

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

KEYSTONE COKE COMPANY, et al. : CIVIL ACTION
:
v. :
:
H. DONALD PASQUALE, et al. : NO. 97-6074

MEMORANDUM ORDER

This action arises from environmental contamination existing at two sites in Upper Merion Township, Montgomery County, Pennsylvania. Pursuant to an Administrative Order on Consent, plaintiffs Keystone Coke Company ("Keystone") and Vesper Corporation ("Vesper") and non-party Beazer East Corporation are presently conducting a remedial investigation and feasibility study ("RI/FS") at these sites under the supervision of the Environmental Protection Agency ("EPA") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

In the instant action, plaintiffs have asserted federal and state law claims arising from the alleged activity of defendants in connection with the contaminated sites. Presently before the court are the motions of defendants H. Donald Pasquale, Out Parcels, Inc., Swedel Road Corp., Each Parcels, Inc., Asis, Inc., Ragm Settlement Corporation, R-T Option Corp., Crater Resources, Inc. and Haploid Corp. to dismiss Counts II and VIII of plaintiffs' complaint. Count II pleads a cause of action under the citizen suit provisions of the Resource Conservation

and Recovery Act ("RCRA"), 42 U.S.C. § 6973(a)(1)(B), which defendants seek to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). Count VIII pleads a claim against defendants for common law indemnity which defendants seek to dismiss under Fed. R. Civ. P. 12(b)(6).

Count II is premised on allegations that defendants are contributing or have contributed to the environmental contamination present at one of the sites. Defendants contend that plaintiffs fail to satisfy the "jurisdictional" requirements of the RCRA which provide that "no [citizen suit] may be commenced" regarding sites where the EPA or a state "has incurred costs to initiate Remedial Investigation and Feasibility Study [under CERCLA] and is diligently proceeding with a remedial action under [CERCLA]," or when the EPA has "obtained a consent order (including a consent decree) or issued an administrative order under section 106 [of CERCLA] or section 6973 of [the RCRA] pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study, or proceeding with a remedial action." 42 U.S.C. § 6972(b)(2)(B) (iii) and (iv).¹ Plaintiffs who seek to bring a citizen suit, however, are "prohibited only as to the scope and duration of the administrative order referred to in clause (iv)." Whether viewed

¹ Plaintiffs acknowledge in a footnote in their brief that an order issued pursuant to the subsequently enacted § 122 of CERCLA would also be covered by § 6972(b)(2)(B)(iv).

as jurisdictional, as a procedural bar or as a matter of standing, this language is preclusive.

Defendants contend that because it is clear from the Complaint that the EPA is undertaking actions described in § 6972(b)(2)(B)(iii) and plaintiffs are performing a RI/FS pursuant to a consent order, the citizen suit (Count II) is barred.

Plaintiffs contend that § 6972(b)(2)(B)(iii) is not applicable because the EPA is not "diligently" proceeding with a "remedial action." They contend that § 6972(b)(2)(B)(iv) is not preclusive because defendants are not parties to the consent order and the scope of that order does not encompass a remedial action at the site in issue.

Count VIII is premised on allegations that defendants are primarily responsible for the contamination at issue and thus plaintiffs are entitled to common law indemnification from them. Defendants argue that the indemnification claim is preempted by CERCLA and that plaintiffs have not alleged in any event that they are without fault.

In Pottstown Industrial Complex v. P.T.I. Services, Inc., 1992 WL 50084 (E.D. Pa. Mar. 10, 1992), relied on by plaintiffs, a claim for indemnity survived a motion to dismiss when the plaintiff alleged that the defendant-lessee was solely responsible for the environmental contamination at issue. Non-

contractual indemnification is available under Pennsylvania law only to a party who is faultless and is required to pay damages solely by operation of law for the acts of another. See In re One Meridian Plaza Fire Litigation, 820 F. Supp. 1492, 1496 (E.D. Pa. 1993); Walton v. AVCO Corp., 610 A.2d 454, 460 (Pa. 1992).

Plaintiffs do not squarely allege that they are faultless. That plaintiffs did not admit fault in the consent order, as they stress in their brief, is not a substitute for an affirmative averment of faultlessness in their complaint. Perhaps this could be cured by an amendment if such an averment could be made consistent with Fed. R. Civ. P. 11, however, such a claim is nevertheless preempted.² The only costs apparent for which plaintiffs seek indemnification are costs incurred pursuant to CERCLA and for which CERCLA provides recovery. See In re Reading Co., 115 F.3d 1111, 1117 (3d Cir. 1997); M & M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683, 689 (M.D. Pa. 1997) (holding common law indemnification claim of plaintiff alleging it was innocent party is preempted).³

The consent order requires an investigation and study to determine, inter alia, the risks posed and the appropriate

² The issue of preemption was never raised or addressed in Pottstown Industrial Complex.

³ Plaintiffs' common law contribution claim in Count VI is also clearly preempted, but defendants do not seek dismissal of that count in their motion.

remedial action. This would appear to be "consistent with" effectuating a "permanent remedy." See 42 U.S.C. § 9601(24) (defining "remedial action"). Accepting that a RI/FS, as a logical predicate to remediation, is a "remedial action," § 6972(b)(2)(B)(iii) when meaningfully read in its entirety "require[s] both that the EPA has initiated a RI/FS and is diligently proceeding with some remedial action beyond the [RI/FS]." Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1509 (E.D. Wisc. 1992); Courtalds Aerospace, Inc. v. Huffman, 1994 WL 508163, *3 (E.D. Cal. June 9, 1994) (citing Acme). Count II is thus not barred by § 6972(b)(2)(B)(iii).

Plaintiffs are conducting a RI/FS pursuant to a consent order. They do not and could not predicate their claim on an alleged lack of diligence on their part as "responsible parties." A citizen suit is not beyond the scope of a consent order merely because the named defendants are not parties to the order. See Acme Printing Ink co. v. Menard, Inc., 881 F. Supp. 1237, 1245 (E.D. Wisc. 1995). Rather, the question is whether the order addresses the same risks and is designed to achieve the same remedial effect as the suit. Id. This clearly appears to be the situation in the instant case. Indeed, the principal relief sought is an order requiring defendants to take action "to investigate, to remediate and to abate [dangerous] conditions" and to undertake "any remedial actions which the EPA deems

appropriate based on the results of the RI/FS." Count II is thus barred by § 6972(b)(2)(B)(iv).

ACCORDINGLY, this day of June, 1998, upon consideration of defendants' Motions to Dismiss Counts II and VIII of the Complaint (Docs. #3, 4 and 7) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motions are **GRANTED**.

BY THE COURT:

JAY C. WALDMAN, J.