

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORE CONSTRUCTION &)	
REMEDICATION, INC.,)	Civil Action
COPLAY AGGREGATES, INC.,)	No. 06-CV-1346
)	
Plaintiffs)	
)	
vs.)	
)	
VILLAGE OF SPRING VALLEY, NY,)	
THE ALLIANCE COMPANIES)	
SA, LLC, and)	
ROCKLAND COUNTY DRAINAGE)	
AGENCY,)	
)	
Defendants)	

* * *

APPEARANCES:

GEORGE A. REIHNER, ESQUIRE
On behalf of Plaintiffs

ANDREW P. HENRY, ESQUIRE and
RONDA K. O'DONNELL, ESQUIRE
On behalf of Defendant
Village of Spring Valley, New York

DAVID A. DOREY, ESQUIRE and
MICHAEL P. BROADHURST
On behalf of Defendant
The Alliance Companies SA, LLC

NEIL S. WITKES, ESQUIRE and
ADAM H. CUTLER, ESQUIRE
On behalf of Defendant
Rockland County Drainage Agency

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on three motions to dismiss filed by Defendant Rockland County Drainage Agency.¹ For the reasons expressed below, I grant defendant Rockland County Drainage Agency's motion to dismiss plaintiff's First Amended Complaint. I deny defendant Rockland County Drainage Agency's motions to dismiss the cross-claims of defendant Alliance Companies SA, LLC and defendant Village of Spring Valley, New York.

Specifically, I conclude that plaintiffs' First Amended Complaint does not contain the requisite particularity for pleading fraud required by Federal Rule of Civil Procedure 9(b). Therefore, I dismiss Counts II and IV of the First Amended Complaint with leave to file a second amended complaint. I also conclude that the cross-claims of defendant Alliance Companies SA, LLC and defendant Village of Spring Valley, New York satisfy the more lenient pleading requirements of Federal Rule of Civil Procedure 8(a).

¹ Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint and accompanying memorandum of law were filed November 13, 2006. Plaintiff's memorandum of law in opposition was filed November 30, 2006.

Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant Alliance Companies SA, LLC's Cross-Claims and accompanying memorandum of law were filed January 5, 2007. Defendant Alliance Companies SA, LLC's response in opposition was filed January 19, 2007.

Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims and accompanying memorandum of law were filed January 22, 2007. Defendant Village of Spring Valley's response in opposition was filed February 5, 2007.

JURISDICTION AND VENUE

Jurisdiction in this case is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to plaintiffs' claims occurred within this judicial district and a substantial portion of the property which is the subject of this action is situated within this judicial district.

PROCEDURAL HISTORY

On March 2, 2006, plaintiff Core Construction & Remediation, Inc. ("Core") filed a Complaint in the Court of Common Pleas of Lehigh County, Pennsylvania, against defendants Village of Spring Valley, New York ("Village"), The Alliance Companies SA, LLC ("Alliance"), and Rockland County Drainage Agency ("Agency"). Core's initial Complaint asserted claims based on defendants' alleged misrepresentations and failures to disclose facts regarding the contamination of material deposited at a quarry managed by Core.

Core contended that it relied on defendants' representations that the deposited materials were "clean fill" in accordance with Pennsylvania Department of Environmental Protection ("PA DEP"). However, the materials allegedly

contained levels of benzo(a)pyrene² in amounts equal or exceeding PA DEP standards.

The Agency timely removed this action on March 29, 2006 from the Pennsylvania state trial court to the United States District Court for the Eastern District of Pennsylvania. Core filed its First Amended Complaint on October 5, 2006.³ The amended complaint added Coplay Aggregates, Inc. ("Coplay"), a party affiliated with plaintiff Core, as an additional plaintiff. The amended complaint also corrected the name of defendant Alliance to "Alliance Companies SA, LLC", and eliminated the negligence-based claim that was asserted in Core's initial Complaint.

² Benzo(a)pyrene is a mutagenic and highly carcinogenic hydrocarbon found in coal tar, automobile exhaust fumes, tobacco smoke and charbroiled food. See Wikipedia, the free encyclopedia at <http://en.wikipedia.org/wiki/Benzopyrene>, September 24, 2007.

³ Plaintiffs erroneously filed their First Amended Complaint electronically in violation of former Rule 5.1.4(a) of the Rules of Civil Procedure of United States District Court for the Eastern District of Pennsylvania on October 5, 2006 (I note that former Local Rule 5.1.4(a) has now been replaced by Local Rule 5.1.2(2)(b)). "The filing of all initial papers in civil cases...[is] accomplished by paper copy filed in the traditional manner rather than electronically." E.D.Pa.R.Civ.P. 5.1.2(2)(b). All parties mistakenly believed plaintiffs' First Amended Complaint was filed of record at that time and subsequently filed responses. Plaintiffs corrected their error by properly filing the First Amended Complaint on March 2, 2007.

My Order dated March 7, 2007 adopted plaintiffs' First Amended Complaint as the operative initial pleading for plaintiffs in this action. My March 7, 2007 Order also deemed the following motions timely and responsive to plaintiffs' complaint: Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint filed on November 13, 2006; the Answer with Affirmative Defense and Cross-Claims of Defendant the Alliance Companies SA, LLC to First Amended Complaint filed December 13, 2006; and the Answer with Affirmative Defenses of Defendant Village of Spring Valley, NY to Plaintiff's First Amended Complaint and Cross-Claims Directed to Co-Defendants Alliance Companies SA, LLC and Rockland County Drainage Agency filed December 29, 2006.

In response to the First Amended Complaint, defendant Agency filed the within motion to dismiss on November 13, 2006.⁴ On November 30, 2006 plaintiffs Core and Coplay filed a memorandum of law opposing the Agency's motion to dismiss.

Defendant Alliance filed an answer to the First Amended Complaint and cross-claims against defendants Village and Agency on December 13, 2006.⁵ Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant Alliance Companies SA, LLC's Cross-Claims was filed on January 5, 2007. On January 19, 2007 Alliance filed a response in opposition to the Agency's motion to dismiss its cross-claims.

The Village filed an answer to the Amended Complaint along with cross-claims against Alliance and the Agency on December 29, 2006.⁶ On January 22, 2007 Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims was filed. The Village filed a response in opposition to the Agency's motion to dismiss its cross-claim on February 5, 2007.

⁴ The Agency's November 13, 2006 motion sought dismissal of Counts II and IV of the First Amended Complaint, which claim fraud and vicarious liability, respectively, pursuant to Rule 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure.

⁵ The cross-claims of defendant Alliance seek contribution and common law indemnification against the Agency and Village.

⁶ The cross-claims of defendant Village seek contribution and both common law and contractual indemnification against Alliance and the Agency.

STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Ordinarily, a court's review of a motion to dismiss is limited to the contents of the complaint, including any attached exhibits. See Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1380 n.1 and n.2 (3d Cir. 1995).

Except as provided in Federal Rule of Civil Procedure 9, a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in

order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Twombly, ___ U.S. at ___, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions" when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the District Court and the Court of Appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 945 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984)(emphasis in original); Maspel v. State Farm Mutual Auto Insurance Company, No. 06-3716, 2007 WL 2030272, at *1 (3d Cir. July 16, 2007).

A defendant may also move to dismiss a complaint for failure to join an indispensable party pursuant to Federal Rule of Civil Procedure 12(b)(7). Federal Rule of Civil Procedure 19

governs joinder of parties, and requires a bifurcated analysis under sections (a) and (b) of the rule. See Koppers Company, Inc. v. The Aetna Casualty and Surety Company, 158 F.3d 170, 175 (3d Cir. 1998).

Applying this analysis, I first determine whether a party is "necessary" to the dispute and should be joined if "feasible" under Rule 19(a). If I conclude the party is necessary, but cannot be joined without destroying subject matter jurisdiction, I must next determine whether the absent party is "indispensable" to the action under Rule 19(b). Koppers Company, Inc., supra.

DISCUSSION

Agency's Motion to Dismiss the Amended Complaint

The Agency's November 13, 2006 motion to dismiss plaintiffs' First Amended Complaint seeks dismissal of Counts II and IV. The motion to dismiss avers that the fraud and vicarious liability claims against the Agency should be dismissed pursuant to Rules 9(b), 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure.

The Agency argues that Counts II and IV of the Amended Complaint fail to satisfy the heightened pleading requirement for fraud set forth in Federal Rule of Civil Procedure 9(b). For the reasons discussed below, I agree and dismiss plaintiffs' claims for fraud and vicarious liability.

Defendant Agency also contends that plaintiffs cannot establish as a matter of law that they have relied on any representations by defendant Agency. The Agency further asserts that plaintiffs have failed to join a necessary party pursuant to Federal Rule of Civil Procedure 19. Finally, the Agency avers that plaintiff Core is not a real party in interest and should be dismissed accordingly. For the reasons discussed below, I reject these alternate Agency arguments.

