

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE SEPTEMBER 11 LITIGATION :
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ORDER

21 MC 97 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

I have been presented by the plaintiffs with an order to show cause why an order should not be made that the mere filing of a preliminary application with the Victim Compensation Fund, which is not substantially complete for the purposes of obtaining a preliminary estimate from the fund as to the amount of an award, will not constitute an election of remedies or a defense to a claimant’s right to proceed with litigation. The order to show cause was duly served and the parties have argued their respective positions. I hold that the motion is denied, but I will grant relief as stated in the opinion and order that follows.

I hold that the filing of a claim for compensation with the Special Master, as contemplated by Section 401(a) of the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2002), that satisfies both the Special Master’s regulations and the December 22, 2003 statutory deadline will be deemed “filed” and submitted on either the date that the Special Master Claims Evaluator determines that the forms are substantially complete, per Section 104.21(a) of the regulations, 28 C.F.R. § 104.21, or January 22, 2004, the date fixed by the Special Master’s policy statement, whichever is earlier.

Discussion

Section 405(a)(1) of the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (the Act), provides that a claimant may file a claim for compensation with the Special Master on the form developed pursuant to subparagraph 2 of that section. Subparagraph 2 requires the Special Master to develop a claim form that provides various aspects of detailed

information with respect to the claimant—the physical harm or death that was suffered, the possible economic and non-economic losses that the claimant suffered, information regarding collateral sources of compensation that the claimant has received or is entitled to receive and other information required by the Special Master.

Subparagraph 3 of § 405(a) provides that no claim may be filed “after the date that is two years after the date on which regulations are promulgated under Section 407 of the Act.” That date is December 22, 2003, four days from today.

The problem posed by this motion arises from § 405(c)(3)(B)(i) of the Act. That section provides that “upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to any action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.” If, therefore, a claimant enters the Victim Compensation Fund but decides to depart from it and to pursue his right to go to law, there is a potential that the claimant’s entry into the Special Master’s procedures may have constituted an election, depriving the party of a right to a civil recovery—indeed, neither a recovery from the Victim Compensation Fund or from a court of law.

The relevant regulations define when a claim is “filed” and “submitted” with respect to the Victim Compensation Fund. Under § 104.21(a), a claim is “filed” “when a Claims Evaluator determines that both the eligibility form and either a personal injury compensation form or a death compensation form are substantially complete.” 28 C.F.R. § 104.21. The Special Master’s informational bulletin provides that that determination will be made no later than January 22, 2004. The filing date, as thus defined, then triggers the 120-day period within which the Special Master must complete his review and determination of the claim. Act, § 405(b)(3).

There are two other dates of legal consequence. One is the date by when a claim must be “filed,” December 22, 2003. Act, § 405(a)(3). The second date of legal consequence is the date when a waiver occurs affecting the ability to file a civil action or to be a party to a civil action. That date occurs “upon the submission of a claim.” Act, § 405(c)(3)(B)(i).

The regulations define when “submission” occurs. Section 104.21(d), provides that a “claim shall be deemed submitted for purposes of Section 405(c)(3)(B) of the Act when the claim is deemed filed pursuant to Section 104.21 regardless of whether any time limits are stayed or tolled.” In other words, according to the regulations duly promulgated, the act of waiver of remedy does not occur until the “deemed” filing date, that is, the date when the Special Master’s Claims Evaluator determines that the claimant’s application to the Victim Compensation Fund is “substantially complete,” triggering the 120 day-period within which the Special Master must complete his review and determination of the claim.

The regulations thus defines the date of “submission,” not on the date when the process of filing begins but when the process of filing is substantially complete, provided that that latter date is no later than January 22, 2004. That is the interpretation that I must respect, and barring some other interpretation or policy that conflicts, that is the interpretation I must follow. See Colaio v. Feinberg, 262 F. Supp. 2d 273 (S.D.N.Y. 2003), aff’d, Schneider v. Feinberg, 345 F.3d 135 (2d Cir. 2003).

I know of no conflicting policy or interpretation with my interpretation of the Act and regulations. Clearly there has been a high degree of sensitivity on the part of the Special Master with regard to providing information and inviting filing of all those who suffered by the tragedy of September 11, 2001. As the Special Master wrote in his Bulletin, “I have spent almost two years in a determined effort to publicize the September 11th Victim Compensation Fund of 2001 by traveling throughout the nation, meeting with families, injured victims, and the general

public. My goal has been to make sure that every eligible claimant is aware of the program and has every opportunity to file a claim with the fund. I have conducted town hall meetings, sent personalized letters, authorized notices to be published in newspapers, made web announcements, and coordinated with the airlines, charities, foreign consulates and government agencies in an effort to explain the benefits of the September 11th Victim Compensation Fund of 2001.”

The degree of activity by the Special Master in carrying out his statutory responsibilities must be respected. The Special Master has provided a procedure to encourage people who have been almost paralyzed by the tragedy of September 11th and its aftermath. The liberalized definitions of the Special Master enables as many as possible of those eligible to file, even at the last minute. It would be cruel if the court were not to afford the same degree of sensitivity in the absence of a strong policy that might conflict, and I have found none.

Thus, I hold that the submission of a timely claim on or before December 22, 2003 will not constitute a waiver under § 405(c)(3)(B) of the Act. But that lenity has limits. If a claimant completes his filing sufficiently to enable the Special Master to begin the 120-day period for review and determination of that claim, or on January 22, 2004, whichever is earlier, waiver will occur. The interests of proceeding with the lawsuits before me dictates that result. I have taken the position from the outset of these lawsuits, over objections and motions for stays, that the lawsuits are to proceed at their own pace, and I have caused pre-trial proceedings to progress with as much speed and efficiency as the complexity of the suits has allowed. Plaintiffs’ suggestion of keeping the potential of election open beyond January 22, 2004 and until claimants decide to accept the Special Master’s offers of award would conflict with that policy and would make it extremely difficult to enable the lawsuits to progress. I owe it to the litigants before me, and counsel owe it to the clients who have elected to seek their remedies in court, to maintain the

pace of their lawsuits as if there were no Victim Compensation Fund. To keep the process open, as plaintiffs' suggest, would conflict with the just needs of the plaintiffs who chose to sue in courts of law, rather than apply to the Victim Compensation Fund.

Many cases arising from the terrorist-related aircraft crashes of September 11, 2001 are on the suspense docket. That procedure, adopted by the Special Master, enabled claimants to satisfy short statutes of limitation, yet preserve their full right to become claimants of the Victim Compensation Fund within the full time period provided by Congress, that is until December 22, 2003. Act, § 405(a)(3). But if the lawsuits are to continue, that suspense docket must also end. In my order of November 26, 2003 I provided for the elimination of all cases on this suspense docket by February 6, 2004, approximately two weeks after the bar date of January 22, 2004. All such cases will either be dismissed because the remedy provided by the Victim Compensation Fund is being pursued and the plaintiff voluntarily dismisses, or because the opportunity to do so will have lapsed and the case will either have to become active or be dismissed by the court. There will be no suspense docket after that date.¹

Conclusion

I hold that a claimant who satisfies the statutory and regulatory definition of filing or submitting a claim, will have waived his right to sue, or to maintain his suit when that filing, or submission, is substantially complete as determined by the Special Master's Claims Evaluator or January 22, 2004, whichever is earlier, and not before then.

The Port Authority has advised that it intends to allege the defense of waiver as applicable to any filing with the Victim Compensation Fund, notwithstanding my ruling of

¹ My order is not intended to affect the suspense calendar of those cases brought by workers involved with the rescue and clean-up efforts following the collapse of the World Trade Center, which are consolidated under In Re World Trade Center Disaster Site Litigation, 21 MC 100. Many of these cases are on the suspense calendar waiting for decision by the Second Circuit Court of Appeals and subsequent proceedings.

