U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Dependable Towing & Recovery, Inc.	)	**Docket No. CWA-02-2011-3601**
and	)	
David A. Whitehill,	)	Dated: June 6, 2012
	)	
Respondents	)	

ORDER GRANTING MOTION TO WITHDRAW COMPLAINT WITHOUT PREJUDICE

The Complaint initiating this matter alleges that Respondents violated the Clean Water Act ("CWA") by discharging pollutants, consisting of earthen fill material, without a permit into wetlands which are subject to Federal jurisdiction. This matter was scheduled for hearing to commence on April 17, 2012, but upon the parties' joint motion, the hearing was rescheduled to commence on June 26, 2012, based on the parties' representation that they agreed to some elements of a settlement and were focusing their efforts and resources on a settlement with remediation of the violations alleged in the Complaint. On May 3, 2012, United States Environmental Protection Agency, Region 2 ("Complainant" or "EPA"), filed a "Motion for EPA to be Allowed to Withdraw the Instant Complaint Without Prejudice" ("Motion"). On May 22, 2012, Respondents submitted an Opposition to the Motion and a Memorandum of Law ("Memo") in support. Complainant filed a Reply to the Opposition on June 1, 2012.

I. Arguments of the Parties

Complainant seeks to withdraw the Complaint without prejudice on grounds that restoration of the affected environment is EPA's primary goal in this matter, and it "has decided to assess its options pursuant to the Clean Water Act, which include the referral of this matter to the Department of Justice ("DOJ") to obtain the injunctive relief and further penalties, which are not available in this administrative proceeding." Motion at 2. Complainant explains that it had issued an Administrative Compliance Order on March 24, 2010, requiring Respondents, *inter alia*, to remove fill materials from wetlands and restore them. Reply at 2. EPA approved a restoration plan submitted by Respondent, but Respondent "scarcely performed any work" under the plan, so EPA filed the instant Complaint on April 8, 2011. *Id.* Complainant asserts that it has attempted to negotiate a settlement of this matter, but "Respondents have failed to take any actions toward restoration of the environment," as required by the Compliance Order. Motion at

2; Reply at 3.

Respondents oppose the Motion on the ground that they would suffer plain legal prejudice by exposure to much higher penalties in Federal court. They assert that the factual circumstances are similar to those in *City of Mandeville,* EPA Docket No. CWA-VI-97-1620, 1998 EPA ALJ LEXIS 57, 1998 WL 482769 (ALJ, July 14, 1998)(Order Denying Respondent's Motion for a Default Order and Order Denying Complainant's Motion to Withdraw the Complaint), and therefore the instant Motion should be similarly denied. Respondents quote from *City of Mandeville* (citing 8 Moore's Federal Practice 3d, § 41.40[7][b], pp. 41-52)), that "[t]he court should deny a motion for a voluntary dismissal that will prejudice the defendant by subjecting it to the less favorable law of a different forum." Memo at 6. Respondents assert that in Federal court, they would be subject to a potential penalty of $20,000,000 based on Complainant's allegations of 1,000 days of violation, clearly less favorable than the $174,418 proposed in this proceeding. Memo at 13-14.

Respondents assert that they meet the factors set forth in *FDIC v. Knostman,* 966 F.2d 1133, 1142 (7th Cir. 1992) for determining whether a defendant would suffer legal prejudice from withdrawal of a complaint. Specifically, Respondents argue that they have invested substantial efforts and expense in preparing for the hearing including "significant legal fees and associated expenses in retaining counsel to defend them in this action, as well as fees for expert witnesses to assist with the defense of such action," as well as significant costs for their counsel to explore and discuss settlement options. Opposition at 7; Memo at 8. They assert that they engaged in good faith efforts to settle this matter, contrary to Complainant's argument. Opposition at 8, Memo at 11. Respondents point out that the hearing is scheduled to commence very soon, and that they submitted to Complainant proposed stipulations on April 26, 2012, but instead of receiving a response, Complainant informed them on April 30 that it would file a motion to withdraw the Complaint. Respondents assert that they are "at risk of the continued and unfettered demands of Complainant" if this matter is withdrawn and referred to DOJ, and being compelled to defend a new action at this point would impose an undue burden on them. In support, Respondents cite to *Quality Engineers and Contractors, Inc. and Cidra Excavation, Inc.*, EPA Docket No. CWA-02-2007-3411, 2008 EPA ALJ LEXIS 26, 2008 WL 4255885 (ALJ, Sept.16, 2008)(Order Denying Motion Requesting Leave to Withdraw Complaint Without Prejudice).

