



interfered with Plaintiffs' use and enjoyment of their property. Similarly, the trespass claim alleges that pollution caused by Defendants invaded Plaintiffs' right to exclusive possession of their property.

In his Answer to the Second Amended Complaint, Cutone asserts a counterclaim for contribution and indemnity with respect to any liability incurred on the nuisance and trespass claims. Cutone's counterclaim alleges that Plaintiffs' activities contributed to the pollution of Plaintiffs' property. Cutone states: "[T]o the extent that defendant/counterclaim plaintiff Cutone bears any liability for the degradation of the Reynolds 'pond' or Trout Run, which degradation is denied, counterclaim defendants are liable over to Cutone for all or part of his liability under the doctrines of contribution and indemnification."<sup>1</sup>

On March 24, 2006, Plaintiffs filed the instant Motion to Dismiss Cutone's counterclaim for failure to state a claim upon which relief can be granted.

## **II. STANDARD OF REVIEW**

Motions to dismiss a counterclaim are subject to the same standard as motions to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6).<sup>2</sup> When reviewing a motion to dismiss, the Court must "accept as true all the allegations set forth in the complaint, and . . . draw all reasonable inferences in the plaintiff's favor."<sup>3</sup> The Court is not required, however, to credit a complaint's "bald assertions" or "legal conclusions."<sup>4</sup> The Court may grant dismissal under Rule

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<sup>1</sup> Def. Michael Cutone's Answer 12 ¶ 7.

<sup>2</sup> See United States v. Union Gas Co., 743 F. Supp. 1144, 1150 (E.D. Pa. 1990).

<sup>3</sup> Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998).

<sup>4</sup> In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997).

12(b)(6) “only if the plaintiff ‘can prove no set of facts in support of his claim which would entitled him to relief.’”<sup>5</sup>

### III. DISCUSSION

Pennsylvania permits contribution among joint tort-feasors.<sup>6</sup> Under the Pennsylvania statute governing contribution, “‘joint tort-feasors’ means two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them.”<sup>7</sup> Moreover, Pennsylvania common law permits one party to seek indemnification from another party where both parties are jointly and severally liable to the same injured third party, and the party from whom indemnification is sought is primarily liable for the third party’s injury.<sup>8</sup>

Accordingly, in order for Cutone to state a claim for contribution or indemnity here, he must establish that Plaintiffs are jointly and severally liable with him—that is, are liable at all—for the nuisance and trespass they allege.

While nuisance and trespass differ, both torts require an interference with or entry on the *land of another*.<sup>9</sup> Thus, Plaintiffs cannot be liable for nuisance or trespass for polluting their own

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<sup>5</sup> Ford, 145 F.3d at 604 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1967)).

<sup>6</sup> 42 Pa. Cons. Stat. § 8324(a).

<sup>7</sup> 42 Pa. Cons. Stat. § 8322.

<sup>8</sup> Burbage v. Boiler Eng’g & Supply Co., 249 A.2d 563, 567 (Pa. 1969).

<sup>9</sup> Pennsylvania has adopted the Restatement (Second) of Torts. See Kembel v. Schlegel, 478 A.2d 11, 14 (Pa. Super. Ct. 1984) (citing Waschak v. Moffat, 109 A.2d 310 (Pa. 1954), which adopted the first Restatement). Section 822 of the Restatement defines a nuisance as “the invasion of another’s interest in the use and enjoyment of his land.” Harford Penn-Cann Serv., Inc. v. Zymblosky, 549 A.2d 208, 209 (Pa. Super. Ct. 1988). Section 158 of the Restatement provides that “[o]ne is subject to liability to another for trespass . . . if he intentionally (a) enters *land in the possession of the other*, or causes a thing or third person to do so.” Restatement (Second) of Torts § 158 (emphasis added).

property, since an essential element of both torts would, logically, be lacking. Therefore, Plaintiffs are not joint tort-feasors with Cutone, and Cutone cannot seek contribution or indemnity for any liability he may incur on Plaintiffs' nuisance and trespass claims. Even taking as true that Plaintiffs caused some or all of the pollution of their land, Cutone's counterclaim fails to state a claim for which relief may be granted.

Defendants support their counterclaim by citing cases interpreting federal environmental statutes, most notably the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>10</sup> Those cases are unavailing. First, they merely affirm that contribution and indemnity exists only between joint tort-feasors<sup>11</sup>; Plaintiffs' status as polluters does not necessarily expose them to joint and several liability for the nuisance and trespass they allege. Second, the cases uniformly deal with a defendant accused of polluting plaintiff's property who is seeking contribution or indemnity from a third-party defendant, not from the plaintiff.<sup>12</sup>

#### **IV. CONCLUSION**

For the foregoing reasons, the Court grants Plaintiffs' Motion to Dismiss. The dismissal of Cutone's counterclaim does not preclude him from presenting evidence of Plaintiffs' role in polluting their own property as a defense to Plaintiffs' nuisance and trespass claims. Indeed, the essence of Cutone's allegations is that Plaintiffs, not him, caused the harm to their property. However, those allegations, when taken as true, do not establish a legal basis for contribution or indemnity between Plaintiffs and Cutone.

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<sup>10</sup> 42 U.S.C. § 9607 (2000).

<sup>11</sup> See Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1487-89 (D. Colo. 1985).

<sup>12</sup> See id.