Pleading with Particularity

Federal Rule of Civil Procedure Rule 9 governs pleading of special matters. Specifically, Rule 9(b) mandates that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed.R.Civ.P. 9(b).

The purpose of Rule 9(b) is to put defendants on notice of the precise misconduct with which they are charged and to safeguard defendants against spurious charges of immoral and fraudulent behavior. Seville Industrial Machinery Corporation v. Southmost Machinery Corporation, 742 F.2d 786, 791 (3d Cir. 1984). For the following reasons, I dismiss Counts II and IV of plaintiffs’ First Amended Complaint for failure to plead fraud and vicarious liability with sufficient particularity.

To comply with Rule 9(b), a plaintiff must allege specific statements which show a causal connection between misrepresentations and damages. Sun Company, Inc. (R & M) v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 369 (E.D.Pa. 1996)(quoting HBC Contractors v. Rouse & Associates, Inc., Civ.A.No. 91-CV-5350, 1992 WL 176142, at *5 (E.D.Pa. July 13, 1992)). The allegations must provide the "who, what, when, where, and how: the first paragraph of a newspaper story would satisfy the particularity requirements." Sun Company, Inc., 939 F.Supp. at 369 (internal citation omitted).

Plaintiffs may satisfy Rule 9's requirement by pleading the date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation into their allegations of fraud. Lum v. Bank of America, 361 F.3d 217, 223-224 (3d Cir. 2004)(internal citations and quotations omitted).

"There is a special kind of proximate cause requirement for fraud and misrepresentation...[P]laintiff must demonstrate that a specific statement caused a specific harm." Sun Company, Inc., 939 F.Supp. at 369 (quoting Hurt v. Philadelphia Housing Authority, 806 F.Supp. 515, 530 n.25 (E.D.Pa.1992)(emphasis omitted)).

Thus, to properly plead a claim for fraud, a claimant must allege five specific elements: "(1) a specific false

representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." Sun Company, Inc., supra (quoting Shapiro v. UJB Financial Corporation, 964 F.3d 272, 284 (3d Cir. 1992)).

In the within matter, plaintiffs have failed to satisfy the heightened pleading requirement of Rule 9(b) concerning fraud. First, plaintiffs failed to allege a specific false representation of material fact. Plaintiffs' First Amended Complaint includes only a general statement that "Defendant Drainage Agency, through its authorized representatives, deliberately and intentionally misrepresented to Plaintiff that the material from the Memorial Park Pond job site was 'clean fill' in accordance with DEP standards." This statement is a bald conclusion of law. It fails to give a particularized account of what the statement was, or who may have said it. See Sun Company, Inc., supra.

The second pleading requirement, knowledge of falsity by the person making the allegedly fraudulent statement, is also not satisfied. Plaintiffs' First Amended Complaint simply states that defendant "knew or should have known" that the material was contaminated. This assertion in the alternative weakly alleges knowledge of falsity. It suggests that maybe defendant knew, or

maybe defendant did not know, but merely should have known, that the waste was contaminated. However, plaintiffs do not identify a particular person who made a statement. Moreover, they fail to allege the means or method of communication utilized by defendants or indicate defendants' specific knowledge.

The third element, ignorance of falsity by the person to whom the statement was made, is also not pled with particularity. Plaintiffs' First Amended Complaint merely states that plaintiffs "reasonably relied to their detriment" on defendants' statements. However, the Complaint never identifies who relied on the statement (as no person is named or otherwise described), nor does it aver the nature of the unidentified individual's knowledge. Accordingly, the statement is a general legal conclusion by plaintiffs rather than a well-pled element of fraud.

The fourth element, defendants' intent that plaintiffs should act on their statement, is also not pled with particularity. The First Amended Complaint states that defendants' statements "were intended to and, did in part, induce reliance by Plaintiffs." This averment is vague. Simply using the word "intend" to establish intention is conclusory and insufficient alone to satisfy Rule 9(b), which requires greater specificity and clarity.

The fifth element, that plaintiffs acted on the statements to their detriment, is pled in greater detail than the other four elements. Throughout the First Amended Complaint, plaintiffs offer detailed explanation regarding the costs associated with the drudge waste for testing fees, removal, disposal fees and fines. Thus, this element is pled with sufficient particularity.

