UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STRATFORD HOLDING, LLC, Plaintiff, v. FOG CAP RETAIL INVESTORS LLC and FOOTLOCKER RETAIL, INC., Defendants.	CIVIL ACTION FILE NO. 1:11-CV-3463-SCJ

O R D E R

This cost recovery action under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, is before the Court on Defendants' motions to dismiss [Doc. Nos. 7 and 8].

I. BACKGROUND

Stratford Holding, LLC (Stratford) discovered that its premises were contaminated with the solvent tetrachloroethen (PCE)—a hazardous substance. On December 2, 1975, Stratford's predecessor, 63 Associates, Inc., had leased the premises to the Kinney Shoe Corporation. Foot Locker Retail, Inc. (Foot Locker) is the successor of the Kinney Shoe Corporation and, as such, became the lessee of the premises. On October 9, 2002, Foot Locker assigned its lease to Fog Cap Retail Investors LLC (Fog Cap).

Since 1990, a commercial dry cleaning business has occupied the premises as a sub-lessee.[1] According to Stratford, the sub-lessee's dry cleaning operations have involved the use of the PCE that has contaminated the soil and groundwater on its property. An environmental inspection in April 2010 revealed that the sub-lessee was employing poor housekeeping practices.[2] In light of "the degree of risk dry cleaners are known to pose," Stratford concluded that "there was a significant chance that soil and groundwater" at the premises may be contaminated with PCE [Doc. No. 12, 5]. The following year, in March 2011, Stratford demanded that Defendants clean up the premises as required by law and the Lease Agreement. Defendants did not accede to the demand. In May 2011, Stratford renewed its demand and asked Fog Cap to assume the costs of investigating and remediating any PCE contamination. Fog Cap commissioned an environmental investigation, but it failed to reveal PCE contamination. Consequently, Fog Cap refused to take additional action. Considering Fog Cap's investigation less than thorough, Stratford hired another environmental consulting firm to conduct a second assessment of the

[1] Fog Cap continued to lease the premises to the dry cleaning business after acquiring the lease assignment from Foot Locker. Under the Lease Agreement, both Foot Locker and Fog Cap are considered to have subleased the premises to the dry cleaning business.

[2] The inspection was apparently visual and did not involve the testing of soil and groundwater samples.

premises. A test of soil and groundwater samples from the premises revealed PCE concentrations as high as 1200 ppb (soil) and 56 ppb (groundwater).

In September 2011, citing the terms of the lease, Stratford demanded that Defendants reimburse it for costs it incurred in its investigations, conduct their own investigations into the PCE contamination, and restore the premises to its pre-lease condition. And on October 11, 2011, Stratford filed suit under CERCLA seeking reimbursement for the costs it has incurred in assessing the PCE contamination (Count I), under CERCLA §§ 107 and 113,[3] and a declaratory judgment for future costs (Count II), pursuant to 28 U.S.C. § 2201. In Count III of the complaint, Stratford seeks a declaratory judgment regarding Defendants' obligations under the lease, and it seeks the recovery of costs related to its investigation into the PCE contamination based on Defendants' breach of the lease in Count IV. Count V asserts liability for nuisance and negligence.

In lieu of their answers, Defendants filed motions to dismiss. They argue that the federal law claims (Counts I and II) should be dismissed as Stratford is not entitled to recoup costs under CERCLA and that the Court should decline to exercise

[3] In addition to asserting claims under CERCLA §§ 107 and 113, Count I also includes a request for attorneys' fees. Defendants argue that Stratford is not entitled to bring a claim for contribution under § 113 and CERCLA does not authorize the recovery of litigation costs. Stratford concedes both points [Doc. No. 12, 20 n.4].

supplemental jurisdiction over Stratford's pendant state law claims (Counts III through V) or, alternatively, dismiss those Counts for failure to state a claim.

II. LEGAL STANDARD

A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–62, 570 (2007) (retiring the prior *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), standard which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In *Iqbal*, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 129 S. Ct. at 1949.

In *Twombly*, the Supreme Court emphasized a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the

assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (internal citations and emphasis omitted).

The court, at the motion to dismiss stage, accepts all well-pleaded facts as true and construes all reasonable inferences from the facts "in the light most favorable to the plaintiff." *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1261 (11th Cir. 2006).

III. DISCUSSION

A. COST OF RECOVERY UNDER CERCLA

"CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs." *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009). PRPs (potentially responsible parties) are liable for all government-incurred "costs of removal or remedial action" as well as "any other necessary costs of response incurred by any other party consistent with the national contingency plan." 42 U.S.C. § 9067(a)(4)(A)–(B). PRPs include "the owner and operator of a . . . facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(1)–(2).

