

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICKY J. KAWCZYNSKI,

Plaintiff,

OPINION AND ORDER

12-cv-937-bbc

v.

RITCHIE LAKELAND OIL CO.,
JOE RITCHIE and THE DEPARTMENT
OF NATURAL RESOURCES,

Defendants.

In this civil action for monetary and declaratory relief, plaintiff Ricky Kawczynski, acting pro se, alleges that defendants Ritchie Lakeland Oil Co. and Joe Ritchie are responsible for discharging hazardous pollutants on property formerly owned by plaintiff. Additionally, plaintiff contends that defendant Wisconsin Department of Natural Resources (DNR) has failed to enforce federal environmental statutes against Ritchie Lakeland Oil Co. Plaintiff asserts five claims: (1) violation of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, against Ritchie Lakeland Oil Co. and Joe Ritchie; (2) violation of the Clean Water Act, 33 U.S.C. §§ 1251-1387, against Ritchie Lakeland Oil Co. and Joe Ritchie; (3) failure to enforce the Resource Conservation and Recovery Act, against the DNR; (4) failure to enforce federal programs; and (5) failure to enforce the Clean Water Act, against the DNR.

Defendants Ritchie Lakeland Oil and Joe Ritchie have moved to dismiss plaintiff's claims against them for failure to state a claim on which relief may be granted. Dkt. #14. The DNR has moved to dismiss the claims against it as barred by the doctrine of sovereign immunity and for failure to state a claim. Dkt. #4.

After reviewing plaintiff's complaint, I conclude that defendants' motions must be granted. Plaintiff's claims against the DNR are precluded by the doctrine of sovereign immunity. Additionally, neither the Clean Water Act nor the Resource Conservation and Recovery Act provides a private cause of action for damages. Therefore, plaintiff has failed to state viable claims against Ritchie Lakeland Oil and Joe Ritchie.

In his complaint, plaintiff alleges the following facts. In resolving defendants' motions to dismiss, I have accepted all of plaintiff's allegations as true and viewed all of the facts in the light most favorable to plaintiff. Bogie v. Rosenberg, 705 F.3d 603, 609 (7th Cir. 2013).

ALLEGATIONS OF FACT

Plaintiff Ricky Kawczynski purchased vacant property in Minocqua, Wisconsin in November 2004 for \$680,000 for investment purposes. Sometime later, plaintiff learned that a private well on the property had been contaminated previously with gasoline-component and that there were monitoring wells on the property. He also learned that his property, as well as a contaminated site owned by defendant Ritchie Lakeland Oil, were listed as contaminated properties on the DNR Bureau of Remediation and Redevelopment System website.

Plaintiff contacted the Department of Natural Resources about defendant Ritchie Lakeland Oil's potential responsibility for the contamination on his property and was told the source of contamination was unknown but that Ritchie Lakeland Oil was not responsible. Department personnel assured plaintiff that the listing of his site on the Remediation and Redevelopment System directory was not an issue and "they would look at closing the site and retiring the monitoring wells." Cpt. ¶ 6, dkt. #1.

In July 2007, plaintiff accepted an offer to purchase the land from a local developer for \$915,000, but the purchase fell through when the buyer was informed the property would not be removed from the Remediation and Redevelopment System directory, that monitoring wells on the property had to remain and that a groundwater contamination plume was coming toward the land from the site Ritchie Lakeland Oil was remediating. Plaintiff contacted the department again and was told that he could apply for an exemption letter to relieve him of liability for any remediation costs.

Subsequently, plaintiff found documents "incriminating the DNR as well as files suggesting that [Ritchie Lakeland Oil] was in fact responsible for the contamination on his property." Id. at ¶ 11. In September 2009, plaintiff offered to sell the property to Ritchie Lakeland Oil for \$950,000. Ritchie Lakeland Oil rejected the offer and made a counteroffer of \$525,000, which plaintiff rejected. Plaintiff lost the property to foreclosure in October 2009 and in July 2010, the bank sold the property to James Smith for \$400,000. In October 2010, plaintiff and his spouse filed for Chapter 7 bankruptcy.

Plaintiff requests relief from both defendants in the form of \$10 million in damages and costs and punitive damages of \$100 million. With respect to the Department of Natural

Resources, plaintiff wants a declaration that its actions violate the laws of the United States and the memorandum of agreement between the department and the federal government authorizing enforcement of the Resource Conservation and Recovery Act, a declaration that the department is failing to enforce federal programs and a recommendation to the United States Environmental Protection Agency that it review its program authorization to the department.

OPINION

A. Department of Natural Resources' Motion to Dismiss

Defendant Department of Natural Resources has moved to dismiss plaintiff's claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Specifically, it argues that (1) plaintiff's claims are barred by sovereign immunity; (2) plaintiff's claims for damages are not redressable under the Resource Conservation and Recovery Act or the Clean Water Act; (3) plaintiff has not alleged facts demonstrating compliance with the notice of intent to sue provisions under either Act; (4) plaintiff's claim that the department failed to enforce federal statutes fails because it has no obligation to enforce those statutes; (5) plaintiff's citizen-suit claims are barred by the statute of limitations; and (6) plaintiff's state law claims should be dismissed if no federal claims survive.

Defendant's first argument is that the doctrine of sovereign immunity precludes plaintiff's claims against it. Defendant is correct. The doctrine of sovereign immunity is derived from the Eleventh Amendment and "bars actions in federal court against a state,

state agencies, or state officials acting in their official capacities,” Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration, 603 F.3d 365, 370 (7th Cir. 2010), unless the state waives immunity, Congress abrogates it or the plaintiff’s claim falls under the exception articulated by the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908). Council 31 of the American Federation of State, County & Municipal Employees, AFL-CIO v. Quinn, 680 F.3d 875, 882 (7th Cir. 2012); Virginia Office for Protection & Advocacy v. Stewart, 131 S. Ct. 1632, 1637-38 (2011). The doctrine applies to suits against state agencies “regardless of the nature of the relief sought.” Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984). In this case, the state has not consented to suit, there is no suggestion that Congress abrogated states’ immunity to suit under the Clean Water Act or Resource Conservation and Recovery Act and Ex Parte Young does not apply.

Plaintiff argues that sovereign immunity does not apply under the rule in Umansky v. ABC Insurance Co., 2009 WI 82, 319 Wis. 2d 622, 769 N.W. 2d 1. However, that case is not about sovereign immunity relating to the liability of a state or state agency. Rather, it concerns discretionary immunity for state employees under state law. Id., 2009 WI 82 at ¶¶ 9-10. Plaintiff provides no other basis for opposing the department’s sovereign immunity defense. Accordingly, I am granting its motion to dismiss on the grounds of sovereign immunity. I need not address the department’s remaining arguments.

B. Ritchie Lakeland Oil Co. and Joe Ritchie’s Motion to Dismiss

Defendants Ritchie Lakeland Oil Co. and Joe Ritchie have moved to dismiss plaintiff’s

complaint under Fed. R. Civ. P. 12(b)(6) on several grounds, including that (1) plaintiff cannot bring a claim for damages under the Clean Water Act or Resource Conservation and Recovery Act; (2) if plaintiff's claims are construed as claims for injunctive relief, he failed to comply with the notice provisions of both Acts; and (3) if plaintiff is attempting to bring state law claims, this court lacks subject matter jurisdiction over them.

In his opposition brief, plaintiff states that he is not seeking injunctive relief, so defendants' second argument is moot. However, this clarification does not help plaintiff. As defendants point out, plaintiff cannot bring a claim for compensatory and punitive damages under either the Clean Water Act or Resource Conservation and Recovery Act. Under the Clean Water Act, private citizens may sue for injunctions to enforce the statute, 33 U.S.C. § 1365(a), but they may not sue for damages under the Act. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14 (1981) ("[T]he existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available"); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1016 (7th Cir. 1979).

Similarly, the remedies provision of the Resource Conservation and Recovery Act permits a district court 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 . . . , to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6972(a). The Act does not authorize the award of damages. Meghriq v. KFC Western, Inc., 516 U.S. 479, 484 (1996). See also Albany Bank & Trust Co. v.

Exxon Mobil Corp., 310 F.3d 969, 974 (7th Cir. 2002) (“The plain language of 42 U.S.C. § 6972(a) bars damages and deliberately limit[s] RCRA's remedies to injunctive relief.”) (citation omitted).

Plaintiff has sought only damages with respect to his claims against defendants Ritchie Lakeland Oil and Joe Ritchie and he has alleged nothing to suggest that these defendants are engaged in ongoing violations of the law that should be enjoined. Therefore, plaintiff has failed to state a viable claim under either the Clean Water Act or Resource Conservation and Recovery Act.

ORDER

IT IS ORDERED that

1. Defendant Wisconsin Department of Natural Resources’ motion to dismiss, dkt. #4, is GRANTED.
2. The motion to dismiss filed by defendants Ritchie Lakeland Oil Co. and Joe Ritchie, dkt. #14, is GRANTED.
3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 11th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge