)).

FOOTNOTES

[5] We note that this case is distinguishable from *Baur* because the holding of that case was limited to "the specific context of food and drug safety suits." *Baur*, 352 F.3d at 634. Regardless of whether such a distinction is meaningful, plaintiff's alleged increase in risk fails to satisfy the analysis under *Baur*. The court in *Baur* noted that HN4 "the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm." *Id.* at 637. There, the risk at issue was

transmission of a "deadly disease with no known cure or treatment." *Id.* at 637 . Therefore, the court concluded that even a "moderate increase" in the risk of transmitting such a disease would be sufficient to confer standing. *Id.* at 637 . Here, by contrast, plaintiff alleges nothing more than an increase in risk over a long period of time of aggravating a chronic condition similar to allergies.

[*9] Plaintiff's second assertion, that he has developed some form of mental illness from knowledge of the dangers of pollution over the years, is also insufficient to confer standing. If we interpret plaintiff's allegation to mean that he has some continuing apprehension from the dangers of pollution, then it is clearly a generalized grievance, which is insufficient to confer standing. *See Defenders of Wildlife*, 504 U.S. at 575. If plaintiff's allegation were interpreted to mean that he actually has developed some form of mental illness from the knowledge of the danger, it nonetheless would not confer standing because the requested relief would not redress the alleged injury. *See Baur*, 352 F.3d at 632 (HN5 "To establish Article III standing, a plaintiff must therefore allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." (citing *Bennett v. Spear*, 520 U.S. 154, 162, 137 L. Ed. 2d 281, 117 S. Ct. 1154, (1997))). The requested relief in this case -- that defendants be held liable for contributions to global warming, enjoined from contributing [*10] further and required to use plaintiff's invention -- simply would not redress plaintiff's alleged mental injury stemming from knowledge of the general dangers of pollution.

Conclusion

For the reasons set forth above, defendants' motions to dismiss are granted in their entirety, and all claims against defendants are dismissed.

SO ORDERED.

Dated: New York, New York

September 28, 2005

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

*192 Fed. Appx. 71, *; 2006 U.S. App. LEXIS 21024, ***

GERSH KORSINSKY, Plaintiff-Appellant, -v.- U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), N.Y.S. DEPARTMENT OF ENVIRONMENTAL PROTECTION, N.Y.C. DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Defendants-Appellees.

No. 05-6802-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

192 Fed. Appx. 71; 2006 U.S. App. LEXIS 21024

August 10, 2006, Decided

NOTICE: [**1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York. (Naomi Reice Buchwald, Judge).
Korsinsky v. United States EPA, 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y., Sept. 28, 2005)

COUNSEL: Gersh Korsinsky, Plaintiff-Appellant, Pro se, Brooklyn, New York.

For Defendants-Appellees: Lawrence H. Fogelman, Assistant United States Attorney for the Southern District of New York, New York, NY; Simon Wynn, Assistant Attorney General (Michael Belohlavek, Senior Counsel, Daniel J. Chepaitis, Assistant Solicitor General, on the brief), Office of the Attorney General, New York, NY; Elizabeth S. Natrella, Senior Counsel, Appeals Division, The City of New York Law Department, New York, NY.

JUDGES: PRESENT: HON. BARRINGTON D. PARKER, HON. RICHARD C. WESLEY, HON. PETER W. HALL, Circuit Judges.

OPINION

[*71] **SUMMARY ORDER**

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Gersh Korsinsky, *pro se*, appeals from the district court's judgment dismissing his suit for lack of subject matter jurisdiction. [**2] We assume the parties' familiarity with the factual and procedural history.

Article III, § 2 of the United States Constitution limits federal courts to deciding only cases or

controversies, and, thus, at a minimum, a plaintiff seeking relief in federal court must "allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [it is] presum[ed] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted). Nonetheless, the injury must be "actual" or "imminent," rather than "conjectural" or "hypothetical." *Id.* at 560 (internal quotation marks omitted).

Korsinsky's primary claim, that global warming and carbon dioxide emissions may cause him a future injury, is [**3] too speculative to establish standing. *See Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 330 (2d Cir. 1997) ("The keystone for determining injury in fact is the requirement that it be distinct and palpable . . . .") (internal quotation marks omitted). Korsinsky [*72] does not explain exactly what injury may be caused by the appellees' actions, nor does he explain how the appellees' actions have increased any possible risk to his health. Moreover, Korsinsky has failed to sufficiently allege that his injury is likely to be redressed by any relief the district court could grant.

For these reasons, the judgment of the district court is hereby AFFIRMED. The mandate shall issue forthwith.