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MAR 23 1993

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

MEMORANDUM IN OPPOSITION OF 444 SANDHILL, INC. TO PLAINTIFF'S  
MOTION TO JOIN PARTY 444 SANDHILL, INC. AS DEFENDANT  
UNDER RULE 19; MOTION TO JOIN CLAIM UNDER RULE 18;  
AND MOTION TO AMEND COMPLAINT APPROPRIATELY UNDER RULE 15

444 Sandhill, Inc., an Ohio corporation ("444 Sandhill"), by attorney, Jacob A. Myers, hereby objects to being joined as a party in the above entitled litigation on the basis that 444 Sandhill is not necessary for adjudication of the legal matters therein, and requests this Court to deny Plaintiff's motion.

This action was commenced by the filing of a complaint by Green Environmental Coalition, Inc. ("GEC") against Southdown, Inc. ("Southdown") which generally alleges that Southdown is in violation of § 301(a) (33 U.S.C. § 1311(a)) and § 402 (33 U.S.C. § 1342) of the Clean Water Act by virtue of an alleged ongoing discharge of pollutants from a facility in Greene County, Ohio, generally known as Landfill No. 1, and into the waters of the United States without a permit.

In the Complaint filed on July 20, 1993, GEC requested that the Court declare Southdown to have violated and to be in violation of the Clean Water Act; issue an injunction permanently enjoining Southdown from any and all future violations of the Act; order Southdown to pay civil penalties pursuant to 33 U.S.C. § 1319(d) for each day that it has violated the Act; and order Southdown to pay GEC's reasonable

attorneys' fees and costs, including expert witness fees. Accordingly, Southdown has been a party for over three years to litigation directed at the condition of Landfill **No. 1.**

On or about September 30, 1997, 444 Sandhill purchased approximately 287.219 acres of land located in Clark County and Greene County, Ohio, together with all appurtenant rights, privileges and easements and a non-exclusive easement for ingress and egress to the land under State 444.

**A. JOINDER OF 444 SANDHILL IS NOT REQUIRED IN ORDER TO ASSURE COMPLETE RELIEF IN THE SUIT**

In order to join 444 Sandhill, the Court must determine whether in the person's absence, complete relief cannot be accorded among those persons already parties. Rule 19 of the Federal Rules of Civil Procedure provides:

(a) Person **to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or in a proper case, venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

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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.

According to the Court's records, approximately two years ago, this Court stayed the action on January 23, 1993 in order to allow a settlement agreement between the parties to become fully consummated. Since that date, it appears that no such agreement was reached by the parties, and no such agreement was 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 Clean Water Act. Furthermore, any potentially necessary remedial action ordered by this Court against Southdown will not be prevented by 444 Sandhill, and the Court should deny the Plaintiff's motion to join 444 Sandhill.

**B. PLAINTIFF'S MOTION TO ADD ADDITIONAL CLAIM OF FRAUDULENT CONVEYANCE AND MOTION TO AMEND SHOULD BE DENIED**

The decision whether to grant leave to amend is within the sound discretion of this Court. United States v. Wood, 877 F.2d 453, 456 (6th Cir. 1989). Absent unusual circumstances such as “delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ..., [or] futility of amendment,” leave should be freely granted. Foman v. Davis, 371 U.S. 178, 182 (1962).

In analyzing the propriety of granting leave to amend a complaint, the Sixth Circuit employs several factors which should be considered by the District Court. Wood, 877 F.2d at 456-7. These considerations include: 1) whether the opposing party will be unduly prejudiced if leave is granted; 2) whether the amended complaint can survive a motion under Fed. R. Civ. P. 12(b)(6); 3) whether the opposing party will be unduly surprised by any new theories asserted in the amended complaint; 4) whether the opposing party will have sufficient time to conform its pleadings to the amended complaint; and, ultimately, 5) whether granting leave to amend adversely affects the opposing party's posture in the litigation. Wood, 877 F.2d at 456-7. In the instant case, since the amended complaint would unduly prejudice 444 Sandhill; would unduly surprise 444 Sandhill; and cannot survive a motion to dismiss under Rule 12(b)(6), Plaintiff's motion to amend its Complaint to add an additional claim should be denied. Furthermore, Plaintiff's failure to attach the proposed amended complaint is fatal. Therefore, Plaintiff's motion to amend its Complaint to add an additional party should be denied.

1. **Plaintiff's motion should be denied because Plaintiff failed to allow the Court enough information and 444 Sandhill will be unduly prejudiced and surprised by any new theories asserted in the amended complaint.**

Plaintiff has requested the Court allow the Plaintiff to amend its Complaint to add an additional count of fraudulent conveyance claim against Southdown and 444 Sandhill and Dirtvest. According to Rule 9(b) of the Federal Rules of Civil Procedure, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Plaintiff’s memorandum in support merely alleges that a fraudulent transfer occurred when Southdown conveyed property to 444 Sandhill and Dirtvest. Such conclusory allegations shed little light on what specific factual allegations Plaintiff believes establishes a fraudulent transfer as it relates to 444 Sandhill and Dirtvest. The Plaintiff’s attempt to join a claim of fraudulent conveyance in its Complaint against 444 Sandhill is based simply on Rule 18(b) of the Federal Rules of Civil Procedure. Consequently, it is unclear whether the Plaintiff is basing its claim of fraudulent conveyance on some common law claim or on the Ohio Uniform Fraudulent Transfer Act under R.C. § 1336 et seq., and without additional information, the true nature of the claim for fraudulent conveyance cannot be ascertained, and is unduly prejudicial to 444 Sandhill in that no cause of action for fraud appears supportable against 444 Sandhill. Consequently, Plaintiff’s motion should be denied.

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**2. In the alternative, in light of Plaintiff's failure to attach a copy of the amended complaint to its motion, Plaintiff's motion should be denied or stayed until a copy of the proposed amended complaint is submitted.**

This Court has held that “there is substantial authority for the proposition that Civil Rules 7(b)(l) and 15(a) impliedly require submission of the proposed amended pleading with the motion to amend.” Nation v. U.S. Government, 512 F.Supp. **121, 124** (S.D. Oh. **1981**). The Plaintiff's failure to attach a proposed amended complaint to its motion to leave to amend is suspect. Plaintiff's memorandum in support merely alleges that a fraudulent transfer occurred when Southdown conveyed property to 444 Sandhill and Dirtvest. That single allegation fails to identify the specific factual allegations Plaintiff believes establishes a fraudulent transfer under any cause of action. Furthermore, this is an entirely new claim requiring that new facts be alleged. As such, Plaintiff's motion should either be denied or stayed pending submission by Plaintiff of an amended complaint. Nation, 512 F.Supp. at 124-5 (disposition of motion for leave to amend pleading should be held in abeyance until movant has submitted a proposed amendment); see also Williams v. Wilkerson, 90 F.R.D. 168, 170 (E.D. Va. 1981) (motion for leave to file amended complaint denied without prejudice because plaintiff failed to attach a copy of the proposed amended pleading to the motion).

3. 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"; Plaintiff is not a creditor of 444 Sandhill; and Southdown is solvent after the transfer of the land.

While the extent and detail of Plaintiff's allegations are not entirely clear because Plaintiff failed to attach a copy of its proposed amended complaint, it is clear that under Ohio law Plaintiff can make no claim against 444 Sandhill for a fraudulent conveyance. Pursuant to Ohio Rev. Code Section 1336.04:

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

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

(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 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 become due.

....

According to Section 1336.05(A):

A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

In order for the alleged transfers to be fraudulent as against 444 Sandhill under Ohio law, Defendant 444 Sandhill must be a “debtor” of GEC and must have transferred land. See Ohio Rev. Code §§ 1336.04 and 1336.05. 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.

Furthermore, GEC is not a “creditor” of 444 Sandhill. In order to be a “creditor” of 444 Sandhill, Plaintiff must have a “claim” against 444 Sandhill. Ohio Rev. Code § 1336.01(D). A “claim” is a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured.” Ohio Rev. Code §1336.01(C) (emphasis added). Plaintiff has failed to allege that Plaintiff has a “claim” or “right to payment” against 444 Sandhill. This failure alone requires the court to deny Plaintiff’s motion to join an additional claim. Moreover, Plaintiff cannot allege that it is a “creditor” of 444 Sandhill in the context of this lawsuit because any such right of payment will only exist between Plaintiff, the U.S. Government, and Southdown. This failure alone requires the court to deny Plaintiff’s motion to join additional claim against 444 Sandhill.

Finally, in order to set aside a transfer as fraudulent, the Plaintiff will have to show that the debtor was “insolvent” as a result of the transfer to 444 Sandhill. Section 1336.02 (A) defines when a “debtor” is “insolvent”, and provides as follows: “(1) A debtor is insolvent if the sum of the debts of the debtor is greater than all of