

FILED

MAY - 11 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH J. MURPHY, Clerk
DAYTON, OHIO

IN RE:

SOUTHDOWN, INC., LITIGATION,

Case No. C-3-93-270

Judge Walter Herbert Rice

SURREPLY OF 444 SANDHILL, INC. TO PLAINTIFF'S
MEMORANDUM TO OBJECTIONS TO JOIN CLAIMS AND PARTIES

Plaintiff, Greene Environmental Coalition, Inc. ("GEC"), filed Plaintiff's Motion to Join Parties as Defendants under Rule 19; Motion to Join a Claim under Rule 18; and Motion to Amend Complaint Appropriately under Rule 15 ("GEC's Motion") on or about March 2, 1998. Defendant, 444 Sandhill, Inc. ("444 Sandhill"), filed its Memorandum In Opposition to GEC's Motion on March 23, 1998.

Plaintiff's Reply to Objections to Join Claims and Parties ("Plaintiff's Reply") failed to negate 444 Sandhill's showing that joinder of 444 Sandhill is not required in order to assure complete relief in the suit. Plaintiff has attached a proposed Amended Complaint that is not based solely on the addition of the claims as proposed in GEC's Motion. Plaintiff has added an additional claim against 444 Sandhill and Dirtvest, Ltd. ("Dirtvest") entitled "Second Claim" that appears to allege that 444 Sandhill and Dirtvest, according to Paragraph 16 of the Proposed Amended Complaint, are "currently discharging and will continue to discharge into the foreseeable future pollutants from Landfill No. 1 through the discernible

confined and discrete rivulet and into Mud River Creek in violation of the [Clean Water] Act unless enjoined and restrained by this Court.”

This Court should deny GEC’s attempt to add an additional claim against 444 Sandhill for violations of the Clean Water Act (the “Act”) because GEC has failed to comply with the necessary statutory prerequisites in order to institute litigation against 444 Sandhill. The Act regulates the “discharge” of “pollutants” from “point sources” in to “waters of the United States.” 33 U.S.C. § 1311; 40 C.F.R. §§ 122.2, 123.2. There are a number of prerequisites that must be satisfied before a citizens’ suit can go forward.

One such requirement is that the Plaintiff give an alleged transgressor a chance to remedy its behavior and the enforcement agencies an opportunity to take action and to the government agencies at least 60 days before filing suit. 33 U.S.C. § 1365(b); 40 C.F.R. § 135.3. The notice requirement is required. Failure to give the notice is fatal to a citizens’ suit and it must be dismissed. This suit was filed against Southdown on July 20, 1993. Consequently, there can be no allegation that the proper notice was given 444 Sandhill prior to the initiation of this action for violation of the Act against Southdown. In Hallstrom v. Tillamook County, 110 S. Ct. 304, 310 (1989), the plaintiff notified the alleged violator, but failed to send a timely notice letter to the enforcement agencies. Tillamook, 110 S.Ct. at 307. The district court held that plaintiff had cured the defect by notifying the government of the suit after it had been filed, and allowed the case to proceed to trial. Tillamook, 110 S.Ct. at 307-08. The Court of Appeal reversed, holding that plaintiff’s failure to

comply with the 60-day notice provision deprived the district court of subject matter jurisdiction. Tillamook, 110 S.Ct. at 308. The Supreme Court affirmed, holding that “where a party suing under the citizen suit provisions ... fails to meet the notice and 60-day delay requirements ... the District Court must dismiss the action as barred by the terms of the statute.” Tillamook, 110 S.Ct. at 308.

The Court must deny the Plaintiff’s Motion to Amend its Complaint to allege a claim for violation of the Act against 444 Sandhill because GEC has not followed the proper notice procedures and its claim could never withstand a motion to dismiss under Rule 12(B)(6) of the Federal Rules of Civil Procedure.

Furthermore, GEC failed to address the arguments of 444 Sandhill that Plaintiff’s motion should be denied because Plaintiff cannot, as a matter of law, state a claim for fraudulent transfer under Ohio law because 444 Sandhill is not a “debtor that transferred property”; and Southdown is solvent after the transfer of the land. Clearly, under Ohio law, Plaintiff can make no claim against 444 Sandhill for a fraudulent conveyance.

Defendant 444 Sandhill must be a “debtor” of GEC and must have transferred land. See Ohio Rev. Code §§ 1336.04 and 1336.05. Plaintiff cannot deny this argument of 444 Sandhill, because it is true. Plaintiff has failed to allege that 444 Sandhill is a “debtor,” or that 444 Sandhill transferred land. This failure alone requires the Court to deny Plaintiff’s motion to join an additional claim of fraudulent conveyance against 444 Sandhill.

Moreover, the Plaintiff failed to respond to the argument made by 444 Sandhill that the Plaintiff must show that the debtor was “insolvent” as a result of the transfer to 444 Sandhill. Southdown is a New York Stock Exchange company and clearly has the financial ability to meet any financial orders made by the Court. The Plaintiff has not alleged any facts indicating that the alleged transfer of the land has rendered Southdown “insolvent.” The return of the property to Southdown is unnecessary in that Southdown does not need to be the owner or in possession of the property in order to be held financially responsible under the terms of the original Complaint, and therefore, the Court should deny the Plaintiff’s motion to amend the Complaint to add an additional claim of fraudulent transfer against 444 Sandhill.

Furthermore, 444 Sandhill has shown clearly, without sufficient contradiction from GEC, that in its absence, complete relief can be accorded among those persons already parties. The original Complaint requested civil penalties, attorneys’ fees and injunctive relief against Southdown. To the extent that the Court orders civil penalties, Southdown is still the appropriate party. Furthermore, 444 Sandhill is not a necessary party in that the Court can still order Southdown to perform the necessary remedial action on Landfill No. 1. There is no allegation made by Plaintiff that 444 Sandhill would deny entry to the property if the Court were to order Southdown to perform remedial actions on the property, and 444 Sandhill would not deny entry to its property.

Since the Court stayed the action between GEC and Southdown on January 23, 1993, it appears that no settlement agreement was reached by the parties, or consummated by the parties. Southdown should remain the only Defendant in this action until such time as the Court would determine if GEC is entitled to the Court's decision ordering any injunctive relief against Southdown and which remediation would be ordered against Southdown and not the current owner. Southdown is still the party in interest as it relates to the continued allegations by GEC, and any penalties would be appropriately entered against Southdown for any alleged violations of the Act. Furthermore, any potentially necessary remedial action ordered by this Court against Southdown will not be prevented by 444 Sandhill as there is no CKD on the land purchased by 444 Sandhill, and the Court should deny the Plaintiff's motion to join 444 Sandhill.

Respectfully submitted,



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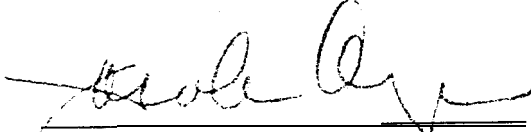
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Surreply of 444 Sandhill, Inc. To Plaintiff's Memorandum To Objections To Join Claims And Parties was served by U.S. Mail, postage prepaid, this 1st day of May, 1998 upon the following:

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444 Sandhill/GEC
SurReply to GEC's Reply
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