Overall, however, plaintiffs' Amended Complaint does not "inject precision and some measure of substantiation into [the] allegations [of fraud]." Sun Company, Inc., 939 F.Supp. at 369 (quoting In re Chambers Development Securities Litigation, 848 F.Supp. 602, 616 (W.D.Pa. 1994)). Nor have plaintiffs used any "alternative means of injecting precision" into their allegations of fraud. Seville Industrial Machinery Corporation, 742 F.2d at 791. Therefore, the Agency's argument that Count II of plaintiffs' First Amended Complaint fails to satisfy the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) is meritorious.

Furthermore, Count IV of the First Amended Complaint, alleging vicarious liability, must also be dismissed. The Supreme Court of Pennsylvania has held that "[a] claim of vicarious liability is inseparable from the claim against the agent since any cause of action is based on the acts of only one tortfeasor." Reis v. Barley, Snyder, Senft & Cohen LLC,

484 F.Supp.2d 337, 349 (E.D.Pa. 2007)(citing Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 221, 560 A.2d 1380, 1384 (1989)). As stated above, pursuant to Rule 9(b), the factual averments regarding "the circumstances constituting fraud...shall be stated with particularity." Fed.R.Civ.P. 9(b).

Thus, to properly assert a claim based on vicarious liability where the underlying liability of the agent is premised on fraud, plaintiffs must specifically plead the underlying fraud claim against the agent or agents. Therefore, just as plaintiffs' claim for fraud in Count II fails for want of particularity, plaintiffs' vicarious liability claim in Count IV also fails for non-compliance with the requirements of Rule 9(b).

Accordingly, plaintiffs' claims for fraud in Count II and Count IV of the First Amended Complaint are dismissed because they lack the requisite particularity.

Although the Rule 9(b) particularity issue disposes of Agency's motion to dismiss the sole two counts pleaded against it in plaintiffs' First Amended Complaint, defendant Agency has raised alternative grounds for dismissal which contain issues which could conceivably significantly affect the pendency of this action and the remaining defendants and, in the event that the Agency remains a defendant after plaintiffs have an opportunity to re-plead, defendant Agency as well. Therefore, I consider the

other issues which have been raised in defendant Agency's motion to dismiss the First Amended Complaint.

Justifiable Reliance

The Agency argues that plaintiffs cannot have justifiably relied on defendants' alleged statements that dredge waste was "clean fill" in accordance with PA DEP standards because plaintiff Coplay had an obligation under its PA DEP permit to ensure that it only accepted true "clean fill". For the following reasons, I disagree.

The Agency points to a letter written to Coplay by the PA DEP and an Order issued by PA DEP to Coplay, both of which were referred to in plaintiffs' complaint.⁷ The letter discusses plaintiff Coplay's receipt of the dredge materials, and the Order describes plaintiffs damages as a result of the dredge waste's contamination.

Plaintiffs argue that these documents do not establish that they failed to act with ordinary prudence in accepting the dredge materials as clean fill. Furthermore, plaintiffs contend that common diligence is more properly assessed in a summary judgment proceeding. Indeed, the cases relied upon by defendant

⁷ The letter and Order were attached to Agency's motion to dismiss. Although it is not proper for me to assess the authenticity of the documents in hearing the Agency's motion to dismiss, I may consider the documents part of the pleadings because they are referenced in plaintiffs' complaint, and neither party disputes that they are central to plaintiffs' claim. See Pryor v. National Collegiate Athletic Association, 288 F.3d 548, 559-560 (3d Cir. 2001).

in arguing this matter were all decided on a motion for summary judgment. See Forbis v. Reilly, 684 F.Supp. 1317 (W.D.Pa. 1988), Scaife Company v. Rockwell-Standard Corporation, 446 Pa. 280, 285 A.2d 451 (1971).

The motion before me is not one of summary judgment, but a motion to dismiss. As such, I must consider only if "no relief could be granted under any set of facts that could be proved consistent with the allegation." Hishon v. King & Spalding, 468 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Despite the Agency's arguments that plaintiffs had an affirmative obligation to reject contaminated materials, I must accept the facts alleged in the First Amended Complaint as true and view them in the light most favorable to plaintiffs. Although defendant Agency's documentary evidence raises the specter that plaintiffs may not have exercised diligence, it is insufficient to establish lack of diligence as matter of law. Moreover, plaintiffs have averred that they justifiably and reasonably relied on the representations of the Agency. Therefore, defendant Agency's motion to dismiss the First Amended Complaint for lack of justifiable reliance is denied.

Joinder of Necessary Parties

The Agency next argues that plaintiffs have failed to join parties needed for a just adjudication. It moves this court to either dismiss plaintiffs' First Amended Complaint for failure

to join necessary and indispensable parties pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19, or order plaintiffs to join all the necessary parties, namely Innovative Recycling Technologies ("Innovative") and Mountain View Construction, Inc. ("Mountain View"). For the following reasons, I disagree.

The Agency argues that Innovative and Mountain View were the parties involved in transporting and removing the fill materials and, thus, have potential liability in this action. Defendant Agency argues that complete relief cannot be afforded among current parties so long as Innovative and Mountain View are not joined.

Plaintiffs respond that it is premature to ascertain whether Innovative and Mountain View are necessary parties for a just adjudication. Plaintiffs assert that Innovative and Mountain View are only mentioned in passing in their original Complaint and not included at all in the First Amended Complaint. Plaintiffs aver that they had no dealings with Innovative and Mountain View and have limited knowledge of their involvement in the underlying transaction.

Federal Rule of Civil Procedure 19 provides in pertinent part that:

a) Persons 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 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.

Fed.R.Civ.P. 19(a).

According to the United States Court of Appeals for the Third Circuit, a court must first determine whether an absent party is "a necessary party who should be joined in the action. If the answer to that first question is yes, then the court must do so if feasible. If the answer to the first question is no, however, then the inquiry need go no further." Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates, 844 F.2d 1050, 1053-1054 (3d Cir. 1988)(citing Abel v. American Art Analog, Inc., 838 F.2d 691, 695 (3d Cir. 1988)).

The moving party bears the burden of demonstrating why an absent party should be joined pursuant to Rule 19. National Organization on Disability v. Tartaglione, Civ.A.No. 01-CV-1923, 2001 U.S. Dist. LEXIS 16731, at *25 (E.D.Pa. Oct. 11, 2001).

The concept of "complete relief" embodied in Rule 19(a)(1) has been construed narrowly. It refers solely to the relief available for "those parties who are already present"

in the action. Field v. Volkswagenwerk AG, 626 F.2d 293, 301 (3d Cir. 1980).

The fact that Innovative and Mountain View may have been in some way involved in the transportation of the dredge materials does not suggest that complete relief cannot be afforded without them. Defendant Agency has not averred that the absent parties must be present in the action in order to determine the parties' legal rights or obligations or that the present parties will be unable to make the plaintiffs whole. Moreover, the failure to join Innovative and Mountain View does not foreclose a future separate action which will determine whether the absent parties are in some way liable for plaintiffs' damages.

The Agency does not argue under Rule 19(a)(2) that Mountain View and Innovative have an interest in the present litigation which may be harmed by their absence. Nor does the Agency argue that the absence of Mountain View and Innovative may subject the existing defendants to an increased risk of multiple or inconsistent judgments.

Therefore, I conclude that Innovative and Mountain View are not necessary parties pursuant to Rule 19(a) and need not be joined as defendants in this action. Accordingly, their absence provides no basis to dismiss the First Amended Complaint against

defendant Agency pursuant to Federal Rule of Civil Procedure 12(b)(7).

Real Parties in Interest

Defendant Agency argues that plaintiff Core is not a proper plaintiff in this action under Federal Rule of Civil Procedure 17(a) and therefore should be dismissed as a party. I disagree. According to the Agency, Core is not addressed in either the letter or Order from PA DEP concerning the fill waste, and is not a permittee for the quarry. Additionally, the Agency asserts that Core did not set forth in the Amended Complaint any specific harm that it suffered.

Plaintiffs claim that they have pled sufficient facts to show that Core is a proper plaintiff. Plaintiffs' First Amended Complaint states that Core manages Coplay's quarry operation, that Core is authorized to accept materials at the quarry, and that both Core and Coplay have suffered extensive damages resulting from the contaminated fill materials.

Aside from these fact-based arguments, neither party has cited a particular legal basis upon which their arguments rest. Both plaintiff and defendant have failed to cite even a single case in support of their positions. Thus, both parties have failed to address this matter in a meaningful way as required by Rule 7.1(c) of the Rules of Civil Procedure of the

United States District Court for the Eastern District of Pennsylvania.

Under the rules of this district, "failure to cite to any applicable law is enough to deny a motion as without merit...." Marcavage v. Board of Trustees, Civ.A.No. 00-CV-5362, 2002 U.S. Dist. LEXIS 19397, at *10 (E.D.Pa. Sept. 30, 2007) (Tucker, J.). Thus, defendant Agency's motion to dismiss Core as a plaintiff in this action could be denied for failure to brief.

