

12-1600-cv

County of Erie v. Colgan Air, Inc.

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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4
5 August Term, 2012
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7 (Argued: February 1, 2013 Decided: March 4, 2013)
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9 Docket No. 12-1600-cv
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12 COUNTY OF ERIE, NEW YORK,
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14 *Plaintiff-Appellant,*
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16 - v. -
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18 COLGAN AIR, INC., PINNACLE AIRLINES CORP., CONTINENTAL
19 AIRLINES, INC.,
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21 *Defendants-Appellees.*
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26 Before:

27 WALKER, CABRANES, AND WESLEY, *Circuit Judges*
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31 Plaintiff-Appellant County of Erie, New York seeks to
32 recover the costs of emergency and clean-up services it
33 incurred when responding to the crash of Continental
34 Connection Flight 3407 within its borders. The United
35 States District Court for the Western District of New York
36 (Skretny, C.J.) dismissed the complaint under Federal Rule
37 of Civil Procedure 12(b)(6), holding that the action was
38 barred under New York law by the state's "free public
39 services" doctrine. We AFFIRM.
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23 WESLEY, Circuit Judge:
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25 After the February 12, 2009 crash of Continental
26 Connection Flight 3407 on approach to Buffalo-Niagara
27 International Airport, plaintiff-appellant County of Erie,
28 New York ("the County") sued defendants-appellees Colgan
29 Air, Inc., Pinnacle Airlines Corp., and Continental
30 Airlines, Inc. (collectively "defendants") to recover its
31 expenditures in responding to, and cleaning up after, the
32 accident. The United States District Court for the Western
33 District of New York (Skretny, C.J.) granted defendants'
34 motion to dismiss the complaint under Federal Rule of Civil

1 Procedure 12(b)(6). *County of Erie v. Colgan Air, Inc.*, No.
2 10-CV-157S, 2012 WL 1029542, at *2 (W.D.N.Y. Mar. 26, 2012).
3 The court found the County's claims barred by New York law
4 on the ground that "'public expenditures made in the
5 performance of governmental functions are not recoverable.'"
6 *Id.* (quoting *Koch v. Consolidated Edison Co. of N.Y.*, 62
7 N.Y.2d 548, 560 (1984)). The County appeals, and we affirm.

8 **Background**

9 According to the amended complaint, Flight 3407
10 departed from Newark en route to Buffalo on February 12,
11 2009. On descent, the flight crashed into a private
12 residence in Clarence Center, Erie County, approximately
13 five miles from the airport, killing all passengers and crew
14 as well as one person in the house. The crash "caus[ed]
15 substantial damage to the neighboring properties, including
16 serious environmental clean-up expenses and damages." Joint
17 App'x 67.

18 The County filed suit on March 1, 2010. It later filed
19 an amended complaint asserting five causes of action:
20 negligence, *res ipsa loquitur* negligence,¹ public nuisance,

¹Although the County in its complaint asserted negligence on the theory of *res ipsa loquitur* as an additional count, *res ipsa loquitur* is not a cause of action

1 liability under New York Public Health Law § 1306, and
2 liability under New York General Business Law § 251. The
3 County asserted in the amended complaint that it

4 has sustained unnecessary and unprecedented property
5 and financial damage as a direct and proximate result
6 of Defendants' wanton, reckless, negligent, and willful
7 conduct to the extent Erie County was required to
8 expend resources in excess of the normal provisions of
9 police, fire, and emergency services as a result of the
10 crash of Flight 3407. Specifically, [the County] was
11 forced to expend unprecedented monetary resources in
12 order to provide public services including: Overtime
13 pay for police and emergency personnel; the clean-up
14 and removal of human remains; the clean-up and removal
15 of chemical substances originating from the Aircraft[;]
16 the clean-up and removal of the Aircraft itself; the
17 provision of emergency and counseling services to the
18 surviving members of the decedents' families; and the
19 purchase, lease, or rent of equipment necessary to
20 respond to the crash of Flight 3407.

21
22 Joint App'x 71.

