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

KEYSTONE COKE COMPANY AND VESPER CORPORATION, Plaintiffs, v. H. DONALD PASQUALE, HAPLOID CORP., OUT PARCELS, INC., SWEDELAND ROAD CORPORATION, CRATER RESOURCES, INC., EACH PARCEL ASIS, INC., RAGM SETTLEMENT CORPORATION, R-T OPTION CORP., UNKNOWN PASQUALE ENTITIES 1-100, Defendants.	:	
==========	:	CIVIL ACTION
H. DONALD PASQUALE, OUT PARCELS, INC., SWEDELAND ROAD CORPORATION, EACH PARCEL ASIS, INC., RAGM SETTLEMENT CORPORATION, R-T OPTION CORP., Third-Party Plaintiffs, v. BEAZER EAST, INC., f/k/a KOPPERS COMPANY, INC., DRUMMOND COMPANY INC. (SUCCESSOR TO ALABAMA BY-PRODUCTS CORPORATION), PHILADELPHIA NEWSPAPER REALTY, INC., PHILADELPHIA NEWSPAPERS, INC., Third-Party Defendants.	:	NO. 97-6074
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HAPLOID CORP. AND CRATER RESOURCES, INC., Third-Party Plaintiffs, v. GULPH MILLS GOLF CLUB Third-Party Defendant.	:	

M E M O R A N D U M

WALDMAN, J. **March 9, 1999**

I. Introduction

This action arises from the cleanup of environmental contamination at a site in Upper Merion Township, Montgomery Count. In Count I of their third-party complaint Crater Resources, Inc. ("Crater Resources") and Haploid Corporation ("Haploid") assert claims against Gulph Mills Golf Club ("Gulph Mills") for recovery of cleanup costs under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and for contribution under § 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f). In Count II they assert claims for recovery of costs, contribution and nuisance under §§ 507, 701, 705 and 1101 of the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. § 6020.101 et seq. In Count III they assert claims under the Pennsylvania Clean Streams Law ("CSL"), 35 P.S. § 691.1 et seq.

Presently before the court are the alternative motions of third-party defendant Gulph Mills to dismiss or stay all claims asserted against it in the third-party complaint of Crater Resources and Haploid Corporation.

II. Legal Standard

In considering a motion to dismiss, the court accepts as true the factual allegations in the complaint and the reasonable inferences therefrom, and views them in a light most

favorable to the nonmovant. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal for failure to state a claim is appropriate only when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987).

III. Facts

Haploid and Crater Resources allege the following pertinent facts.

Haploid, acting for Crater Resources and Swedeland Corporation pursuant to a straw-party agreement, purchased land containing a portion of the subject site in 1979. Haploid acquired the property subject to an easement reserving to the previous owner the right to continue discharging effluent from its coke plant into Quarry No. 3, which was partially located on the property. The property was later subdivided and a parcel containing fifty per cent of Quarry No. 3 was transferred to Crater Resources. When the property was acquired by Haploid and during its ownership and that of Crater Resources effluent was discharged into this quarry.

Gulph Mills purchased property containing portions of Quarry No. 3 in 1954 and in 1973 respectively. The combined

portions account for the remaining fifty per cent of Quarry No. 3 not owned by Crater Resources. In these transactions, Gulph Mills permitted the seller to reserve the right to continue using Quarry No. 3 for disposal of effluent from the coke plant. Effluent was discharged through December 31, 1980.

Crater Resources and Haploid have incurred response costs and will continue to incur costs associated with the cleanup of the property.

IV. Discussion

A. Count I

Gulph Mills argues the § 107 claims cannot be maintained because Crater Resources and Haploid are potentially responsible persons under the terms of CERCLA. A person who is "a potentially responsible person under [CERCLA] § 107(a), who is not entitled to any of the defenses enumerated under § 107(b), may not bring a § 107 action against another potentially responsible person," but rather is limited to a claim for contribution under § 113. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120 (3d Cir. 1997). See also In re Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997) (§ 107 claim for "all response costs" was one for contribution which must be brought under § 113(f)).

As owners of a portion of the quarry during the disposal of a hazardous substance, Crater Resources and Haploid are potentially responsible persons unless they can establish a defense under § 107(b). See 42 U.S.C. § 9607(a)(2); Halliburton, 111 F.3d at 1120 n.2.