Respondents point out that Complainant chose this administrative forum, and yet intended to settle this matter and obtain relief that it could not obtain in this forum except through settlement. Respondents argue that Complainant's delay in filing of the motion until this late stage of the proceedings evidences bad faith, and that there is no new information or change in circumstances that justify the motion. Memo at 11, 14. There is no adequate explanation for withdrawal other than changing to a more favorable forum, and granting the Motion would allow "the most egregious form of forum shopping," Respondents conclude. Memo at 14-15.

In its Reply, Complainant argues that Respondents have not shown that their effort and

expense would be wasted significantly, as a significantly large portion of the costs incurred in the present litigation will likely be subsumed as part of the subsequent Federal court litigation, which would include the same issues. Complainant asserts further that the Clean Water Act's enforcement authority provisions would be ineffective if incurrence of attorney's fees and litigation expenses would bar EPA from pursuing alternate enforcement options.

Complainant asserts that it diligently prosecuted this case since it was transferred from the United States Army Corp of Engineers (Corps), issuing the Administrative Compliance Order (ACO) about six months later, and bringing the present Complaint when Respondents failed to comply with it. Complainant points out that it made timely filings in this case. Complainant also asserts that it notified Respondents in February 2012 that if certain wetland restorations were not agreed to, it would consider seeking judicial relief. Reply at 6-8.

Explaining its need to withdraw the Complaint, Complainant asserts it should be withdrawn for judicial economy and a change in circumstances in this matter. Motion at 9. EPA utilized the administrative forum - both the ACO and the Complaint - as the first level of enforcement, but EPA has concluded that Respondents have no interest in complying with the CWA as long as they are only faced with the consequences of the limited administrative enforcement authority granted by the CWA. Therefore, EPA's objective is to seek a more effective enforcement option as provided by CWA. Reply at 7-9. Judicial enforcement will allow EPA to compel injunctive relief, and EPA could pursue such relief in Federal court regardless of whether the penalty issue is resolved in an administrative tribunal. Protection of the affected wetlands needs to be served through the judicial process, Complainant argues, and therefore, disposition of the penalty should be resolved in the same forum as injunctive relief to avoid the accrual of additional costs for both parties from litigation of the injunctive and penalty matters in two different forums. Therefore, granting the Motion will not create an additional burden or costs to Respondents. Complainant argues that the judicial enforcement authority is an option of legal authority provided by Congress and therefore EPA's exercise of its authority cannot be construed as plain legal prejudice. Reply at 10-12.

Complainant distinguishes *Mandeville* by pointing out that complainant in that case was subject to a default order by missing a prehearing exchange deadline, whereas in the present case, failure to file timely joint stipulations does not constitute legal prejudice to Respondents. Reply at 8-9. Respondents failed to engage in good faith negotiations, Complainant argues, in that Respondents submitted a wetlands assessment on April 24, 2012, over a month after it had been offered, and it lacked technical information, leading Complainant to file the Motion on April 30, 2012. Reply at 12.

If withdrawal of the Complaint would result in plain legal prejudice to Respondents, Complainant requests in the alternative that the Complaint be "withdrawn *with* prejudice such that further civil action can be promptly sought." Reply at 13.

II. Relevant Legal Standards

The Rules of Practice governing this proceeding, 40 C.F.R. Part 22, provide that after an answer to the complaint has been filed, "[t]he complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(d). The Rules do not provide any standard for granting leave to withdraw a complaint, but the Federal Rules of Civil Procedure ("FRCP") and federal court decisions interpreting the FRCP provide guidance. The determination of whether to grant or deny a plaintiff's motion to dismiss a complaint under FRCP 41(a)(2) is within the discretion of the court. *Westlands Water District v. United States Dep't of Interior*, 100 F.3d 94, 96 (9th Cir. 1996); *Roberts v. Smithkline Beecham Corp.*, Civ. No. 09-0162, 2010 U.S. Dist. LEXIS 20040 * 9 (E.D. La. Jan. 29, 2010).

