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

JACK RISER, et al.,	)	
	)	
Plaintiff(s),	)	No. 15 L 9955
	)	
V.	)	
	)	
CITY OF CHICAGO,	)	Judge Thomas R. Mulroy
	)	Commercial Calendar "I"
Defendant(s).	)	
	)	

ORDER

This matter is before the Court on Defendant City of Chicago's Motion for Summary Judgment against All Plaintiffs and Motion for Summary Judgment against Particular Plaintiffs. For the following reasons, the Court grants both Motions.

BACKGROUND

Plaintiffs live near Chicago O'Hare International Airport ("O'Hare") which opened and began operating new runway 10C-28C (Runway) on October 17, 2013 which has been in continual operation ever since. Frame Aff. ¶ 9. Before the Runway opened, planes did not regularly fly over Plaintiffs' properties. ¶ 3. The runway directed heavy air traffic over Plaintiffs' homes which allegedly deprived them of the enjoyment of their property: a *taking* or *avigation easement*. Plaintiffs had one year from the date of this alleged taking to file suit under the applicable statute of limitations. Plaintiffs filed their complaint on October 1, 2015.

On February 24, 2017, Plaintiffs filed their Third Amended Complaint alleging that air traffic from the Runway significantly increased between late 2014 or early 2015 creating a new cause of action which extended the statute of limitations past the date the Runway opened and went into operation.

LEGAL STANDARD

A party is entitled to summary judgment under 735 ILCS 5/2-1005 when there is no genuine issue of material fact and when the party is entitled to judgment as a matter of law. *Chubb Ins. Co. v. DeChambre*, 349 Ill. App. 3d 56, 59 (1st Dist. 2004). The Court considers the pleadings and evidence to determine if any material factual dispute exists. *Id.*

DISCUSSION

The Illinois Constitution states, "[p]rivate property shall not be taken...for public use without just compensation...." Ill. Const., Art. I, § 15. "[W]hen regular and frequent flights by...aircraft over privately owned land at altitudes of less than 500 feet from the surface of the ground constitute a direct, immediate, and substantial interference with the use and enjoyment of the property, there is a taking by the Government of an avigation easement, or easement of flight." *A.J. Hodges Industries, Inc. v. United States*, 355 F.2d 592, 594 (Ct. Cl. 1966); *see also United States v. Causby*, 328 U.S. 256, 266 (1946).

Statute of Limitations

The Local Government and Governmental Employees Tort Immunity Act states, "No civil action...may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101(a). Furthermore, "the term 'civil action' includes any action, whether based upon the common law or statues or Constitution of this State." 745 ILCS 10/8-101(c). "'Injury' means...damage to or loss of property.... 'Injury' includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois." 745 ILCS 10/1-204. This one-year statute of limitations applies to an action for a taking.

Plaintiffs filed their case on October 1, 2015, two years after the Runway opened and was fully operational causing alleged damage to Plaintiffs. Plaintiffs had to file their

case by October 2014. In its Motions for Summary Judgment, the City argues that, even if a taking occurred, Plaintiffs' claims accrued in October 2013, when the Runway went into operation and caused the alleged damage to Plaintiffs, and are therefore barred by the one-year statute of limitations.

Illinois has not defined when a cause of action for an avigation taking arises against a government; however, a federal takings claim accrues when all the events which fix the government's liability have occurred *and* when the plaintiff should have been aware of those events. *Andrews v. United States*, 108 Fed. Cl. 150, 157 (Fed. Cl. 2012). "In determining whether plaintiffs knew, or should have known, of the requisite factual predicates establishing the government's alleged liability in [a taking] case, the court must apply an objective standard." *Lengen v. United States*, 100 Fed. Cl. 317, 333 (Fed. Cl. 2011); *Morgan v. United States*, 101 Fed. Cl. 145, 163 (Fed. Cl. 2011); *Goodman v. United States*, 100 Fed. Cl. 289, 306-07 (Fed. Cl. 2011). A taking happens when airplanes begin to operate regularly, frequently, and at low altitudes as viewed objectively.

Weeks after this Runway opened, Plaintiffs knew or should have known the nature and extent of the noise impact from the flights. When the City built, opened and began to use the Runway, Plaintiffs were put on notice that overflights and noise would continue into the future. In fact, Plaintiffs in their depositions admitted they were painfully aware of the noise and disruption immediately after the Runway opened. *See* Third Am. Compl. ¶ 89. Within the first few weeks, hundreds of airplanes were flying over Plaintiffs' properties and aircraft overflights steadily increased over the next several months. Frame Aff. ¶ 10. By March 2014, hundreds of airplanes were flying over Plaintiffs' properties at low altitudes (¶¶ 11, 12), and the impact from aircraft noise was obvious, causing Plaintiffs to complain to City officials about it. Third Am. Compl. ¶¶ 92-102. Thus, there is no factual dispute that Plaintiffs knew or should have known as of October 2013 of the events which gave rise to their Complaint.

However, Plaintiffs argue that a second taking occurred because, they allege, the air traffic and noise increased a year after the Runway opened. Thus, they argue the statute of limitations began to run anew in 2014.

To extend the one year statute of limitations or to begin the running of a new statute of limitations, Plaintiffs must show that the impact on their property from the Runway substantially increased after October 2014, thus creating a new taking. To do this, Plaintiffs must establish there was a change in the flight paths of the aircraft, a substantial increase in the number of flights over their property, or the introduction of new planes at the Runway. *Lengen*, 100 Fed. Cl. at 334; *see also Andrews*, 108 Fed. Cl. at 157 ("A separate cause of action with its own limitations period may accrue when the government, for example, increases the number of flights or introduces louder aircraft so as to 'sufficiently increase[] the scope' of the original easement."); *see also Argent v. United States*, 124 F.3d 1277, 1285 ("The [government] may effect a second taking by, *inter alia*, increasing the number of flights, *see* [*Avery v. United States*, 330 F.2d 640, 643 (Ct. Cl. 1964)], or introducing noisier aircraft, *see* [*Lacey v. United States*, 595 F.2d 614, 619 (Ct. Cl. 1979)]."). In addition, Plaintiffs must prove that the interference with the use and enjoyment of their property increased and that the new activities resulted in an additional diminution in the value of Plaintiffs' property. *See Lengen*, 100 Fed. Cl. at 336; *see also Biddison v. City of Chicago*, No. 85 C 10295, 1989 U.S. Dist. LEXIS 9048, at *6 (N.D. Ill. July 28, 1989) ("A significant depreciation as a direct and proximate result of the overflights is a prerequisite to entitlement to recovery of just compensation [and] also marks the date of taking for purposes of the statute of limitations.").

Plaintiffs argue that their deposition testimony satisfies their burden and shows that a second taking occurred. Plaintiffs contend that in late 2014 or early- to mid-2015, air traffic increased: there were larger and heavier planes; more cargo planes; more planes flying at lower altitudes; more planes flying at odd late night hours; and louder planes began to more frequently use the Runway; a second taking.

The City responds that the flights over Plaintiffs' property from the Runway have been continual and regular from the moment the Runway opened in October 2013, have

not increased in any way, and argues that Plaintiffs' allegation of increased air traffic does not satisfy the objective standard which must be used to determine when a taking occurs.

The City filed the affidavit of Aaron Frame, Deputy Commissioner of Environment for the Chicago Department of Aviation (CDA) who manages CDA's work in environmental planning, environmental compliance and airport noise for O'Hare. He is familiar with runway use patterns at O'Hare and, in particular, Runway 10C-28C. He attached to his affidavit, exhibits consisting of graphs and tables accurately depicting operations data collected by CDA's Airport Noise Management System which he oversees. His affidavit and exhibits show that immediately after the Runway opened, hundreds of airplanes began flying at low altitudes over Plaintiffs' neighborhood. The flights have been regular and frequent without any fundamental change in the frequency, altitude, flight path, or type of aircraft. Frame Aff. ¶ 2. There are no counter charts or affidavits countering this information.

The City also attached the affidavit of Paul Dunholter, a licensed Professional Engineer with lengthy experience in airport noise. The affidavit explains the noise exposure at Plaintiffs' properties after the Runway opened. His affidavit states that there has been no significant increase in noise since October 2, 2014 due to the Runway operations. Dunholter Aff. ¶ 4. He attached charts and graphs prepared from publically available noise data to support his opinion. There is no counter affidavit to the information contained in Dunholter's affidavit.

There were no significant changes in Runway operations – including nighttime operations – between Spring-Summer 2014 and Spring-Summer 2015 outside of normal, seasonal variations. Frame Aff. ¶¶ 22-23. Data shows that the altitudes and flight paths of aircraft in the first year of the Runway were the same as the altitude and flight paths of aircraft in the second year. ¶¶ 3, 19. The types of aircraft using the Runway remained virtually unchanged during the first two years of operation. ¶¶ 17-18. From the date the Runway opened in October 2013 through October 2015, passenger planes comprised 94% to 97% of the aircraft overflights, and the percentage of

overflights dedicated to cargo planes ranged from 3% to 8% with slight variations by month. ¶ 17. Similarly, wide-body aircraft consistently constituted 12% to 17% of the planes using the Runway. ¶ 18.