Section 107(b) provides a defense if the release of a hazardous substance was caused solely by (1) an act of God; (2) an act of War; or, (3) the conduct of a third party other than an agent of the defendant or one whose conduct occurs in connection with a direct or indirect contractual relationship with the defendant. See 42 U.S.C. § 9607(b); FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833, 841 (3d Cir. 1994). The pleadings do not implicate the first two defenses and the third is unavailable to a party who purchased directly or indirectly from the polluting third party unless he can prove he is an "innocent owner." See United States v. CDMG Realty Co., 96 F.3d 706, 716 (3d Cir. 1996).

A defendant can sustain an "innocent owner" defense only if he establishes that the facility in question "was acquired after the disposal or placement of the hazardous substance on, in or at the facility and that at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility." Id.[1] If the deed to Haploid provided an easement for the discharge of the hazardous effluent from the coke plant neither Crater Resources nor Haploid could claim ignorance.

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[1] See 42 U.S.C. § 9601(9)(B) (defining "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located").

Indeed, Crater Resources and Haploid do not deny that they are potentially responsible parties or claim that they can establish any of the defenses specified in § 107(b). Rather, they argue that although they cannot meet the literal requirements of an "innocent owner" defense, they are nonetheless "'innocent' in the common sense meaning of that word" and thus should be allowed to pursue their § 107 claims.[2] This contention is foreclosed by the strict test adopted by the Third Circuit. See Halliburton, 111 F.3d at 1124 (a party who cannot satisfy the requirements of the "innocent owner" defense may not maintain a § 107 claim against another potentially responsible party).

Gulph Mills also argues that the § 113 contribution claims should be dismissed because Haploid and Crater Resources did not allege they have assumed more than an equitable share of the cleanup costs. While the third-party complaint does not contain an explicit allegation that Haploid and Crater Resources have paid more than their fair share, this is fairly implied. The complaint gives clear notice of the claim and its basis in law. As such, the issue of whether an unequitable share has been paid is a matter properly addressed on a motion for summary judgment or at trial.

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[2] Haploid and Crater Resources rely on several cases from the Seventh Circuit. The Seventh Circuit, however, has adopted a less stringent standard for § 107 claims than the Third Circuit. See Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235, 1241 (7th Cir. 1997) ("landowners who allege that they did not pollute the site in any way may sue for their direct response costs under § 107(a)").

B. Count II

Gulph Mills contends that the HSCA claims asserted in Count II are barred because Crater Resources and Haploid did not follow the notice provisions of § 1115 of the HSCA, 35 P.S. § 6020.1115. The argument is predicated on an assumption that the HSCA claims may only be brought pursuant to § 1115 as the citizen suit provided in that section is the only vehicle by which a private litigant can enforce terms of the Act.

Other courts, however, have reasonably predicted that the Pennsylvania Supreme Court would recognize a private cause of action directly under the substantive provisions of the HSCA. See, e.g., Smith v. Weaver, 665 A.2d 1215, 1221 (Pa. Super. 1995) (private cause of action exists under the HSCA); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 407 (M.D. Pa. 1998) (HSCA authorizes private cause of action); Bethlehem Iron Works, Inc. v. Lewis Industries, Inc., 891 F. Supp. 221, 225-26 (E.D. Pa. 1995) (same). The notice provisions of § 1115 do not govern such private actions. See M&M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683, 688-89 (M.D. Pa. 1997) (distinguishing for notification purposes private actions under §§ 702 and 1101 from citizen suits under § 1115).[3]

[3] Redland Soccer Club v. Department of the Army, 696 A.2d 137, 147 (Pa. 1997), cited by Gulph Mills, is inapposite as it deals solely with the requirements of a citizen suit under § 1115 and not with a private action under §§ 702 or 1101. See Joshua Hill, Inc. v. Whitemarsh township Auth., 46 ERC 1883, 1887 (3d Cir. 1997) (noting Redland Soccer Club "never intimates that citizen suits are the only private causes of action available under the statute" and recognizing such claims under §§ 702 and 1101 without requiring compliance with notice provisions of § 1115).

Gulph Mills' argument that Crater Resources and Haploid have not properly pled claims for contribution under the HSCA because they do not allege they have assumed a disproportionate share of the cleanup costs is rejected for the same reason as was the identical argument made with regard to the CERCLA contribution claims.