A prima facie case for cost recovery under CERCLA is established by showing: "1) that the site is a CERCLA 'facility'; 2) that there was a release or threatened release of a hazardous substance; 3) which caused the plaintiff to incur

response costs consistent with the National Contingency Plan; and 4) the defendant is a [PRP]." *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1302 (11th Cir. 2002). According to Stratford, Defendants qualify as PRPs under § 9607(a)(4)(B) as each was an owner and/or operator of the premises at the time when the PCE release occurred and Fog Cap additionally qualifies under § 9607(a)(4)(A) because it is the current owner and/or operator of the premises. Defendants do not dispute that they are PRPs. Defendants also do not dispute that the premises at issue qualify as a CERCLA facility or that a hazardous substance was released on the premises.

The point of contention is whether the costs incurred by Stratford were necessary. Defendants insist that Stratford cannot state a claim for cost recovery because it has not incurred necessary response costs under CERCLA. Response "costs are recoverable under CERCLA only if 'necessary.' It is generally agreed that this standard requires that an actual and real threat to human health or the environment exist before initiating a response action." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (citing *Southfund Partners III v. Sears, Roebuck & Co.*, 57 F. Supp. 2d 1369, 1378 (N.D. Ga. 1999). Here, Stratford notified the Georgia Environmental Protection Division (EPD) upon obtaining test results showing PCE contamination at a level requiring such notification (180 ppb for soil

and any detectible amount for groundwater) [Doc. No. 8-3]. On October 13, 2011, after conducting its own evaluation, the EPD issued a Release Notification stating: "EDP has no reason to believe that a release exceeding a reportable quantity has occurred at the property" [Doc. No. 8-2, 1].[4] The EPD is required to "list a site on the Hazardous Site Inventory [HSI] if the Director determines that a release exceeding a reportable quantity has occurred or that a release poses a danger to human health and the environment." Ga. Comp. R. & Regs. 391-3-19-.05(1). The EPD determined not to list the premises at issue on its HSI. The Release Notification, which issued two days after the filing of this complaint, contained no indication that EDP would require Stratford to undertake any further investigations or employ remedial measures to address the contamination or future threats of contamination.

Stratford may not recover its investigation costs under CERCLA, as the costs were not necessary. As noted above, a plaintiff may recover costs for initiating a response only where an actual and real threat to human health or the environment

[4] Stratford's notification letter to the EPD and the EPD's Release Notification, which was issued following the filing of the complaint, comprise matters outside the pleadings as neither is referenced in the complaint. The Court considers these documents at the motion to dismiss stage, however, as they are central to Stratford's claim for recovery of necessary costs and as their authenticity is not challenged. *Speaker v. U.S. Dept. of Health and Human Servs. Ctrs. for Disease Control and Prevention*, 623 F.3d 1371, 1379–80 (11th Cir. 2010). Furthermore, the Court may consider these documents as they are a matter of public record. *Universal Express Inc., v. U.S. S.E.C.*, 177 F. App'x 52, 53 (11th Cir. 2006) ("Public records are among the permissible facts that a district court may consider."). Stratford has not argued against the Court's consideration of these documents.

exists prior to the initiation of the response. The premises do not pose a threat to human health or the environment. The EDP is required to list a contaminated site on its HSI if the contamination poses a threat to human health or the environment. Here, the EDP determined that the PCE contamination did not rise to a level that required the listing of the premises on its HSI. Stratford cites several cases for the proposition that the costs it incurred to assess and evaluate the contamination are recoverable as response costs under CERCLA even if a clean-up program is not implemented. The Court agrees that "[a] prima facie case on liability under CERCLA does not include the implementation of clean-up programs. All that the law requires before investigation and monitoring costs are recoverable is that a release of hazardous substance caused the incurrence of necessary response costs consistent with the NCP." *Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, No. 388CV873J20HTS, 2005 WL 3533163, at *8 (M.D. Fla. Dec. 21, 2005) (emphasis added). The cases cited by Stratford, however, are distinguishable as none of them address a situation where a government agency has determined that the contamination does not rise to a reportable level or poses a threat. This Court's decision in *Southfund*, is on point and persuasive. In *Southfund*, the plaintiff sought to recover costs for its remedial efforts to remove contaminants from soil and groundwater following a determination by the Georgia Department of Natural

Resources that the contaminant release was under the reportable quantity. 57 F. Supp. 2d at 1378. At summary judgment, the Court concluded that the plaintiff was not entitled to recover its costs because "[w]ithout any evidence [that] DNR required the remedial efforts undertaken to ameliorate the effects of contamination, no reasonable juror could find the response costs to be necessary." *Id. See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (allegation by plaintiff "that he was required by state and local agencies to incur the response cost that he seeks to recover" sufficient to support a claim that the cost incurred was necessary but reserving opinion on "whether response costs not required by state and local agencies may also be 'necessary'"). While a plaintiff need not "show agency action as a prerequisite to cost recovery," *Carson*, 270 F.3d at 872, here, the EPD did act. It undertook its own assessment of the premises. It was required to place the premises on its HSI list if the contamination posed a threat to human health or the environment; it decided not to do so. As in *Southfund*, here, the EPD has not required any remedial efforts and the premises are not listed on the HSI. Although Stratford's complaint contains the conclusory assertion that its costs of response are consistent with the NCP [Doc. No. 1, 41], it fails to adduce any facts to indicate that its response was necessary to allay an existing threat to human health or the environment. Stratford asserts that its premises are contaminated with PCE,

however, the contamination is not above the reportable level and the premises have not been placed on the HSI.[5] Stratford provides no additional facts indicating that the PCE contamination was at a level to pose an actual threat necessitating the response it undertook.

Furthermore, the Court is unpersuaded by Stratford's contention that the premises are undergoing the initial discovery and preliminary assessment stage and that only a Remedial Investigation and Feasibility Study (RI/FS), as outlined under the NCP, can determine whether a site is a threat to human health or the environment.[6] Although *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwrites, Inc.*, 240 F.3d 534 (6th Cir. 2001), the case cited by Stratford in support of its proposition, describes the RI/FS process in general, it does not indicate that only the RI/FS sampling guidelines are the controlling guidelines for threat assessment. Nevertheless, even if a completed RI/FS is in fact required to determine that a property poses a threat, Stratford's claim fails as premature. The complaint

[5] The Court is unpersuaded by Stratford's argument that whether the contaminant release is of a reportable quantity is irrelevant to the question of necessity of the response in a private action to recover costs. The case it cites in support concerns government action and stands for the proposition that "the 'reportable quantities' concept has no relation to when a government can take a removal action." *United States v. Saporito*, No. 07 C 3169, 2011 WL 2473332, at *7 (N.D. Ill. June 22, 2011) (emphasis added).

[6] According to 40 C.F.R. § 300.5, "Feasibility study (FS) means a study undertaken by the lead agency to develop and evaluate options for remedial actions. The FS emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI)."

provides no indication that the Environmental Protection Agency (EPA) has completed such a process. By Stratford's own admission, "the testing performed thus far . . . is still at the initial discovery and preliminary assessment stage" [Doc. No. 12, 11]. Thus, before the completion of the RI/FS process, it cannot allege that the premises are a threat to human health and environment. In the absence of such an allegation, its investigatory costs cannot be deemed necessary. Accordingly, Count I of the complaint is dismissed.

Stratford has also failed to state a claim for declaratory judgment as to Defendants' liability for an equitable share of future response costs addressing the PCE contamination. Stratford, in its complaint, assumes that it will incur future costs related to the contamination. "To be entitled to declaratory relief under § 107(a), a party need only prove liability for costs already incurred." *Reichhold, Inc. v. U.S. Metals Refining Co.*, 522 F. Supp. 2d 724, 729 (D. N.J. 2007). As Stratford has failed to establish a claim for the recovery of costs it has already incurred, its claim for declaratory judgment also fails.[7] As such, Count II of the complaint is dismissed.

B. STATE LAW CLAIMS

[7] Additionally, while Stratford opposes Defendants' motions to dismiss by arguing that its investigation costs are recoverable under CERCLA, it fails to address Defendants' claim that a declaratory judgment as to their future liability is unwarranted.

Because Stratford's federal claims are dismissed, the Court declines to exercise supplemental jurisdiction over its state law claims. *Arnold v. Tuskegee Univ.*, 212 F. App'x 803, 811 (11th Cir. 2006) ("When the district court has dismissed all federal claims from a case, there is a strong argument for declining to exercise supplemental jurisdiction over the remaining state law claims.") Thus, Counts III, IV, and V are dismissed.

IV. CONCLUSION

For the above mentioned reasons, Defendants' motions to dismiss [Doc. Nos. 7 and 8] are **GRANTED**. As no additional claims remain pending, the Clerk is **DIRECTED** to terminate this action.

SO ORDERED, this 17th day of September, 2012.

s/Steve C. Jones
STEVE C. JONES
United States District Judge