However, I briefly consider the merits of the issue and conclude that the Agency's claim under Rule 17(a) is without merit. Rule 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a). The purpose of this rule is to "protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure that the judgment will have its proper effect as res judicata." Fed.R.Civ.P. 17 Advisory Committee Notes to the 1966 Amendment.

"The real party in interest is the party who, by the substantive law possesses the right to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Svarzbein v. Saidel, Civ.A.No. 97-CV-3894, 1999 WL 729260, at *5 (E.D.Pa. Sep. 10, 1999)(quoting Best v. Kelly, 39 F.3d 328, 329 (D.C.Cir. 1994)). A federal court looks to the applicable state law in order to identify the real party

in interest. See McAndrews Law Offices v. School District of Philadelphia, Civ.A.No. 06-CV-5501, 2007 WL 515412, at *2 (E.D.Pa. Feb. 9, 2007).

Plaintiff's First Amended Complaint asserts four causes of action pursuant to the common law of the Commonwealth of Pennsylvania. All parties acknowledge that Pennsylvania law is the applicable state law in this matter.

Under Pennsylvania law, a plaintiff establishes standing if "(1) the plaintiff has a substantial interest in the controversy (2) that interest is direct, and (3) that interest is immediate." LSC Holdings, Inc. v. Insurance Commissioner of Pennsylvania, 151 Pa.Comm. 377, 381, 616 A.2d 1118, 1121 (citing William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 193-195, 346 A.2d 269, 281-282 (1978)).

A plaintiff establishes standing by showing harm. As a general matter, the core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no right to obtain a judicial resolution of his challenge. Kuropatwa v. State Farm Insurance Company, 554 Pa. 456, 460, 721 A.2d 1067, 1069 (1998).

Accepting as true the facts put forth in plaintiffs' complaint, plaintiff Core has standing to bring suit and is a real party in interest. The First Amended Complaint states that both Core and Coplay were provided with "written confirmation"

that the dredge materials were clean fill under PA DEP standards. The complaint also avers that "Core and Coplay accepted...dredge material" and that both Core and Coplay suffered monetary damages as a result of accepting the materials. These facts establish that Core suffered direct harm because of the alleged acts of defendants. Thus, Core has an interest in this litigation and is a real party in interest.

Moreover, allowing Core to remain a party to this action prevents a subsequent suit against the same defendants and thereby fulfills the legislative aim of Rule 17(a). See Fed.R.Civ.P. 17 Advisory Committee Notes to the 1966 Amendment. Accordingly, I find that Agency's contention that Core is not a real party in interest under Rule 17(a) is without merit.

Agency's Motion to Dismiss Alliance's Cross-Claims

Defendant Agency's January 5, 2007 motion to dismiss seeks to dismiss Alliance's cross-claims against the Agency pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The Agency avers that Alliance has active and primary tort liability for the alleged misrepresentations to plaintiffs, and therefore cannot seek indemnity against the Agency. Defendant Agency also asserts that Alliance fails to state any viable tort claims against the Agency because Alliance bases its claims upon those of the plaintiffs, which the Agency contends are deficient

under Rule 9(b). For the following reasons, I deny the Agency's motion to dismiss.

Defendant Alliance responds that a set of facts may be inferred which would entitle Alliance to relief; namely, other entities may be guilty of making the false representations to plaintiffs. Furthermore, Alliance alleges that cross-claims can survive even if a party against whom a cross-claim is sought is dismissed from the underlying action.

Under Pennsylvania common law, the right of indemnity allows a defendant who is without fault but compelled to pay damages for the negligence of another for which it is secondarily liable to recover losses. Hale v. AWF Trucking, Inc., Civ.A.No. 04-CV-302, 2005 WL 3418439, at *2 (E.D.Pa. December 12, 2005)(quoting Builders Supply Co. V. McCabe, 336 Pa. 322, 325, 77 A.2d 368, 370 (1951)). A defendant is entitled to indemnification when its liability does not stem from its own conduct, but from a relationship with a third party that creates a legal obligation to pay damages on the third party's behalf. Hale, supra.

Neither party has argued that defendants Alliance and Agency lack a relationship that would create such a legal obligation. The Agency instead focuses on the requirement that a party seeking the right of indemnity not be at fault.

