UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CARMINE GREENE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 3:09CV510-PPS/CAN
	)	
KENNETH R. WILL, VIM RECYCLING, INC., K.C. INDUSTRIES, LLC, and SOIL SOLUTIONS COMPANY,	)	
	)	
Defendants.	)	

ORDER

Carmine Greene and five other named plaintiffs are residents of Elkhart, Indiana who seek relief for themselves and a class of 1,700 other residents from harms allegedly resulting from a nearby waste processing facility operated by defendants Kenneth R. Will, VIM Recycling, Inc., K.C. Industries, LLC, and Soil Solutions Company. This last defendant, Soil Solutions Company, is recently added to the litigation, and has brought a motion to dismiss the claims asserted against it in the First Amended Class Action Complaint. These are claims of private nuisance in Count II, trespass in Count III, and negligence in Count IV.[1]

Plaintiffs allege that the three VIM defendants operated the waste processing facility from 2000 to July of 2011. [DE, ¶15]. Soil Solutions acquired the waste processing facility from VIM Recycling, Inc. in July 2011. [DE, ¶6]. Based on its late entry onto the scene, and invoking the pleading standards discussed by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Soil Solutions argues that the

[1]The other defendants, collectively referred to as the VIM defendants, are named in all five counts, including Count I under RCRA, 42 U.S.C. §6972(a)(1)(B) and Count V seeking punitive damages for wilful and wanton misconduct under Ind.Code §34-51-3-4.

complaint does not allege particular facts about Soil (as opposed to the VIM defendants) sufficient to support its liability on the claims asserted. In response plaintiffs first argue that they have adequately pled the factual basis for Soil Solutions' liability because they have pled the VIM defendants' tortious conduct in detail (as Soil Solutions acknowledges) and have alleged that Soil Solutions has continued all the same acts and practices: "Defendant SOILS continues to conduct the same activities and operations at the VIM site...." [DE 66, ¶13]. Second, plaintiffs argue that Soil Solutions' liability is supported by the assertion of successor liability for the conduct of the VIM defendants.

The Supreme Court has held that: "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949. Construing this standard, the Seventh Circuit advises that: "[i]n reviewing the sufficiency of a complaint under the plausibility standard announced in *Twombly* and *Iqbal*, we accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chicago*, No. 09-3561, ___ F.3d ___, 2011 WL 4975644 at *4 (7th Cir. Oct. 20, 2011). In sum, "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together." *Swanson v. Citibank*, 614 F.3d 400, 404 (7th Cir. 2010).

Soil Solutions acknowledges that plaintiffs "set forth in painstaking detail the alleged wrongs done and harms caused by the *other* defendants in connection with [the] waste processing facility in Elkhart." [DE 81, p. 1]. I disagree with Soil Solutions' argument that, by contrast, plaintiffs have failed to plead unlawful conduct on the part of Soils since it has been

connected with the VIM facility. The First Amended Complaint alleges that Soil Solutions "continues to conduct the same activities and operations at the VIM site including but not limited to outdoor storage, handling, grinding, processing, transporting and disposal of solid waste materials." [DE 66, ¶13]. This is an allegation of fact.

The allegation can be described as "summary," in the sense that the First Amended Complaint opts for this allegation rather than repeat each specific allegation about the manner in which waste materials are stored, handled, ground, processed, transported and disposed of, merely for the purpose of substituting "Soil Solutions" in place of "the VIM defendants." But the meaning is the same. The inferences required are not opaque. Activities and operations of an on-going nature alleged to have been undertaken by the VIM defendants prior to July 2011 are alleged to have been continued and undertaken by Soil Solutions since July 2011. Plaintiffs have used a conclusory way of alleging Soil Solutions' on-going operation of the VIM facility in the same fashion as alleged in greater detail with respect to the prior management. But this shortcut in the factual allegations is not the type of conclusory allegation "merely reciting the elements of the claim" that, under *Twombly* and *Iqbal*, is not entitled to a presumption of truth. *McCauley* at *4.

The factual basis of the private nuisance claim in Count II is that all the defendants, now including Soil Solutions, have "failed to comply with applicable laws enacted to protect public health, safety and environment and have failed to properly dispose of, contain and abate harmful wastes, fumes, smoke, debris, odors and emissions at, and released from, the VIM site." [DE 66, ¶58]. The trespass claim in Count III alleges that defendants "have and continue to negligently and/or knowingly and intentionally cause or allow harmful air pollutants, gases, noxious odors,

smoke, wastes, contaminants, garbage, dusts and debris to enter and invade properties owned and/or possessed by Plaintiffs." [DE 66, ¶61]. Count IV's negligence claim asserts that defendants have failed to manage and operate the VIM facility (1) in accordance with all governing law and (2) in a reasonable manner and condition so as not to substantially injure the property interests of others including plaintiffs. [DE 66, ¶72].

Supporting factual allegations as to the particular conduct and specific failures of the defendants are found in paragraphs 2, 15, 16, 17, 18, 23, 30, 32, 33, 34, and 35, which include the following assertions. Defendants have stored and continue to store tons of waste materials dumped on bare earth, and these waste piles permit contaminants to leach into the ground, attract vermin, pose fire hazards and emit pollutants. The types of waste stored at the VIM site are numerous and varied, and include many types of wood waste, as well as construction and demolition waste such as roofing materials, plumbing and electrical fixtures, vinyl, plastic, carpet, bricks, concrete, glass, and insulation, along with biosolids from the Elkhart wastewater treatment plant. The waste piles have reached heights of 50 feet, and cover many acres.

The Indiana Department of Environmental Management has determined that the storage of a certain class of deteriorated manufactured woods at the VIM site constituted a threat to human health or the environment, including danger of fire, vector attraction, air or water pollution and other contamination. As of the filing of the First Amended Complaint, defendants had failed to fully comply with a 2007 Agreed Order to remove and properly dispose of all of this "C" waste. In related state court litigation, IDEM represented that it anticipated that Soil Solutions would resolve the outstanding environmental violations.

The large waste piles at the VIM site are clearly visible to plaintiffs. "Much of the older debris has rotted, molded, and leached contaminants into the environment, [and] attracted harmful vectors, such as mosquitoes and rodents." [DE 66, ¶32]. A catastrophic and fatal fire occurred at the VIM site in 2007, and the threat of fire persists as a result of the present-day operation of the site. Class members have often observed smoke emanating from smoldering waste piles, heard defendants' machinery operating in the middle of the night, and been awakened by noise, odors and fumes emanating from the VIM site. The facility's operations release dust laden with chemicals, glues and resins which collect on homes, cars, and lawns.

These detailed allegations clearly apply to Soil Solutions either because Soil Solutions is individually or collectively named, or because plaintiffs allege that Soil Solutions has continued the same activities and operations at the VIM site as its predecessors engaged in. The structure and content of the First Amended Complaint reasonably require this interpretation, and defeat Soil Solutions' argument that plaintiffs have not alleged any factual detail in support of its legal theories as against Soil Solutions.[2] The suggestion that plaintiffs' pleading against Soil Solutions fails because it does not repeat each factual allegation with separate and specific reference to Soil Solutions' post-acquisition conduct is inconsistent with the "basic objective of the rules to avoid civil cases turning on technicalities." 5 Wright & Miller, *Federal Practice and Procedure* §1215 at 165-173 (3d ed. 2004) (quoted in *Swanson*, 614 F.3d at 404). There is

[2]Soil Solutions devotes some attention to whether plaintiffs' allegations about individual defendant Kenneth R. Will being an "agent" of Soil Solutions are entitled to a presumption of truth. [DE 81, pp.7-8]. Based on my analysis, those agency allegations are not critical to the sufficiency of the pleading against Soil Solutions. In any event, the ambiguity of the allegations in paragraphs 14 and 68 is overcome by the clear assertion in paragraph 67 that Will acted on Soil Solutions' behalf to manage operations at the VIM site from February 2010 to present. [DE 66, p. 17].

plenty of detail in the First Amended Complaint to give defendants (including Soil Solutions) fair notice of the nature and basis of plaintiffs' claims, and to meet the requirement of plausibility.

In briefing the motion to dismiss, the parties stumble through a debate about Soil Solutions' possible successor liability for its predecessors' mis-deeds. I have already rejected Soil Solutions' challenge to the First Amended Complaint's pleading of Soil Solutions' direct liability. The First Amended Complaint contains a reference to a vicarious liability theory when it alleges that Soil Solutions is "VIM's successor in interest with respect to addressing VIM's outstanding environmental violations and compliance issues." [DE 66, ¶13]. In its opening brief, Soil Solutions briefly (using one sentence and one legal citation) challenges any successor liability theory, arguing that the purchase of assets alone does not create an assumption of the seller's liabilities. [DE 81, p.11]. In response, plaintiffs agree with that legal principle but contend that an equitable exception to that rule applies to support such successor liability here. [DE 106, p. 8]. So far this is a debate on the merits of a successor liability theory, and does not, particularly on this skimpy briefing, present an issue that can be determined on a motion to dismiss.

Soil Solutions' reply doesn't flesh the matter out, either. In reply, Soil Solutions switches from the merits of successor liability to a *Twombly*-type challenge to the sufficiency of the pleading. [DE 110, p. 10]. It is hardly persuasive for Soil Solutions to argue that plaintiffs' "pleading is woefully lacking to put Soil on notice of any successor-liability claim" [*id.*] when Soil Solutions had obviously been sufficiently on notice to identify the issue and reference it in its opening brief. And advancing a new challenge in the reply cannot carry the day. *United*

States v. Dabney, 498 F.3d 455, 460 (7th Cir. 2007). In short, Soil Solutions' current motion does not persuade me to make any determination against the viability of a theory of successor liability, and the issue must be left for another time when it is properly raised and fully briefed.

ACCORDINGLY:

Defendant Soil Solutions' Motion to Dismiss Plaintiffs' First Amended Class Action Complaint [DE 80] is DENIED.

SO ORDERED.

ENTERED this 7th day of February, 2012.

/s/ Philip P. Simon
PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT