IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO, EX REL. JIM PETRO ATTORNEY GENERAL OF OHIO,	)	CASE NO. CV 2006 07 4740
Plaintiff,	)	JUDGE BURNHAM UNRUH
vs.	)	
9150 GROUP, L.P., *et al.*,	)	**ORDER**
Defendants.	)	

This matter comes before the Court on Plaintiff's Motion to Dismiss Defendants' Counterclaim. Plaintiff argues that the Defendants have failed to state a claim upon which relief can be granted, pursuant to Civil Rule 12(B)(6) and that the Court lacks the authority to award the relief requested to the Defendants. The Court has considered the Plaintiff's Motion to Dismiss, Defendants' Brief in Opposition, the Civil Rules and applicable law. Upon due consideration, the Court GRANTS Plaintiff's Motion to Dismiss.

The Status Conference scheduled for March 20, 2007 at 8:30 a.m. is CONFIRMED.

I. Statement of Facts

This case involves an industrial property site located at 9150 Valley View, Macedonia, Summit County, Ohio. The Property has in the past been the location of an aerosol company that manufactured private label aerosol products for the automotive, industrial, and hobby and craft

industries. The State alleges that Defendants violated Ohio's hazardous waste rules and the Cessation of Regulated Operations rules.

Defendants 9150 Group, LLC, 9150 Group, L.P., Larry Albright, Irving Sands, and Gerald C. West ("Defendants") filed an Amended Answer and Counterclaim on December 8, 2006. Defendants claim that prior to their ownership of the Property, Aerosol Systems (which may have changed names to Specialty Chemical Resources, Inc.) (hereinafter "Aerosol Systems") owned and operated an aerosol manufacturing business at the Property. Defendants allege that Plaintiff sued Aerosol Systems for violations of Chapter 3734 of the Revised Code. This lawsuit resulted in a Consent Order requiring Aerosol Systems to implement a Closure Plan to which it agreed. Defendants allege that Aerosol Systems failed to close its facility and remove hazardous waste in accordance with the approved Closure Plan.

With regard to the Plaintiff, Defendants allege that "[t]he State of Ohio, acting on behalf of Ohio EPA and the Director, has failed to enforce the 1990 Consent Order and the Closure Plan by failing to file an injunction and/or action for contempt against Aerosol Systems and/or Hi-Port Aerosol." Defendants request, among other things, that the Court "grant injunctive relief requiring Plaintiff to enforce the current and effective 1990 Consent Order and approved Closure Plan for the Property through a contempt action against Aerosol Systems and/or Hi-Port Aerosol."

In its Motion to Dismiss, Plaintiff argues that Defendants have failed to state a claim upon which relief can be granted. Plaintiff argues that the only allegation that even resembles a claim against the State is found in paragraph 47 (quoted above) where Defendants argue that the State has failed to enforce the 1990 Consent Order against Aerosol Systems. Plaintiff argues that it was within the State's discretion to enforce the 1990 Consent Order with a third-party.

Accordingly, Plaintiff argues that the Court lacks the authority to grant the injunctive relief requested by the Defendants. In other words, Plaintiff argues that the Court cannot force the State to perform a discretionary act. Plaintiff argues that Defendants have not made any other allegations that the EPA failed to do anything that it was required to do. Plaintiff also argues that the Defendants are not without relief for the allegations asserted in their Counterclaim. Plaintiff argues that the Defendants could have brought Aerosol Systems and/or Hi-Port Aerosol into this lawsuit as third-parties. Finally, Plaintiff argues that, to the extent that the Defendants' Counterclaim seeks a monetary award for diminution in property value, the Defendants must bring their claim in the Court of Claims.

Defendants filed a Brief in Opposition to the Plaintiff's Motion to Dismiss on January 30, 2007. Defendants argue that, once the State made the decision to pursue a lawsuit against Aerosol Systems, it was obligated to enforce the resulting 1990 Consent Order. Defendants argue that "once an agency chooses to act, that action is reviewable by the Courts." Defendants also argue that they do not have any other relief because they cannot require Aerosol Systems or others to comply with Ohio's environmental laws. Defendants argue that they cannot bring a third-party Complaint against Aerosol Systems to comply with the 1990 Consent Order. Defendants do not feel that they should be held liable for Aerosol System's failure to comply with this Order. They also feel that the present case would not have been brought against them if the 1990 Consent Order would have been enforced. Defendants also argue that they are not seeking monetary damages against the State. For this reason, they argue that their claims are not required to be brought in the Court of Claims. Defendants state that they are seeking injunctive relief alone.

II. Law and Analysis

Plaintiff has moved to dismiss Defendants' Counterclaim pursuant to Civil Rule 12(B)(6) and 12(B)(1). To grant a dismissal pursuant to Civ.R. 12(B)(6), it must appear beyond doubt that the party can prove no set of facts entitling him to relief. *Celeste v. Wiseco Piston*, 151 Ohio App.3d 554, 2003 Ohio 703, at *12. In construing a complaint upon a motion to dismiss for failure to state a claim, all factual allegations stated in the pleading must be presumed to be true and all reasonable inferences in favor of the nonmoving party be made. *Id.*

The Defendants' Counterclaim requests that this Court require the Plaintiff to "enforce the current and effective 1990 Consent Order and approved Closure Plan for the Property through a contempt action against Aerosol Systems and/or Hi-Port Aerosol". Plaintiff argues that the enforcement of the 1990 Consent Order is a discretionary enforcement function.

Enforcement decisions are clearly a discretionary function. Ohio Revised Code Section 3734.13 provides in part:

> If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or an term or condition of a permit, license, variance, or order issued thereunder, the director **may** request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction.

Use of the word "may" is generally construed to make the provision in which it is contained optional, permissive or discretionary, at least where there is nothing in the language of the provision to require an unusual interpretation. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, 107, 107.

Plaintiff also cites *Heckler v. Chaney* (1985), 470 U.S. 821. In *Chaney*, the United States Supreme Court opined that an agency's decision whether or not to bring an enforcement action is within the agency's absolute discretion.

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.
>
> An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Defendants attempt to distinguish the present case from *Chaney* and other cases cited by the Plaintiff. Defendants argue that *Chaney* involved an agency that refused to act. Defendants argue that Plaintiff *did* act in this case. The Defendants cite *Chaney* for the proposition that, "when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." Defendants argue that Plaintiff did act to enforce its hazardous waste laws by previously suing Aerosol Systems. Plaintiff argues that this Court now has the authority to enforce the 1990 Consent Order, which resulted from the prior litigation against Aerosol Systems.

The Court is not persuaded by Defendants' arguments. If Defendants' Counterclaim were to prevail, the Plaintiff would be required to take additional legal action against Aerosol Systems to enforce the 1990 Consent Order. The case law cited by Defendants provides that the Court can review action already taken by the State. It does not support the idea that the Court can force the State to continue acting or enforcing its laws. Defendants have not cited any case law in support of its argument. On the other hand, the case law cited by Plaintiff appears to be directly applicable to the present facts. An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's

absolute discretion. *Chaney, supra.* The Court finds that the decision of the State to enforce or bring a contempt action against third-parties, such as Aerosol System, is a discretionary act. This Court cannot force the State to exercise such discretion.

In their Counterclaim, Defendants request that the Court grant the following relief:

a. Grant injunctive relief requiring Plaintiff to enforce the current and effective 1990 Consent Order and approved Closure Plan for the Property through a contempt action against Aerosol Systems and/or Hi-Port Aerosol;

b. Allow 9150 Group, LLC to intervene in *State v. Aerosol Systems,* Summit Co. Common Pleas Court Case No. CV 884-1014;

c. Dismiss Counts One through Three of Plaintiff's Amended Complaint with prejudice; and

d. Award attorney fees, costs and any other such relief as may be necessary, just or appropriate under the circumstances.

The Court finds that it does not have the authority to grant the relief requested by the Defendants in their Counterclaim. For the reasons already stated above, the Court cannot require Plaintiff to bring a contempt action or otherwise enforce its Order against third-parties. If the Defendants can demonstrate that Aerosol Systems or other third-parties are responsible for the violations for which Defendants have been sued, Defendants can raise such evidence in the form of a defense against Plaintiff's claims. As suggested by Plaintiff, Defendants may also be able to pursue third-party claims against Aerosol Systems or other responsible parties.

The Court also does not have the authority to permit the Defendants to intervene in Case Number CV 884-1014, a case which is no longer pending and appears to have been closed for some time. The Court has already considered and denied Defendants' request to Dismiss Counts One through Three of Plaintiff's Amended Complaint. (See Court's Order of November 15, 2006). Finally, the Court notes that the Defendants are seeking injunctive relief only and are not

seeking monetary damages against the State. The Plaintiff's argument regarding the Court of Claim's jurisdiction is *moot.*

In summary, The Court finds that the Defendants have failed to state a claim upon which relief can be granted. Accordingly, the Court GRANTS Plaintiff's Motion to Dismiss.

CONCLUSION

WHEREFORE, upon due consideration, the Court GRANTS the Plaintiff's Motion to Dismiss Defendant's Counterclaim.

The Status Conference scheduled for March 20, 2007 at 8:30 a.m. is CONFIRMED.

IT IS SO ORDERED.

JUDGE BRENDA BURNHAM UNRUH

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