

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

FILED
CLERK OF DISTRICT COURT
99 JAN 13 AM 8:20
WESTERN DIVISION
COLUMBUS, OHIO

IN RE: SOUTHDOWN, INC., : Case No. C-3-93-270

CHIEF JUDGE WALTER HERBERT RICE

DECISION AND ENTRY OVERRULING, SUBJECT TO RENEWAL,
GREENE ENVIRONMENTAL COALITION'S MOTION TO JOIN PARTIES
AS DEFENDANTS, PURSUANT TO RULE 19 (DOC. #69-1) AND ITS
MOTION TO AMEND ITS COMPLAINT, PURSUANT TO RULE 15
(DOC. #69-3); DECISION AND ENTRY OVERRULING GREEN
ENVIRONMENTAL COALITION'S MOTION TO JOIN A CLAIM,
PURSUANT TO RULE 18 (DOC. #69-2)

This litigation was brought by Greene Environmental Coalition ("GEC") against Southdown, Inc. ("Southdown") under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, seeking civil penalties and the abatement of the pollution of Mud Run. GEC alleged that leachate has emanated from a large landfill located on Southdown's property and has polluted Mud Run, resulting in significant deterioration of its water quality. On January 23, 1995, this Court ordered a stay of proceedings to allow the parties to evaluate the landfill site and to propose a settlement of this matter. An evaluation report was issued in April, 1997, and the parties subsequently met to engage in settlement discussions. They were unable to reach a agreement. The Court ordered a settlement conference, which was ultimately scheduled for November 13, 1997.

gl

On November 7, 1997, counsel for Southdown informed GEC that the tract of land containing the landfill had been sold to two companies, 444 Sandhill, Inc., ("444 Sandhill") and Dirtvest, Ltd., ("Dirtvest"). The Court was notified of the transactions by correspondence, dated November 11, 1997. During a telephone status conference on November 25, 1997, this Court permitted Plaintiff to submit appropriate motions, addressing the legal issues presented by the transfer of ownership of the landfill property. On March 3, 1998, GEC filed the instant motions, seeking: 1) to join 444 Sandhill and Dirtvest as defendants, pursuant to Fed. R. Civ. P. 19 (Doc.#69-1); 2) to join a claim for fraudulent conveyance against Southdown, 444 Sandhill, and Dirtvest, pursuant to Fed. R. Civ. P. 18 (Doc. #69-2); and 3) to amend its Complaint, pursuant to Fed. R. Civ. P. 15, to reflect these additional parties and claims (Doc.#69-3). For the reasons assigned, Plaintiff's motion to add the claim for fraudulent conveyance (Doc.#69-2) is Overruled. GEC's motion to join 444 Sandhill and Dirtvest as defendants (Doc. #69-1) and its motion to amend its Complaint (Doc. #69-3) are Overruled, subject to renewal.

I. Standard for Motion to Amend Complaint

GEC has requested leave to amend its Complaint to add the claim of fraudulent conveyance and to join 444 Sandhill and Dirtvest as parties. Under Rule 15(a), leave to amend a complaint should be "freely given when justice so

requires.” Fed. R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178 (1962). The Sixth Circuit has set forth several factors that a district court should use in determining whether to grant leave to amend: undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. Brooks v. Celeste, 39 F.3d 125, 130 (6th Cir. 1994) (citations omitted). An amendment of a complaint is futile if it would not survive a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). Thiokol Corp. v. Dept. of Treasury, 987 F.2d 376, 382 (6th Cir. 1993); Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21, 23 (6th Cir. 1980).

In the instant case, there are no allegations of undue delay, bad faith or dilatory tactics on the part of GEC. Although the proposed additional defendants assert they would be prejudiced by the additional claim, they have provided no evidence of such prejudice. Predominately, Southdown and the proposed additional defendants assert that amendment of the Complaint to include a claim for fraudulent conveyance would be futile. In addition, 444 Sandhill and Dirtvest contend that they are not necessary parties within the meaning of Rule 19 and, therefore, amendment of the Complaint to include them as parties is inappropriate.

II. Motion to Join Claim of Fraudulent Conveyance (Doc. #69-2)

GEC seeks to amend its Complaint to join a claim of fraudulent conveyance against Southdown, 444 Sandhill and Dirtvest. Although Plaintiff does not specifically reference Ohio's Fraudulent Conveyance Act ("the Act"),¹ it asserts that the transfer of the property by Southdown to 444 Sandhill and Dirtvest should be voided as a fraudulent conveyance. Southdown, 444 Sandhill, and Dirtvest oppose the Motion, contending that GEC is not a creditor within the meaning of the Act.² Under Ohio's Fraudulent Conveyance Act, a transfer made by a debtor is fraudulent as to a creditor if the transfer was made:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; [or]

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or

¹ GEC moves to join the claim of fraudulent conveyance, pursuant to Rule 18. However, in its reply memorandum, it argues that it has met the requirements for Ohio's Fraudulent Conveyance Act. Although Rule 18 acknowledges claims for fraudulent conveyance, it does not establish such claims. Rather, Rule 18 states that, procedurally, such claims may be brought concurrently with the underlying claim for money. Accordingly, the Court concludes that the Ohio Fraudulent Conveyance Act is the more appropriate vehicle for asserting a cause of action for fraudulent conveyance.

² Southdown also argues that GEC cannot avail itself of the Act, because Southdown had transferred a liability, not an asset. The Court finds this argument disingenuous. Although Southdown could potentially incur liability as a result of its ownership of the land in question, real property is an asset.

transaction;

(b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Ohio Rev. Code Ann. § 1336.04(A). In order to be a creditor, a person must have a claim. Ohio Rev. Code Ann. § 1336.01 (D). The term “claim” means “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Ohio Rev. Code Ann. § 1336.01 (C). The language and structure of this Act indicates that the statute was intended to prevent debtors from diminishing their assets in an effort to prevent their creditors from seizing them to satisfy an amount owed.

With that intent in mind, GEC does not have a claim against Southdown. Under the CWA, plaintiffs do not have a right to damages for violations of that statute. Rather, plaintiffs may seek civil penalties, payable to the United States Treasury, or injunctive relief. Although a person in violation of the CWA may be subject to penalties up to \$25,000 per day, per violation, the amount, if any, of civil penalties are determined by the court. 33 U.S.C. § 1319(d). Even if Plaintiffs proved that violations of the CWA occurred, civil penalties would not necessarily be awarded. See United States v. Winchester Mun. Util., 944 F.2d 301, 306 (6th Cir. 1991)(stating in dicta that “[i]t is true that a number of district courts have stated that whether to impose a civil penalty is discretionary. We

ourselves are inclined to believe that these district courts have interpreted § 1319 correctly.. .."); see also Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995)(concluding that although the district court must assess some penalty, it may be a nominal amount).

Most **importantly**, even if civil penalties were awarded, they would be paid to the federal government, not to Plaintiff. Civil penalties are not damages to compensate the plaintiffs for injuries caused by violations of the CWA. As stated by the Supreme Court regarding civil penalties for violation of the Emergency Planning and Community Right-to-Know Act of 1986:

[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to [plaintiff] if they were payable to [plaintiff]. But they are not. These penalties -- the only damages authorized by EPCRA -- are payable to the United States Treasury. In requesting them, therefore, [plaintiff] seeks not remediation of its own injury -- reimbursement for the costs it incurred as a result of the [violation] -- but vindication of the rule of law--the "undifferentiated public interest...."

Steel Co. v. Citizens for a Better Environment, 1 18 S. Ct. 1008, 1018

(1998)(request for civil penalties did not meet redressibility requirement for standing). Similarly, plaintiffs involved in CWA citizen suits do not have a "right to **payment**" to themselves. **Rather, citizens who bring CWA suits do so as private attorneys general, suing on behalf of the United States, which is entitled to damages.** See Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996); Bennett v. Spear, 1 17 S. Ct. 1 154, 1 162 (1997)(citizen suit provision in

Endangered Species Act encouraged enforcement by “private attorneys general” as evidenced by “its elimination of the usual amount-in- controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the federal government of a right of first refusal to pursue the action initially and a right to intervene later.”). Thus, any “right to payment ” belongs to the government, not to the citizen. Accordingly, GEC cannot claim that it is a creditor by virtue of the fact that civil penalties might be assessed against Southdown in this litigation.

In addition, GEC is not a creditor by requesting litigation costs under the CWA. Although the CWA permits a court to award costs of litigation, including reasonable attorney and expert witness fees, to a prevailing or substantially prevailing party, 33 U.S.C. § 1365(d), the awarding of such costs do not constitute redress for violations of the statute. Rather, 33 U.S.C. § 1365(d) merely allows a plaintiff to be reimbursed for the costs of pursuing redress. See Steel Co., 1 18 S. Ct. at 1019, quoting, Lewis v. Continental Bank Corn., 494 U.S. 472, 480 (1990)(The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An “interest in attorney’s fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”). Because litigation costs are not awarded to plaintiffs to compensate for violations of the CWA, they do not form a basis for a “claim” under the Act. Accordingly, this Court

concludes that GEC is not a creditor of Southdown within the meaning of Ohio's Fraudulent Conveyance Act.³

Because GEC is not a creditor within the meaning of Ohio's Fraudulent Conveyance Act, a cause of action under that statute would be subject to dismissal, pursuant to Fed. R. Civ. P. 12(b)(6).⁴ This Court, therefore, concludes that amendment of GEC's Complaint to include a cause of action for fraudulent conveyance would be futile. GEC's Motion to Join a Claim of Fraudulent Conveyance (Doc. #69-2) is Overruled.

III. Motion to Join 444 Sandhill and Dirtvest as Parties (Doc.#69-1) and to so Amend its Complaint (Doc.#62-3)

GEC requests that this Court permit it to join 444 Sandhill and Dirtvest as parties to this litigation. GEC asserts that 444 Sandhill and Dirtvest are necessary parties to the litigation in order for this Court to order injunctive relief, namely abatement or remediation of the pollution of Mud Run Creek. 444 Sandhill and Dirtvest contest the proposed joinder, arguing that they are not necessary parties to this litigation, because there is no evidence that they would deny access to

³ Since GEC is not a creditor of Southdown within the meaning of Ohio's Fraudulent Conveyance Act, it is not a creditor of 444 Sandhill and Dirtvest either.

⁴ Because the Court concludes that GEC is not a creditor within the meaning of Ohio's Fraudulent Conveyance Act, it need not discuss whether the particularity requirements of Fed. R. Civ. P. 9(b) are applicable to allegations of fraudulent conveyance and, if so, whether Plaintiff has satisfied those requirements in its proposed First Amended Complaint.