23 Discussion

24 We review *de novo* a district court's dismissal under
25 Rule 12(b)(6), "construing the complaint liberally,
26 accepting all factual allegations in the complaint as true,

but rather an evidentiary doctrine that allows "an inference of negligence [to] be drawn solely from the happening of the accident upon the theory that certain occurrences contain within themselves a sufficient basis for an inference of negligence." *Dermatossian v. N.Y.C. Transit Auth.*, 67 N.Y.2d 219, 226 (1986) (internal quotations omitted). "The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury" *Id.*

1 and drawing all reasonable inferences in the plaintiff's
2 favor." *Chase Grp. Alliance LLC v. City of N.Y. Dep't of*
3 *Fin.*, 620 F.3d 146, 150 (2d Cir. 2010) (internal quotation
4 marks omitted). "To survive a motion to dismiss, a
5 complaint must contain sufficient factual matter, accepted
6 as true, to state a claim to relief that is plausible on its
7 face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
8 (internal quotation marks omitted). "A claim has facial
9 plausibility when the plaintiff pleads factual content that
10 allows the court to draw the reasonable inference that the
11 defendant is liable for the misconduct alleged." *Id.*
12 Additionally, "[a]n affirmative defense may be raised by a
13 pre-answer motion to dismiss under Rule 12(b)(6) if the
14 defense appears on the face of the complaint."² *Iowa Pub.*
15 *Employees' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 145
16 (2d Cir. 2010) (alteration and quotation marks omitted).

17 Having considered the arguments *de novo*, we affirm the
18 judgment of the district court for substantially the reasons
19 stated in its well-reasoned decision and order. The
20 County's claims arise under New York law, and New York law

²For this reason, we need not consider whether the public-expenditure rule at issue here is an affirmative defense or a factor that must be defeated as part of the County's *prima facie* case on its various claims.

1 therefore provides the elements of, and defenses to, those
2 causes of action. See *Ferri v. Ackerman*, 444 U.S. 193, 198
3 (1979) (“[W]hen state law creates a cause of action, the
4 State is free to define the defenses to that claim,
5 including the defense of immunity, unless, of course, the
6 state rule is in conflict with federal law.”).

7 As the district court explained, New York’s “‘general
8 rule is that public expenditures made in the performance of
9 governmental functions are not recoverable.’” *County of*
10 *Erie*, 2012 WL 1029542, at *2 (quoting *Koch*, 62 N.Y.2d at
11 560). In *Koch*, New York City, after a 25-hour citywide
12 blackout caused by Con Edison’s negligence, attempted to
13 recover from the company “costs incurred for wages,
14 salaries, overtime and other benefits of police, fire,
15 sanitation and hospital personnel from whom services (in
16 addition to those which would normally have been rendered)
17 were required in consequence of the blackout.” *Koch*, 62
18 N.Y.2d at 560. The Court of Appeals rejected the city’s
19 claim as contrary to the “general rule” regarding non-
20 recoverable public expenditures, citing cases holding
21 similarly in the context of a nuclear accident, an oil
22 spill, and the dumping of a large quantity of tires. *Id.*

1 "The general rule is grounded in considerations of public
2 policy, and we perceive nothing in the different and
3 somewhat closer relationship between Con Edison and
4 plaintiffs in this case which would warrant departure from
5 that rule." *Id.* at 560-61.

6 Other courts have found that the doctrine is rooted in
7 a recognition that "'the cost of public services for
8 protection from fire or safety hazards is to be borne by the
9 public as a whole, not assessed against the tortfeasor whose
10 negligence creates the need for the service.'" See *County*
11 *of Erie*, 2012 WL 1029542, at *2 (quoting *City of Flagstaff*
12 *v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322, 323
13 (9th Cir. 1983)). For example, in *District of Columbia v.*
14 *Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984), the
15 municipal authorities for the District of Columbia sued Air
16 Florida airlines for the cost of responding to a plane that
17 crashed into a bridge over the Potomac River. Citing *Koch*
18 and related cases, the *Air Florida* court rejected the city's
19 claim for reimbursement for emergency services, noting:

20 Where emergency services are provided by the government
21 and the costs are spread by taxes, the tortfeasor does
22 not anticipate a demand for reimbursement. Although
23 settled expectations must sometimes be disregarded when
24 new tort doctrines are needed to remedy an inequitable
25 allocation of risks and costs, where a generally fair

1 system for spreading the costs of accidents is already
2 in effect – as it is here through assessing taxpayers
3 the expense of emergency services – we do not find the
4 argument for judicial adjustment of liabilities to be
5 compelling.

6
7 We are especially reluctant to reallocate risks where a
8 governmental entity is the injured party. It is
9 critically important to recognize that the government's
10 decision to provide tax-supported services is a
11 legislative policy determination. It is not the place
12 of the courts to modify such decisions. Furthermore,
13 it is within the power of the government to protect
14 itself from extraordinary emergency expenses by passing
15 statutes or regulations that permit recovery from
16 negligent parties.

17
18 *Id.* at 1080.

19 Like the district court, we conclude that, absent an
20 exception, the free public services doctrine plainly bars
21 the County's claims to recover public expenditures. Some of
22 the County's arguments amount to an assertion that the
23 doctrine lacks strong support in New York law and has been
24 weakened by subsequent related developments, but these
25 arguments are unavailing – most notably because the New York
26 Court of Appeals has not suggested that the doctrine no
27 longer applies. See *Bank of N.Y. v. Amoco Oil Co.*, 35 F.3d
28 643, 650 (2d Cir. 1994) ("In making [the] determination [of
29 what New York law provides, we] of course will afford the
30 greatest weight to the decisions of the New York Court of
31 Appeals.").

1 Moreover, neither of the County's arguments on this
2 point is persuasive. First, the County contends that
3 various cases arising from the terrorist attacks on
4 September 11, 2001, have "expanded the duty of an airline to
5 pay for consequences of a crash far greater in scope than
6 the lives of the passengers and crew killed in a crash or
7 the value of the airplane." Appellants' Reply at 8; see
8 also, e.g., *In re Sept. 11 Litig.*, 594 F. Supp. 2d 374, 380
9 (S.D.N.Y. 2009). These cases are irrelevant. The scope of
10 the *defendants'* duties is not at issue. The only question
11 presented is whether the free public services doctrine bars
12 the *County's* recovery, and the County has not pointed to any
13 aspect of the September 11 decisions that bears on that
14 issue.

15 Second, we disagree with the County's assertion that
16 New York has implicitly abandoned the free public services
17 doctrine by allowing individual officers to recover for
18 personal injuries sustained in the line of duty - contrary
19 to the common-law "fireman's rule," which previously barred
20 that type of suit.³ Though the free public services

³"The 'firefighter's rule,' a product of [New York's] long-standing common law, precludes firefighters and police officers from recovering damages for injuries caused by negligence in the very situations that create the occasion

1 doctrine and fireman's rule are similar in some respects,
2 the cases cited by the County do not suggest that the free
3 public services doctrine cannot stand on its own without the
4 fireman's rule. See *Koch*, 62 N.Y.2d at 560-61; *Austin v.*
5 *City of Buffalo*, 182 A.D.2d 1143, 1144 (4th Dep't 1992).
6 Moreover, to the extent that New York has abandoned the
7 fireman's rule, it has done so through *statutes* that provide
8 for *individual* rights of action for injuries sustained by
9 public officials.

10 New York's legislature, through enactments in 1935,
11 1989, 1992, and 1996, successively loosened the restrictions
12 on the ability of firefighters and police officers to seek
13 redress for their injuries from tortfeasors. See, e.g.,
14 *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 77-79 (2003)
15 (discussing legislative reforms). General Obligations Law §
16 11-106 (L. 1996, ch. 703, § 5), to which the County points
17 in support of its argument here, permits police officers or
18 firefighters injured in the line of duty to recover damages
19 from the person or entity whose negligence caused the

for their services. . . . where the injury sustained is related to the particular dangers which [they] are expected to assume as part of their duties." *Zanghi v. Niagara Frontier Transp. Comm'n*, 85 N.Y.2d 423, 438-39 (1995) (internal quotation marks and citations omitted).

1 injury. However, this law does not enable a local
2 government entity to, for example, recover police or
3 firefighters' overtime costs. Nor does it alter the free
4 public services doctrine. If anything, the statute
5 militates against the County's argument, since it does not
6 provide for a governmental right of action to recover public
7 expenses. See generally N.Y. Stat. Law, § 240 ("The maxim
8 *expressio unius est exclusio alterius* is applied in the
9 construction of the statutes").

10 The heart of the County's theory on appeal is that its
11 response to Flight 3407 falls within an exception to the
12 free public services doctrine. The Court of Appeals noted
13 in *Koch* that "certain exceptions to the general rule have
14 been created by statutory enactment to give a municipality a
15 claim for expenditures for fire fighting and other police
16 powers," such as claims for injuries to first responders or
17 against municipalities that called for outside assistance.
18 *Koch*, 62 N.Y.2d at 561. In *Koch*, however, "[n]o statute
19 [was] called [to the court's] attention which would accord a
20 comparable benefit to plaintiffs in the circumstances of
21 this case." *Id.* The County asserted below that either of
22 two exceptions to the doctrine should apply in this case: a

1 general exception for public nuisances, or a statutory
2 exception under New York Public Health Law § 1306.

3 The district court rejected both of these contentions.
4 First, it noted that there could not, strictly speaking, be
5 a general “public nuisance exception” because “‘it would be
6 the exception that swallows the rule, since many
7 expenditures for public services could be re-characterized
8 by skillful litigants as expenses incurred in abating a
9 public nuisance.’” *County of Erie*, 2012 WL 1029542, at *4
10 (quoting *Walker County v. Tri-State Crematory*, 643 S.E.2d
11 324, 328 (Ga. App. 2007)). Thus, “recovery for a public
12 nuisance is a separate cause of action . . . ‘unrelated to
13 the normal provision of police, fire, and emergency
14 services.’” *Id.* (quoting *City of Flagstaff*, 719 F.2d at
15 324). We agree with the district court, and the County does
16 not appear to pursue this argument on appeal.

17 The County does contend, however, that § 1306 provides
18 a statutory exception. The relevant section of that statute
19 states:

20 The expense of suppression or removal of a nuisance or
21 conditions detrimental to health shall be paid by the
22 owner or occupant of the premises, or by the person who
23 caused or maintained such nuisance or other matters,
24 and the board of health of the municipality or county
25 wherein the premises are located may maintain an action

1 in the name of the municipality or county to recover
2 such expense, and the same when recovered shall be paid
3 to the treasurer of the municipality or county
4

5 N.Y. Pub. Health § 1306(1). The district court “decline[d]
6 Plaintiff’s invitation to treat the crash itself and the
7 immediate aftermath as a public nuisance within the meaning
8 of New York law [because the County had] alleged neither a
9 continuing nor recurrent problem, or that permanent damage
10 from the crash required remediation beyond the clean up
11 itself.” *County of Erie*, 2012 WL 1029542, at *4.

12 We agree that this was the correct approach. “Nuisance
13 is a conscious and deliberate act involving the idea of
14 continuity or recurrence.” *State v. Long Island Lighting*
15 *Co.*, 493 N.Y.S.2d 255, 258 (Nassau County Ct. 1985).
16 “Doubtless some degree of permanence is an essential element
17 of the conception of nuisance.” *Ford v. Grand Union Co.*,
18 240 App. Div. 294, 296 (3d Dep’t 1934). Defendants’ brief
19 persuasively catalogs nuisance cases supporting this
20 concept; the cases refer to such conditions as the leaking
21 of various kinds of waste or other encroachments on
22 property. See Appellees’ Br. at 12-17. It is clear,
23 especially in the absence of any effective response from the
24 County, that an accidental airplane crash is entirely

1 different from the conscious creation of a continuous or
2 recurring condition.

3 This is not to say that the conditions at the crash
4 site do not *resemble* the conditions that are subject to
5 public recovery under § 1306, or that those conditions could
6 not have *become* a nuisance. Rather, as the district court
7 correctly explained, recovery under § 1306 is limited to
8 recovering expenditures relating to continuing public
9 nuisances, where “the duty to prevent or abate a nuisance on
10 the property rests with the owner or the party that caused
11 the nuisance.” *County of Erie*, 2012 WL 1029542, at *4
12 (citing *Broxmeyer v. United Capital Corp.*, 79 A.D.3d 780,
13 782 (2d Dep’t 2010)). In such cases, “[r]eimbursement is
14 not precluded because, in the interest of public health and
15 safety, the local government is performing not its own duty,
16 but the duty of another.” *Id.* When the government responds
17 to a catastrophic accident, however, it performs *its own*
18 *duty* of responding to a discrete public emergency – not a
19 duty on behalf of or in place of a third party. See *Laratro*
20 *v. City of New York*, 8 N.Y.3d 79, 81 (2006) (“Protecting
21 health and safety is one of municipal government’s most
22 important duties.”); *id.* at 82-83 (mentioning “the duty to

1 provide police protection, fire protection or ambulance
2 service . . . that the municipality owes to the general
3 public").

4 The County's briefs on appeal do not seek to establish
5 that the crash was a "nuisance" within the meaning of the
6 statute. Instead, they attempt to distinguish "nuisance"
7 from "conditions detrimental to health" and argue that the
8 latter clause creates a separate basis for recovery.
9 Essentially, according to the County, because the response
10 to the plane crash included the removal of human remains and
11 other actions which, if left uncompleted, might cause health
12 concerns, its costs are recoverable. Nothing in the statute
13 or its context supports this reading. Article 13 of the New
14 York Health Law is entitled "Nuisances and Sanitation," and
15 the various titles thereunder deal with such subjects as
16 "noxious weeds and growths," "tenement house sanitation,"
17 "food handling," "inactive hazardous waste disposal sites,"
18 and "control of lead poisoning." See N.Y. Pub. Health Law
19 tit. II, III, VIII, X, & XII-A. Under New York law, "words
20 employed in a statute are construed in connection with, and
21 their meaning is ascertained by reference to[,] the words
22 and phrases with which they are associated." N.Y. Stat. Law

1 § 239. Thus, although it may be possible for “conditions
2 detrimental to health” to exist absent a “nuisance,”⁴ both
3 terms refer to the same types of conditions and
4 circumstances that are addressed by the concept of a
5 “nuisance” under Article 13 of the New York Health Law. The
6 County’s attempt to shoehorn the immediate results of a
7 catastrophic accident into this limited category on the
8 grounds that the bodies of those killed have become
9 “detrimental to health” is unpersuasive.

10 Also unpersuasive is the one case the County cites in
11 support of its preferred construction. The County argues
12 that the case of *Town of Cheektowaga v. Saints Peter & Paul*
13 *Greek Russian Orthodox Church*, 205 N.Y.S. 334 (N.Y. Sup. Ct.
14 1924), establishes that “New York decisional law has already
15 set forth that the obvious health hazards associated with
16 human remains are a matter of health safety.” Appellants’
17 Br. at 21. *Town of Cheektowaga* concerned the defendant
18 church’s attempt to create a cemetery on land to which it

⁴For instance, public officials might abate certain conditions that endanger the health of the occupants but that do not interfere with the rights of the public or adjacent property owners. This example illustrates that although applications of § 1306 are at least limited to the same types of conditions addressed by nuisance law, the provision is not necessarily confined to the abatement of conditions that meet the legal definition of a “nuisance.”

1 had recently acquired title. The town brought an action to
2 restrain the church from doing so because of the land's
3 proximity to drinking-water wells. The court granted the
4 request, noting that burial so close to the wells, given the
5 soil conditions of the area, "would certainly annoy, injure,
6 or endanger the comfort, repose, health, or safety of a
7 considerable number of persons." *Town of Cheektowaga*, 205
8 N.Y.S. at 335. "Such act would be a nuisance." *Id.*

9 In designating the proposed cemetery a "nuisance," *Town*
10 *of Cheektowaga* directly contradicts the County's contention
11 that the presence of human remains necessarily causes the
12 separate problem of "conditions detrimental to health" under
13 § 1306. The cemetery was deemed a nuisance because it
14 threatened the water supply and in turn public health; the
15 recovery and cataloguing of human remains from an accident
16 site that are performed as part of the post-accident
17 investigation and clean up are not related to concerns of
18 groundwater pollution. We perceive no administrable
19 distinction, or one recognized under New York law, to treat
20 certain clean-up expenses (such as those relating to human
21 remains) differently from other public expenses (such as
22 overtime pay for police) where all of these expenses were

1 incurred as part of a continuous response to the same public
2 emergency.

3 "Thus, the existence and remediation of public
4 nuisances 'fall into [a] distinct, well-defined categor[y]
5 unrelated to the normal provision of police, fire, and
6 emergency services.'" *County of Erie*, 2012 WL 1029542, at
7 *4 (quoting *City of Flagstaff*, 719 F.2d at 324). To hold
8 otherwise would, as the district court noted, create an
9 exception that would swallow the rule of the free public
10 services doctrine. So too would permitting the County to
11 treat any emergency that creates any condition deemed
12 detrimental to health in some way as a basis to claim
13 reimbursement under § 1306. In other words, public services
14 provided in response to an emergency are just that - public
15 services - and therefore are not subject to reimbursement.
16 See *Koch*, 62 N.Y.2d at 560-61.

17 **Conclusion**

18 We have examined all of the County's arguments on
19 appeal and find them to be without merit. For the foregoing
20 reasons, the judgment of the district court dismissing the
21 County's complaint is **AFFIRMED**.