C. Count III

Gulph Mills argues Count III should be dismissed because Crater Resources and Haploid lack standing to bring a claim under the CSL. Under the terms of the CSL, "any person having an interest which is or may be adversely affected" has standing to bring an action. See 35 P.S. § 691.601(c). As adjacent landowners who have sustained response costs and may have future costs, Crater Resources and Haploid satisfy this requirement. See Dresser Ind., Inc. v. Commonwealth, 604 A.2d 1177, 1184 (Pa. Commw. Ct. 1992) (mine lessee has standing when it may have to remedy seepage of hazardous material from land owned by defendant).

Gulph Mills also contends that Crater Resources and Haploid cannot maintain a claim under the CSL because they failed to comply with the notice provisions of 35 P.S. § 691.601(e). Section 691.601(e) provides in relevant part: "No action pursuant to this section may be commenced prior to sixty days after the plaintiff has given notice in writing of the violation to the department and to any alleged violator."

Crater Resources and Haploid acknowledge they did not give notice to the DER and Gulph Mills. They do aver that the plaintiffs to the original complaint provided such notice. Although the statute is ambiguous as to whether a third-party plaintiff must provide separate notice, it seems unreasonable to impose such a requirement. The statute does not require notice of intent to bring suit but merely notice of the violation itself. See Dresser Industries, 604 A.2d at 1183-84. This purpose would not be furthered by requiring a potential third-party plaintiff to provide duplicative notice. Such a duty would needlessly hinder environmental litigation by requiring a third-party plaintiff to wait sixty days before serving the third-party complaint. It is unlikely that the legislature intended such a result.

Finally, Gulph Mills asserts that the CSL does not provide for monetary relief. Crater Resources and Haploid do not dispute this point and affirm that they are pursuing only injunctive relief pursuant to the CSL.

D. Alternative Request for a Stay

Gulph Mills seeks a stay of all undismissed third-party claims on the ground that a settlement between itself and the EPA is impending.

A stay is incidental to the inherent power of the court to manage litigation and may be entered at the court's

discretion. See Landis v. North American Co., 299 U.S. 248, 254-55 (1936); United States v. Breyer, 41 F.3d 884, 893 (3d Cir. 1994). A stay, however, is an extraordinary measure and the moving party must "make out a clear case of hardship or inequity in being required to go forward." Landis, 299 U.S. at 255. Gulph Mills has not met this burden.

Gulph Mills represents that it has reached an agreement in principle with agents of the EPA which, pursuant to CERCLA § 113(f)(2), would dispose of its liability in the instant action. At this stage, however, the settlement and its terms remain speculative. The Department of Justice has yet to agree to a settlement and any final settlement would require judicial approval. See 42 U.S.C. 9613(f)(2). Approval of a settlement is not automatic and may be denied if the terms are not fair and reasonable. See, e.g., Kelley v. A.T. Wagner, 930 F. Supp. 293, 298 (E.D. Mich. 1996).

Moreover, even if executed and approved, the agreement may not dispose of all the claims in the third-party complaint because they may concern matters beyond the scope of the settlement terms. See Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 766 (7th Cir. 1994) (allowing contribution claim to proceed against settling party for matters distinct from those addressed in settlement); United States v. Union Gas Co., 743 F. Supp. 1144, 1153 (E.D. Pa. 1990) (immunity does not apply to

matters not addressed in settlement). Gulph Mills has not disclosed the terms of the proposed agreement and it is thus impossible to determine whether its terms would be broad enough to provide immunity against all of the claims asserted by Haploid and Crater Resources.

If courts were to impose a stay whenever a defendant was negotiating a potential settlement with the EPA, CERCLA litigation could be prolonged indefinitely and a claim for contribution by a party with substantial cleanup costs could easily be frustrated.

V. Conclusion

For the foregoing reasons, the motion to dismiss will be granted as to the § 107 claims and otherwise denied. the motion for a stay will be denied. An appropriate order will be entered.

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O R D E R

AND NOW, this day of March, 1999, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that the Motion of Gulph Mills Golf Club to Dismiss All Claims in the Third-Party Complaint of Crater Resources, Inc. and Haploid Corporation (Doc. #49, Part 2) is **GRANTED** in part in that the claim in Count I for recovery under § 107 of CERCLA, 42 U.S.C. § 9607, is **DISMISSED** and said Motion is otherwise **DENIED;** and, the Motion of Gulph Mills Golf Club for a Stay (Doc. #49, Part 1) is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.