As the Supreme Court stated many decades ago, "a plaintiff possesses the unqualified right to dismiss his complaint . . . unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." *Jones v. Securities & Exchange Comm'n*, 298 U.S. 1 (1936). The Federal courts have maintained this standard over the years. *E.g., Wimber v. Dep't of Soc. & Rehab. Servs*, 156 F.R.D. 259, 261 (D. Kan. 1994)("Courts generally allow dismissal without prejudice unless the defendant will suffer some plain legal prejudice"); *Westlands Water District v. United States Dep't of Interior*, 100 F.3d at 96; *SEC v. Chakrapani*, Civ. No. 325 (RJS), No. 09 Civ. 1043 (RJS), 2010 U.S. Dist LEXIS 65337 *5 (S.D. NY, June 28, 2010)(There is a presumption in favor of dismissing without prejudice unless defendants show they "will suffer substantial prejudice as a result.")(quoting *A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, 261 F.R.D. 29, 31 (S.D.N.Y. 2009).

In evaluating whether legal prejudice will result, courts have considered: (1) the defendant's effort and expense of preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) the adequacy of plaintiff's explanation for the need to take a dismissal; and (4) the fact that a motion for summary judgment has been filed by the defendant. *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992)(citing *United States v. Outboard Marine Corp.* 789 497, 502 (7th Cir.), *cert denied*, 471 U.S. 961 (1986)); Courts have also considered the plaintiff's diligence in bringing the motion, any undue vexatiousness on plaintiff's part, the extent to which the suit has progressed, and the duplicative expense of relitigation. *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990); *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs. Inc.*, 903 F.2d 352, 360 (5th Cir. 1990)("Important in assessing prejudice is the stage at which the motion to dismiss is made. Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal."). The factors are not exclusive but are merely guidelines for the court. *Zagano*, 900 F.2d at 14.

Indeed, the basic idea of legal prejudice is "prejudice to some legal interest, some legal claim, some legal argument." *Westlands Water District v. United States Dep't of Interior*, 100 F.3d at 97; *see, e.g., Phillips v. Illinois Central Gulf R.R.*, 874 F.2d 984 (5th Cir. 1989)(loss of a

statute of limitations defense constituted clear legal prejudice). Mere loss of tactical advantage does not constitute plain legal prejudice. *Templeton v. Nedlloyd Lines,* 901 F.2d 1273, 1276 (5th Cir. 1990) (no substantial prejudice where defendant lost choice of forum and advantage of trying case to court rather than to jury); *Manshack v. Southwestern Electric Power Co.,* 915 F.2d 172 (5th Cir. 1990) (loss of viability of federal court ruling favorable to defendant is tactical loss and not legal prejudice where state court is governed by same choice of law principles as federal court); 8 Moore's Federal Practice, Civil § 41.40 [5][d] (The fact that a party may obtain some tactical advantage by voluntary dismissal is not sufficient grounds to deny a motion under FRCP 41(a)(2)). "A court should deny a motion for voluntary dismissal that will prejudice the defendant by subjecting it to the law of a different forum where it had already invested time, effort and money in preparation for the law of the original forum. However, when the law of the two forums is essentially the same, the motion should not be denied simply because of minor differences." 8 Moore's Federal Practice, Civil § 41.40 [7][b][vii].

Federal courts have addressed prejudice regarding monetary issues arising from differences in applicable law between the two forums. A court found no legal prejudice where in the second forum the defendants would lose the benefit of a plan adopted by the original court to control litigation costs, which the court considered to be "more of a loss of a tactical advantage than plain legal prejudice." *Grynberg Prod. Corp. v. British Gas, P.L.C.,* 149 F.R.D. 135, 139 (E.D. Tex. 1993)(granting dismissal). On the other hand, another court found legal prejudice where the second forum, unlike the initial court, would allow punitive damages, and where the plaintiff delayed two years before filing the motion. *Wallace v. General Motors Corp. Royal Insurance Company,* Civ. No. 94-2627, 1996 U.S. Dist. LEXIS 4383* 13-14 (E.D. La., April 2, 1996) ("inclusion of punitive damages is closer in substance to losing a defense rather than gaining a tactical advantage,"and would constitute clear legal prejudice, as dismissal would expose defendants to liability for "an additional layer of damage"). In a similar situation, where a defendant would face punitive damages in the second forum, voluntary dismissal was granted where the court conditioned the dismissal on the plaintiffs' stipulation not to seek punitive damages. *Roberts v. Smithkline Beecham Corp.,* Civ. No. 09-0162, 2010 U.S. Dist. LEXIS 20040 * 12-13 (E.D. La. Jan. 29, 2010). The court considered the waste of judicial resources if analogous litigation were permitted to proceed before separate courts, the facts that no trial date had been set and no dispositive or significant rulings had been issued, defendant had not invested significant time and effort in defending the case, and although the parties had engaged in discovery they apparently could use it in the second forum.

In administrative environmental enforcement actions, Administrative Law Judges (ALJs) have granted motions to withdraw complaints without prejudice where additional violations were discovered and therefore additional penalties and/or injunctive relief were sought. *Richmond American Homes of Colorado, Inc.*, EPA Docket No. CWA-08-03-0080, 2004 EPA ALJ LEXIS 4 (ALJ, February 9, 2004)(Order Granting Motion to Withdraw Penalty Complaint)(additional violations discovered during settlement negotiations raised the proposed penalty above the statutory maximum allowable for adjudication in an administrative forum); *Virgin Islands Water & Power Authority*, EPA Docket No. II-95-0107, 1997 EPA ALJ LEXIS 118 (ALJ, June 10,

1997)(Order Denying Respondent's Motion for Reconsideration) (upon newly discovered violations, EPA sought injunctive relief); *ESSROC Materials, Inc.*, EPA Docket No. CAA-17-1993, 1995 EPA ALJ LEXIS 80 (ALJ, Oct. 18, 1995)(Order Dismissing Complaint Without Prejudice)(same). On the other hand, an ALJ denied a motion to withdraw the complaint without prejudice in *Quality Engineers and Contractors, Inc. and Cidra Excavation, Inc.*, CWA-02-07-3411, 8 EPA ALJ LEXIS 26 (ALJ, Sept. 16, 2008)(Order Denying Motion Requesting Leave to Withdraw Complaint Without Prejudice), where an inspection of respondents' facility revealed new violations and ongoing existing violations, but respondents sought finality of the claims, arguing that the motion exposes them to "continued, potentially spurious demands" and unnecessary expense from delaying resolution of the matter.

In another administrative enforcement action, EPA, after filing its prehearing exchange, decided to seek injunctive relief to address the future operation of the respondent's wastewater treatment plant, so it moved to withdraw the complaint without prejudice, to pursue both injunctive and penalty relief in a single judicial forum. *City of Mandeville,* EPA Docket No. CWA-VI-97-1620, 1998 EPA ALJ LEXIS 57, 1998 WL 482769 (ALJ, July 14, 1998)(Order Denying Respondent's Motion for a Default Order and Order Denying Complainant's Motion to Withdraw the Complaint). The ALJ denied the motion, finding legal prejudice to respondent, considering that there was a significant difference in the applicable law between Section 309(d) of the CWA which authorizes penalties in Federal court of up to $25,000 per day per violation, and Section 309(g) which authorizes maximum civil administrative penalties of $125,000. The ALJ noted that EPA did not provide an adequate explanation for its desire to withdraw the complaint at that time, as it did not point to any new information or changed circumstances, and that EPA could pursue injunctive relief without withdrawal of the complaint. Another reason to deny the motion, the ALJ reasoned, was that EPA was subject to a potential default order for failure to file timely its prehearing exchange. Therefore, "a balancing of the relevant equities between the parties" led the ALJ to deny the motion. 1998 ALJ LEXIS 57 * 17.

III. Discussion and Conclusion

Complainant's stated grounds for withdrawing the Complaint, that is, the changed circumstances of Respondent's failure to restore the environment as required by the ACO, and judicial economy by enforcing the ACO and seeking penalties in one forum, must be weighed against any legal prejudice to Respondent resulting from withdrawal of the Complaint without prejudice.

In terms of the *Knostman* and *Zagano* factors referenced above, there is no indication that Complainant excessively delayed prosecuting this case or had any undue vexatiousness, and no motion for summary judgment has been filed. The remaining factors are: (1) the extent to which the case has progressed, (2) Respondents' effort and expense of preparation for hearing and the duplicative expense of relitigation, (3) Complainant's diligence in filing the Motion to Withdraw the Complaint, and (4) the adequacy of Complainant's explanation for withdrawing the

Complaint.

As to the first factor, this proceeding is not in its early stages, as the hearing is scheduled to commence in three weeks. However, as to the related second factor, Respondents have not specified their expenses and extent of preparation for the hearing. Respondents state that they expect their direct case to last one day, and they list only two witnesses and 11 exhibits in their Prehearing Exchange: a chart, two resumes, a hydric soil map, and seven copies of aerial photographs. Respondents do not indicate that the exhibits and preparation done by the witnesses could not be used in a subsequent judicial litigation or with regard to the injunctive relief in the ACO. It is noted that Respondents had claimed in the Answer their inability to pay the proposed penalty and several affirmative defenses, but did not submit any documents in support of such claims in their Prehearing Exchange and did not list any witness to testify as to such claims. They did not supplement their Prehearing Exchange. It appears that the parties have been primarily investing time and effort in attempting to settle this case. Furthermore, neither party has filed substantive motions.

Regarding the third factor, in its Rebuttal Prehearing Exchange dated December 27, 2011 (at p. 9), Complainant asserted that it "knows of no indication that compliance [with the ACO] is likely in the near or distant future," and EPA filed the Motion to Withdraw the Complaint four months later. The case file indicates, however, that as of March 16, 2012, the parties had been in settlement negotiation for several weeks and agreed to some elements of settlement of this matter, and that Respondents submitted their environmental consultants' scientific and technical information in April 2012. Therefore it appears that from at least February 2012 until sometime in April, Complainant reasonably believed that it would complete a settlement of this matter in a timely fashion, and that there was no need to withdraw the Complaint.

With regard to the fourth factor, Complainant has shown that there is a need at this point in time to bring an action to enforce the ACO in Federal court. The expenses for implementing the injunctive relief may affect the amount of penalties that ultimately are agreed upon in settlement or imposed on Respondents, so it is more efficient and appropriate to allow the issues to be presented in a single forum, as it is in cases where additional violations are found after the complaint and answer are filed. The parties have not succeeded in settling the injunctive and penalty matters in the administrative forum, although they have demonstrated a keen interest in resolving them through settlement, to the extent that Respondents have not indicated significant effort in preparing for a hearing as to the penalty. Although the proposed penalty in this matter is $174,418 and the CWA authorizes in Federal court penalty assessments of $25,000 per day of violation, this fact alone does not establish plain legal prejudice. In the circumstances of this case, the fact that greater penalties may be assessed in Federal court is more of a tactical advantage to Complainant than plain legal prejudice to Respondents.

Accordingly, it is appropriate to allow Complainant to withdraw the Complaint without prejudice.

ORDER

1. The Complainant's Motion for EPA to be Allowed to Withdraw the Instant Complaint Without Prejudice is **GRANTED.**

2. The Complaint in this matter is hereby **WITHDRAWN WITHOUT PREJUDICE.**

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the ADR matter of *Dependable Towing & Recovery, Inc. & David A. Whitehill.*, Respondent.
Docket No. CWA-02-2011-3601

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Motion to Withdraw Complaint Without Prejudice,** dated June 6, 2012, was sent this day in the following manner to the addressees listed below.

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Legal Staff Assistant

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