

1100 WEST, LLC, Plaintiff/Counter Defendant,
v.
REDSPOTPAINT & VARNISH CO., INC.,
Defendant/Counter Plaintiff.
No. 1:05-cv-1670-LJM-WTL.

Oct. 15, 2007.

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LARRY J. MCKINNEY, United States Chief District Judge.

Plaintiff, 1100 West, LLC (“1100 West”), filed this action pursuant to the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), for injunctive relief against defendant, RedSpotPaint and Varnish Co., Inc. (“Red Spot”). This matter comes before the Court on Red Spot's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) (“Rule 12(b)(1)”), for lack of standing.

For the following reasons, the Court DENIES Red Spot's Motion to Dismiss.

1100 West is a limited liability company formed by John F. Rogers, II (“Rogers”) and Jerry L. Fruth (“Fruth”). Third Fruth Aff. ¶¶ 2, 5. Rogers and Fruth have conducted business together through various business entities since 1988. Fruth Aff. ¶ 4. In 1990, Rogers and Fruth, as sole partners, formed Pennsylvania Place Partnership (“Pennsylvania Place”).*Id.* ¶ 7. Pennsylvania Place was disbanded sometime after 1999. Fruth Dep. at 121. Pennsylvania Place functioned primarily as a commercial real estate development company. Fruth stated in his affidavit that “Pennsylvania Place was in the business of purchasing older industrial sites, selectively demolishing certain structures on the sites, and reconstructing or reutilizing existing structures on the sites for lease or resale.” Third Fruth Aff. ¶ 6.

In 1999, Pennsylvania Place was converted into 1100 West. Fruth described 1100 West as a limited liability company in the business of “purchasing older industrial sites, selectively demolishing certain structures on the sites, and reconstructing or reutilizing existing structures on the sites for lease or resale.”*Id.* ¶ 7. Due to an inadvertent oversight, the legal title of the seven acre parcel of land owned by Pennsylvania Place was not transferred to 1100 West at the time of Pennsylvania Place's conversion to 1100 West. Rogers Aff. ¶ 7; Fruth Aff. ¶ 7; Rogers Aff. Ex. 4, 1100 West Operating Agreement, Property Description ¶ 4.

A. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

If a district court lacks subject matter jurisdiction over an action, then dismissal is mandated by Rule 12(b)(1). “Subject-matter jurisdiction is the first question in every case, and if the court concludes that it lacks jurisdiction it must proceed no further.” *Illinois v. City of Chicago*, 137 F.3d 474, 478 (7th Cir.1998). On a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, “courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Access 4 All, Inc. v. Chi. Grande, Inc.*, No. 06 C 5250 (N.D.Ill. May 10, 2007) (quoting *Sanner v. Bd. of Trade*, 62 F.3d 918, 925 (7th Cir.1995)). The nonmovant bears the burden of establishing jurisdiction by competent proof where the movant provides evidentiary materials in support of its factual averments. *See Mann v. Hanil Bank*, 900 F.Supp. 1077, 1082 (E.D.Wis.1995); *see also Krizan v. Apfel*, 35 F.Supp.2d 672, 676 (N.D.Ind.1999) (explaining the plaintiff, the nonmovant in the case, must establish competent proof of jurisdiction). “The Seventh Circuit has interpreted ‘competent proof’ as ‘requiring a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists.’” *Access 4 All, Inc.*, 2007 WL 1438167 at *3 (quoting *Retired Chi. Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir.2003)).

1100 West alleges standing to bring its citizen suit

under RCRA, 42 U.S.C. § 6972(a)(1)(B). This RCRA citizen suit provision states:
[A]ny person may commence a civil action on his own behalf-

* * *

(B) against any person, ..., to the extent permitted by the eleventh amendment to the Constitution, ..., who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment....

42 U.S.C.A. § 6972. The statutory language “any person” permits enforcement by every man and woman. *See Bennett v. Spear*, 520 U.S. 154, 166, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

To satisfy Article III, § 1 (“Article III”), case-or-controversy standing, a plaintiff must have an “injury in fact” caused by the conduct underlying the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In addition, there must be redressability. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

Under RCRA, a citizen suit can only be brought if neither the Environmental Protection Agency (“EPA”) nor the State has commenced prosecution of a separate enforcement action under RCRA or the Comprehensive Environmental Response Compensation and Liability Act of 1980 (“CERCLA”), and if neither entity is diligently cleaning up a site under RCRA or CERCLA. *See Spillane v. Commonwealth Edison Co.*, 291 F.Supp.2d 728, 734 n. 2 (N.D.Ill.2003) (citing 42 U.S.C. § § 6972(b)(1)(2)(A)-(C)).

When a citizen suit is brought pursuant to § 6972(a)(1)(B), the District Court has jurisdiction: “[1] to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B); [2] to order such a person to take such action as may be necessary; or [3] both....”

Avondale Fed. Sav. Bank v. Amoco Oil Co., 997 F.Supp. 1073, 1076 (N.D.Ill.1998) (quoting 42 U.S.C. § 6972(a)) (alteration by *Avondale* court).

“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A citizen suit pursuant to RCRA, 42 U.S.C. § 6972(a)(1)(B), is such a federal question conveying exclusive original jurisdiction to “the district court in which the alleged violation occurred or the alleged endangerment may occur.” 42 U.S.C. § 6972(a)(2).

1100 West has operated and managed the seven acre parcel at issue since 1999. Through an inadvertent oversight, the legal title to the parcel was not conveyed in 1999 when Pennsylvania Place was converted to 1100 West. The fact that 1100 West did not hold legal title to the seven acre parcel at the commencement of its action does not negate its alleged injury in fact. 1100 West has sufficiently provided the Court with competent proof of alleged actual injury, causation, as well as redressability.

1. *Legal Title is Not Necessary in a Citizen Suit Pursuant to RCRA*

1100 West filed this action as a citizen suit pursuant to RCRA, 42 U.S.C. § 6972(a)(1)(B). The statutory language of RCRA provides that “any person ..., to the extent permitted by the [E]leventh [A]mendment of the Constitution” may commence a civil action. 42 U.S.C. § 6072(a)(1)(B). Red Spot incorrectly, and without legal authority, posits that 1100 West's claims against Red Spot must fail absent legal title to the property. This Court cannot find language anywhere in 42 U.S.C. § 6072 that, even with the most generous interpretation, would support the position that a plaintiff must own the property in order to have standing to bring a citizen suit pursuant to RCRA, 42 U.S.C. § 6072(a)(1)(B). Rather, RCRA authorizes private parties to bring suit “ ‘[1] to restrain any person who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B); [2] to order such a person to take such action as may be necessary; or [3] both....’ ” *Avondale Fed. Sav. Bank*, 997 F.Supp. at 1076 (quoting 42 U.S.C. § 6972(a)).

Other than the requirements of Article III standing

and the restrictions of the Eleventh Amendment to the United States Constitution, the only jurisdictional limitations are those imposed when a state or agency has already taken action through either the commencement of prosecution or the diligent clean-up of the site at issue. Thus, legal ownership of the contaminated site at issue is not necessary to bring a citizen suit pursuant to RCRA, 42 U.S.C. § 6972. Therefore, the fact that 1100 West did not hold legal title to the seven acre parcel at the commencement of its action is not, alone, sufficient for the determination of whether there is an alleged injury in fact.

2. 1100 West Meets the Case-or-Controversy Requirements of Article III

As stated above, “the ‘irreducible constitutional minimum of standing’ contains three requirements.” *Citizens for a Better Env’t v. Caterpillar, Inc.*, 30 F.Supp.2d 1053, 1060 (C.D.Ill.1998) (quoting *Lujan*, 504 U.S. at 560). Here, then, 1100 West must allege concrete and actual or imminent harm, i.e. “injury in fact.” *Id.* “The injury in fact element of standing ‘requires more than injury to a cognizable interest. It requires that the party seeking review be himself among the injured.’” *Lujan*, 504 U.S. at 563. The Seventh Circuit finds “even a small probability of injury is sufficient to create a case or controversy-to take a suit out of the category of hypothetical-provided of course that the relief sought would, if granted reduce the probability [of injury].” *Village of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir.1993). 1100 West has sufficiently alleged “injury in fact.” Specifically, 1100 West claims that Red Spot contaminated the seven acre parcel of land at issue and thus, “injured 1100 West’s business by preventing reconstruction and sale of a warehouse on the Property.” Further, 1100 West’s Complaint provides “a fairly traceable connection between [its] injury and the complained of conduct of [Red Spot],” which satisfies the causation requirement. *Citizens for a Better Env’t*, 30 F.Supp.2d at 1060. Finally, 1100 West has shown “a likelihood that the requested relief will redress the alleged injury.” *Id.*

Thus, because legal title is not necessary to commence an action pursuant to RCRA 42 U.S.C. § 6972, and because the basic tenants of justiciability are met, 1100 West has standing to bring its citizen suit pursuant to RCRA, 42 U.S.C. § 6972(a)(1)(B).

Although 1100 West did not hold legal title to the property at the onset of this action, 1100 West has functioned as the owner of the property since 1999. Due to an inadvertent oversight, there was no deed formally conveying legal title from Pennsylvania Place to 1100 West. 1100 West provided documentation showing its management of the property including paying property taxes and insurance as well as leasing the property and collecting rent from lessees. Pl.’s Exs. 1-3, 10A, 12B-D, 14. The representations of ownership by 1100 West prior to the transfer of legal title have not resulted in prejudice to Red Spot.

For the reasons stated herein, Defendant’s, RedSpotPaint and Varnish Co., Inc., Motion to Dismiss is DENIED.

IT IS SO ORDERED.