Airfield logistics, air traffic, airport construction, and weather conditions cause the number of aircraft using the Runway to vary by hour, day, week, and month. ¶ 14. All these variations are part of the Runway's continual use through 2014 and 2015. *Id.* Some days the Runway was not used at all; some days it was used by hundreds of planes. ¶ 15. A week can see an extremely busy day like April 28, 2014, with over 500 overflights, or a day like April 30, 2014, when there was only one overflight. *Id.* Operations vary year-to-year, as shown by comparing May 16, 2014, which had over 500 operations, to May 16, 2015, which had none. *Id.*

The undisputed data demonstrates that the most significant change in overflight of Plaintiffs' property occurred on October 17, 2013, when the Runway opened. The pattern established then and in the following months shows that there were no fundamental changes in use of the Runway from that date through the first two years of operations. ¶ 29; Ex. B (showing Runway operation by day). The pattern of operations that began on October 17, 2013 was definitively established by summer 2014.

An analysis of noise levels using FAA's standard metric for measuring noise, Day-Night Average Sound Level (DNL), shows that the noise level in Plaintiffs' neighborhood increased by 5 decibels (dB) DNL between October 17, 2013, when the Runway opened, and September 30, 2014. Dunholter Aff. ¶ 11. However, during the three years after October 2014, the average noise exposure over Plaintiffs' property did not increase significantly. ¶ 13.

Plaintiffs use certain selective data to argue that overflights increased and were different from another particular time, and that that difference constitutes a new taking. The Court, however, cannot look to a limited specific time and ignore previous months when considering whether the air traffic has significantly increased in order to create a new taking. Plaintiffs testified that they experienced the impact of the Runway as early

as October 2013 and were damaged by the overflights. None of Plaintiffs testified that their damages began later than the summer of 2014.

The Court reviewed the evidence, including the pleadings, admissions, affidavits, and their exhibits, and finds that Plaintiffs have failed to establish that a second, increased incremental taking of an avigation easement occurred subsequent to October 1, 2014 which would extend the statute of limitations. The impacts on Plaintiffs' property have not substantially increased during the limitations period due to any change in the elevation or flight paths of existing aircraft, a substantial increase in the number of flights over their property, or the introduction of new planes or significantly increased noise levels. For these reasons, the Court finds that Plaintiffs' takings claims are barred by the one-year statute of limitations.

Equitable Estoppel

Plaintiffs argue that even if the statute of limitations does apply, the City is equitably estopped from asserting the statute of limitations defense. Plaintiffs argue that the City's representatives made repeated public promises and representations to Plaintiffs that the City was working on various initiatives to alleviate the impact of the Runway upon the residents. This was done, they say, in order to mislead Plaintiffs and to delay them from filing this action.

Illinois courts have consistently held that the doctrine of equitable estoppel will not be applied to governmental entities absent extraordinary and compelling circumstances. *See Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 35. A plaintiff seeking to invoke equitable estoppel must show (1) an affirmative act by either the municipality itself or an official with express authority to bind the municipality; and (2) reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position. ¶ 40. Although agency and reliance are typically questions of fact, a plaintiff must offer more than mere conclusions on these elements because Illinois is a fact-pleading jurisdiction, and because, when public revenues are at stake, estoppel is particularly disfavored. *Id.* The usual elements of

estoppel are further supplemented with the additional restriction that a public body will be estopped only when necessary to prevent fraud or injustice, particularly when public revenues are involved. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 48.

After review of the statements cited by Plaintiffs in support of their position, the Court finds that Plaintiffs have failed to establish their equitable estoppel argument. The various statements and announcements made by representatives of the City, its Aviation Department, and committees were not "affirmative acts" by the City that are binding and which would support equitable estoppel. *See Patrick Engineering*, 2012 IL 113148, ¶ 39 ("The municipality's act must be affirmative, but may be either an act by the municipality itself, such as legislation, or an act by an official with express authority to bind the municipality."). Furthermore, even if the statements were affirmative acts, it was not reasonable for Plaintiffs to rely on the statements in delaying the filing of this action. *See id.* ("[T]he reliance must be detrimental and reasonable. That is, the private party must have not only substantially changed its position...but also justifiably done so, based on its own inquiry into the municipal official's authority.") (citations omitted). Accordingly, the statute of limitations period is not equitably tolled and Plaintiffs' claims are barred.

IT IS ORDERED:

Defendant City of Chicago's Motions for Summary Judgment against All Plaintiffs and against Particular Plaintiffs are granted.

This case is disposed of in its entirety.

Judge Thomas R. Mulroy, Jr.

DEC 19 2018

Circuit Court-1941

Date

Judge Thomas R. Mulroy

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