In deciding a motion to dismiss, I must accept as true all well-pled allegations of the non-movant, and draw all reasonable inferences therefrom. Worldcom, 343 F.3d at 653. I need only consider whether a party has put forth enough direct or inferential evidence respecting all material elements that would permit recovery under some viable legal theory. Twombly, ___ U.S. at ___, 127 S.Ct. At 1969, 167 L.Ed.2d at 944.

The cross-claims of Alliance aver that co-defendants Village and Agency alone are liable to plaintiffs. Alliance's cross-claim incorporates by reference plaintiffs' First Amended Complaint, which states that Alliance is responsible for the written confirmation that contained the allegedly false representations. However, plaintiffs' complaint is silent as to the specifics of the written confirmation, including the identity of the party who authored the confirmation.

Construing these facts in the light most favorable to the non-moving party (Alliance), there are legal theories under which Alliance's liability would be completely eliminated or mitigated. Defendants Agency, Village, or another party, may have been responsible in some way for the written confirmation. Thus, I find that Alliance has pled sufficient information from which it could be inferred that it may prevail under some legal theory.

The Agency also contends that Alliance's cross-claim must be dismissed because it relies upon plaintiff's flawed First Amended Complaint. The Agency asserts that Alliance will not be liable to plaintiffs (nor Agency to Alliance) because the First Amended Complaint is deficient. This argument is without merit. In order for Alliance to proceed in its action for indemnification or contribution against defendant Agency, the Agency need not ultimately be liable to plaintiffs.

A dismissal of one co-defendant does not necessitate the dismissal of a cross-claim against such defendant by a co-defendant. In re Arthur H. Sulzer Associates, Inc., Civ.A.No. 04-CV-1533, 2006 WL 891164, at *5 (E.D.Pa. Mar. 31, 2006)(citing Aetna Insurance Company v. Newton, 398 F.2d 729, 734 (3d Cir. 1968)). Regardless of plaintiffs' failure to plead fraud with particularity against the Agency, Alliance's cross-claim against the Agency remains viable. Accordingly, defendant Agency's motion to dismiss the Alliance's cross-claim for indemnity and contribution is denied.

Agency's Motion to Dismiss Village's Cross-Claim

Defendant Agency's January 22, 2007 motion to dismiss seeks to dismiss defendant Village's cross-claims against the Agency pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The Agency avers that defendant Village cannot state a claim for contractual indemnification against the Agency under

Pennsylvania law because no explicit contractual agreement exists.⁸ Defendant Agency contends that the Village fails to state any viable tort claim against the Agency because the Village bases its claims upon those of plaintiffs, which the Agency claims are deficient under Rule 9(b). For the following reasons, I deny the Agency's motion to dismiss.

Defendant Village responds that it has sufficiently pled its claim of contractual indemnity for the purpose of surviving a motion to dismiss. The Village contends that New York state law applies to the issue of contractual indemnity and, that under New York law, a contractual agreement need not be explicit.

To decide the Agency's motion to dismiss the Village's cross-claim at this juncture, I need not decide whether New York or Pennsylvania state law applies to this action. I note that neither party has briefed this issue. However, regardless of which law applies, I find that defendant Village has pled sufficient facts which, taken in the light most favorable to the Village, set forth a viable theory under which the Village can recover under either New York or Pennsylvania law.

⁸ Defendant Village's cross-claim against defendant Agency asserts claims of contractual and common law indemnification. The Agency's motion to dismiss the cross-claim seeks dismissal of the contractual indemnification claim only. Therefore, I do not consider the adequacy of the Village's potential claim for a common law indemnification.

Under the standard of review for a motion to dismiss, I must accept as true all well pled allegations of the non-movant, and draw reasonable inferences therefrom. Worldcom, 343 F.3d at 653. I need only consider whether a party has put forth enough direct or inferential evidence respecting all material elements that would allow recovery under some viable legal theory. Twombly, supra., ___ U.S. at ___, 127 S.Ct. At 1969, 167 L.Ed.2d at 944 (emphasis omitted).

Defendant Village's cross-claim incorporates by reference the allegations set forth in plaintiffs' First Amended Complaint. The complaint contains several statements from which, viewed in the context of a motion to dismiss, I can infer the existence of a contract. The complaint states that the Village "and/or" Agency had Alliance arrange for the removal of waste. Taking this statement in the light most favorable to the non-movant Village, the Village and Agency may have worked together under a contractual relationship to carry out the alleged removal.

