IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Gordon Berry and Ilya Peysin, individually and on behalf of all others similarly situated, Plaintiffs, v. City of Chicago, Defendant.	Case No. 2016 CH 02292 Calendar 2 Courtroom 2601 Judge Raymond W. Mitchell

ORDER

This case is before the Court on Defendant City of Chicago's motion to dismiss Plaintiffs Gordon Berry and Ilya Peysin's first amended class action complaint pursuant to 735 ILCS 5/2-619.1.

I.

The allegations in the first amended complaint are taken as true for the purpose of analyzing this motion to dismiss, and those facts are summarized as follows. The City's residential water system consists of city-owned water mains, which connect to city-owned service lines, which connect to privately-owned service lines. (Compl. ¶¶ 1, 31 *et seq.*). Most of these pipes are made of lead. (¶¶ 26-27). As the pipes corrode, lead can dislodge from them and dissolve into the water that residents consume. (¶ 28).

Recent actions by the City have affected the water's lead levels. The City has added a chemical called blended polyphosphate to the water supply, which creates a white coating on the pipes' interior and prevents lead from entering the water. (¶ 29). But other City actions have increased the levels of lead in the water. (¶¶ 30-44). When the City performs maintenance work on the water system, the resulting vibrations can cause the blended polyphosphate to fail and can allow lead to enter the water at a higher rate. (¶ 31). Further, the rush of water that accompanies a service restoration also disrupts the blended polyphosphate. (*Id.*). Finally, the City's practice of replacing its lead service lines with copper service lines causes higher lead levels in two ways. (¶¶ 33-35). First, like other work, it disrupts the blended polyphosphate. (¶ 34). Second, placing copper in close proximity to lead in the presence of water creates a galvanic cell and leaches lead into the water at a higher rate. (¶ 35).

City officials are alleged to have actual knowledge of both the high lead levels in the City's water and its causes. (¶¶ 45-51, 55). EPA testing has routinely revealed that at sites with a documented physical disturbance, such as pipe maintenance, the water lead levels exceed the EPA's lead action level. (¶ 47). Testing after water main or service line replacements yields the same result. (¶¶ 50-51). The City nevertheless pursues its projects and insists that the water is safe to drink. (¶¶ 48-49).

Lead, which accumulates in the body over time, generally harms an individual's nervous system. (¶¶ 11-12). It can cause hypertension and can weaken one's immunity to disease, along with other adverse effects. (¶ 12). Lead's potential effects are even more dramatic in children: it reduces IQ, intensifies aggression, and impairs blood cell formation. (¶¶ 13-14). Even a small amount of lead in a child's blood is dangerous; there is no safe level. (¶¶ 15-19). Medical professionals use a blood test to detect lead in the blood. (¶¶ 21-22).

Berry sets forth facts alleging unsafe lead levels in his water. (¶¶ 68-79). The City replaced the water main on Berry's block in 1998, and replaced his water meter in 2009. (¶ 68). The City moved his service line during the latter project, which compromised its coating and caused lead to enter his water. (¶ 69). Berry's two-year-old granddaughter lived with him, and in January 2016 had high lead levels in her blood. (¶ 70). Multiple tests by the City revealed elevated lead levels in his water, but the City never told him this. (¶¶ 71-72). Instead, Berry learned of the results from an investigative reporter. (¶ 73). Berry's granddaughter and her parents have moved out of his house, and estimates to replace his lead lines range from $14,000 to $19,000. (¶¶ 77-78).

Peysin alleges that he received a notice that the City would be installing a water main in front of his house. (¶ 80). The notice did not mention the lead service line replacement the City would perform, nor his water's possibly elevated lead levels. (¶¶ 80-81). Eighteen months later, a report from a private company informed Peysin that testing revealed elevated lead levels in his water. (¶¶ 82-84). The report faulted the service line, not Peysin's home plumbing. (¶¶ 84-88).

The first amended complaint consists of two counts. Count I alleges a negligence claim seeking medical monitoring for the putative plaintiff class consisting of all residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters. (¶¶ 99-104 (Count I); ¶ 92 (class definition)). Count II seeks money damages on an inverse condemnation theory. (¶¶ 105-109).

II.

Defendant argues pursuant to section 2-615 that both counts of the first amended complaint fail to state a claim for a variety of reasons. 735 ILCS 5/2-615. Defendant also argues that pursuant to section 2-619 there are affirmative matters that defeat Plaintiffs' right to relief. In disposing of this motion to dismiss on the narrowest possible grounds, the Court finds it unnecessary to address many of Defendant's arguments and does not reach any of the grounds for dismissal urged under section 2-619.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Beachem v. Walker*, 231 Ill. 2d 51, 57 (2008). All well-pleaded facts in the complaint are taken as true and the question is whether the allegations of the complaint, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005). The court may also consider judicial admissions in the record and matters of which it is entitled to take judicial notice. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 18. A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). However, Illinois is a fact-pleading jurisdiction; while the plaintiff is not required to set forth evidence in the complaint, she must allege facts, not mere conclusions, sufficient to bring a claim within a legally recognized cause of action. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368-69 (2004).

A.

Count I alleges a negligence claim seeking medical monitoring. No Illinois authority has permitted such a claim absent an allegation of a present injury. The principal case on which Plaintiffs rely in defending their claim is *Lewis v. Lead Industries Association*, 342 Ill. App. 3d 95, 101-02 (1st Dist. 2003). The appellate court in *Lewis* held that the plaintiffs did not state a tort claim based on exposure to lead paint because the plaintiffs had not adequately pled causation. *Id.* at 103-04. In its discussion of the claim, the appellate court noted its agreement with the plaintiffs' theory that the cost of statutorily-mandated lead testing could constitute a compensable damage in a tort action (though this discussion might be characterized as *dictum* since the appellate court affirmed the dismissal of the tort claim): "we find no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty." *Id.* at 101-02.

Any question about the meaning and limits of *Lewis* was answered by the appellate court four years later in *Jensen v. Bayer AG*, where the appellate court squarely held that a claim for medical monitoring in the absence of a present injury was not compensable in tort. Ill. App. 3d 682, 693 (1st Dist. 2007). Indeed, the appellate court read *Lewis* as circumscribed by the narrow facts of that case: where a statute imposed a medical monitoring requirement on the plaintiffs, the cost associated with that testing could constitute a present injury. *Id.* That scenario is in stark contrast to the facts alleged by Plaintiffs here, who readily concede that they lack a present injury. Their claim is one for medical monitoring based solely on a potential for *future* harm. Under *Jensen*, such a claim is not compensable in tort.

The rule espoused in *Jensen* finds support in elementary tort principles articulated in various Illinois authorities. In *Williams v. Manchester*, the Illinois Supreme Court held that an increased risk of future harm does not give rise to a cause of action—instead, it is an element of damages that can be recovered when (but only when) there is a present injury. 228 Ill. 2d 404, 425 (2008). In *Dillon v. Evanston Hospital*, the plaintiff's recovery included an award for an increased risk of future harm because she had sustained a clear *present* injury and recovered on that basis. 199 Ill. 2d 483, 487-88 (2002). Similarly, the First District Appellate Court affirmed this general principle by denying credit monitoring relief without present injury. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358 (1st Dist. 2010). The only cases to the contrary are a few federal district court cases predicting that the Illinois Supreme Court would uphold a claim for medical monitoring absent a present injury. *See, e.g., Carey v. Kerr-McGee Chemical Corp.*, 999 F. Supp. 1099, 1119 (N.D. Ill. 1998). Twenty years and intervening Illinois decisions have proven that prediction to be in error.

There is no allegation that either Plaintiff suffered a present injury. Accordingly, Plaintiffs fail to allege a viable claim for medical monitoring.

B.

Count II alleges a claim for inverse condemnation based on the Illinois Constitution, which provides in relevant part:

> Private property shall not be taken or damaged for public use without just compensation as provided by law.

Ill. Const. (1970) art. I, § 15. This provision is identical in substance to the 1870 Constitution. The language "or damaged" dates to the 1870 Constitution and was added to "overcome decisions under the 1818 and 1848 Constitutions" limiting compensation to situations where the state physically took property. *See* G. Braden and R. Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* 56

(Univ. of Ill. 1969). The Illinois Supreme Court recognized the same in *Rigney v. City of Chicago* and held that the additional language was intended to provide a remedy to property owners who suffered a significant, *special* damage to their property:

> [T]o warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which give to it an additional value, and that by reason of such disturbance he has sustained *a special damage with respect to his property in excess of that sustained by the public generally.*

102 Ill. 64, 80-81 (1882) (emphasis added). The Illinois Supreme Court, however, has consistently recognized that this constitutional provision is not intended to reach every instance where government action impacts private property. *See Rigney*, 102 Ill. 64 (1882); *Cuneo v. Chicago*, 379 Ill. 488 (1942); *Belmar Drive-in Theatre Co. v. Illinois State Toll Highway Commission*, 34 Ill. 2d 544 (1966).

Here, Plaintiffs allege that the City's work on water pipes or near the owners' properties, including the attachment of copper lines to the lines servicing Plaintiffs' homes, disturbed the protective coating on the lines, shook lead loose, or created a galvanic cell. (Compl. ¶¶ 1, 30 *et seq.*). All of these things, it is alleged, caused lead to leach into Plaintiffs' water. (¶¶ 1, 31-35). But this alleged damage is not unique or special to Plaintiffs' properties. According to Plaintiffs, the City has "known for years" that the work to replace existing water mains causes "the release of additional unsafe levels of lead into residents' water over time." (¶ 1). The City has a "vast network of lead services lines" that run throughout Chicago and "nearly 80 percent of the properties in Chicago" receive their drinking water via lead pipes. (¶¶ 23-24, 27). Indeed, Plaintiffs' proposed class consists of "[a]ll residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters ... between January 1, 2008, and the present." (¶92).[1] In short, as Plaintiffs' first amended complaint alleges, the damage to Plaintiffs is not *special*: it is a damage borne equally by all residents of the City of Chicago attendant to a public improvement, namely the replacement of lead water mains.

Throughout the Illinois Supreme Court's jurisprudence is the recognition that an allegation of general damage will not support a claim for inverse condemnation:

> [i]t has long been established that there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property and

[1] Exhibit A to Plaintiffs' First Amended Complaint consists of a 58-page listing of various streets throughout Chicago where work on water mains has occurred since 2009.

> for which the law does not, and never has, afforded any relief, examples being the depreciation caused by the building of fire houses, police stations, hospitals, cemeteries and the like in close proximity to private property.

Belmar Drive-in Theatre, 34 Ill. 2d at 550. This category of damage is characterized as *damnum absque injuria*—loss without legal injury—and it is not compensable based on the rationale that the property owner is compensated for the injury or damage by sharing in the general benefits which inure to all from the public improvement. *Id.*

The Illinois Supreme Court's decision in *Cuneo* highlights the failing in Plaintiffs' inverse condemnation claim. 379 Ill. 488 (1942). In *Cuneo*, the Court affirmed a money judgment for the plaintiff where an adjacent construction of a subway airshaft damaged the plaintiff's property through a loss of support. *Id.* at 493. That injury was unique to the plaintiff's property. *Id.* Here the injury or damage of which Plaintiffs complain is one borne by all Chicagoans. A damage sustained by all property owners due to a public improvement is *not* compensable: "Depreciation suffered in common by all lands in the vicinity of an improvement is not compensable." *Department of Public Works & Bldgs. v. Horejs*, 78 Ill. App. 2d 284, 292 (1st Dist. 1966). Accordingly, Plaintiffs cannot allege a claim for inverse condemnation.

III.

For the foregoing reasons, it is hereby ORDERED:

(1) Defendant City of Chicago's motion to dismiss Plaintiffs' First Amended Class Action Complaint pursuant to section 2-615 is GRANTED. Having already been afforded an opportunity to amend, it is now abundantly clear that Plaintiffs can plead no set of facts which would entitle them to relief. Accordingly, the First Amended Class Action Complaint is dismissed with prejudice.

(2) All other pending motions are denied as moot.

(3) The case management conference set for May 14, 2018 is STRICKEN.

(4) This is a final order that disposes of the case in its entirety.

ENTERED,

Judge Raymond W. Mitchell, No. 1992

Judge Raymond W. Mitchell

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Circuit Court – 1992