Moreover, plaintiffs' First Amended Complaint sets forth strikingly similar claims against the Agency and Village. From the related averments I can infer that a relationship existed between the Agency and Village that would support a claim for contractual indemnity.

Even if Pennsylvania state law, which requires an explicit contract for claims of contractual indemnification,⁹ were to apply, the Agency's motion to dismiss fails. The Village need only put forth a "short and plain" statement of the facts pursuant to the liberal pleading requirement of Federal Rule of Civil Procedure 8(a), and need not plead the existence of a contract with particularity. As described above, I can reasonably infer the existence of some contractual relationship from plaintiffs' First Amended Complaint. Therefore, defendant Agency's motion to dismiss defendant Village's cross-claim for contractual indemnification is without merit.

The Agency's assertion that the Village does not have a viable tort claim against the Agency mirrors the argument set forth in the Agency's motion to dismiss Alliance's cross-claims. As such, I incorporate my preceding discussion. A cross-claim may remain viable after a defendant is dismissed from the underlying action. See In re Arthur H. Sulzer Associates, Inc., Civ.A.No. 04-CV-1533, 2006 WL 891164, at *5 (E.D.Pa. Mar. 31, 2006)(citing Aetna Insurance Company v. Newton, 398 F.2d 729, 734 (3d Cir. 1968)).

Defendant Agency also argues that plaintiff's First Amended Complaint is flawed and, thus, defendant Village cannot maintain a cross-claim against the Agency which is wholly

⁹ See McClure v. Deerland Corporation, 585 A.2d 19, 22, 401 Pa.Super. 226, 231 (1991).

dependent on the First Amended Complaint. This argument again mirrors the argument in the Agency's motion to dismiss Alliance's cross-claims. Once again, I incorporate my preceding discussion on this issue. Therefore, the Village's cross-claims against the Agency remain viable regardless of plaintiffs' failure to plead fraud with particularity against the Agency. Accordingly, defendant Agency's motion to dismiss the Village's cross-claims is denied.

CONCLUSION

For the foregoing reasons, I grant Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint for failure to plead fraud with particularity pursuant to Federal Rule of Civil Procedure 9(b). However, I grant plaintiffs leave to file a second amended complaint. In addition, I deny Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant Alliance Companies SA, LLC's Cross-Claims. I also deny Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORE CONSTRUCTION &)
REMEDICATION, INC.,) Civil Action
COPLAY AGGREGATES, INC.,) No. 06-CV-1346
)
Plaintiffs)
)
vs.)
)
VILLAGE OF SPRING VALLEY, NY,)
THE ALLIANCE COMPANIES)
SA, LLC, and)
ROCKLAND COUNTY DRAINAGE)
AGENCY,)
)
Defendants)

O R D E R

NOW, this 27th day of September, 2007, upon consideration of the following motions:

1. Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint, which motion and accompanying memorandum of law were filed November 13, 2006; together with:
 - a. Plaintiffs' Memorandum of Law in Opposition to Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint, which memorandum was filed November 30, 2006;

2. Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant Alliance Companies SA, LLC's Cross-Claims, which motion and accompanying memorandum of law were filed January 5, 2007; together with:
 - a. Defendant Alliance Companies SA, LLC's Response to the Motion to Dismiss Crossclaims Filed on Behalf of Defendant Rockland County Drainage Agency, which response was filed January 19, 2007;
3. Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims, which motion together with accompanying memorandum of law were filed January 22, 2007; together with:
 - a. Defendant Village of Spring Valley, NY's Response to Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims, which response was filed February 5, 2007;

it appearing that Counts II and IV of plaintiffs' First Amended Complaint (docket entry 31) are the sole two claims asserted against Rockland County Drainage Agency; and for the reasons

expressed in the accompanying Opinion,

IT ORDERED that Defendant Rockland County Drainage Agency's Motion to Dismiss the Amended Complaint is granted.

IT FURTHER ORDERED that Counts II and IV of plaintiffs' First Amended Complaint are dismissed against defendant Rockland County Drainage Agency.

IT FURTHER ORDERED that plaintiffs' First Amended Complaint against defendant Rockland County Drainage Agency is dismissed.

IT IS FURTHER ORDERED that plaintiffs shall until October 15, 2007 to file a second amended complaint.

IT FURTHER ORDERED that Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant Alliance Companies SA, LLC's Cross-Claims is denied.

IT FURTHER ORDERED that Defendant Rockland County Drainage Agency's Motion to Dismiss Defendant the Village of Spring Valley, New York's Cross-Claims is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge