

1998 WL 1053712

United States District Court, E.D. Virginia.

WASHINGTON PARK LEAD COMMITTEE, INC.

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

No. 2:98CV421.

|

Dec. 1, 1998.

Attorneys and Law Firms

Thomas J. Henderson, Lawyers Committee for Civil Rights Under Law, Washington DC, Counsel for Plaintiffs.

Robert H. Foster, Environment and Natural Resources Division, Washington DC, Counsel for Defendants.

***1** The court holds that residents of a predominately African American low-income housing project may assert claims of discrimination and continued segregation against the U.S. Environmental Protection Agency (EPA), a city, and a housing authority. The residents' claims are based on a selected Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remedy for a contaminated foundry adjacent to the housing project. The cleanup plan called for the removal and relocation of all residents of privately owned residential property adjacent to the site. Under the record of decision (ROD), the housing project residents would remain in the cleanup area. The court first holds that the residents sufficiently alleged standing to bring an equal protection claim against EPA. Even though the conditions of segregation and discriminatory land use may not fairly be traced to EPA's actions, viewing the facts alleged in the light most favorable to the residents, the complaint can be read to allege discriminatory action on the part of EPA in its selection of the overall remedy and that the residents were injured thereby. The court also holds that at this stage of the litigation the residents have pled standing and requested a remedy demonstrating a live case or controversy against the city and the housing authority.

The court then holds that the residents' claims are not barred by the statute of limitations. The cause-of-action for the selected remedy did not accrue until judgment was entered on the consent decree, not when the ROD was issued. In addition, the court holds that the residents'

claims are not barred by laches. The residents participated in the decisionmaking process at every available opportunity. The court further holds that the residents are not collaterally estopped from bringing their suit. The residents were not parties to the consent decree, the residents are not in privity with any of the parties to the consent decree, and the residents' interests are opposed to the interests of the parties to the consent decree.

The court next holds that the residents sufficiently alleged that the site owner acted under color of state law as is required to obtain relief under the Thirteenth and Fourteenth Amendments to the U.S. Constitution. The complaint alleges that the remedial plan, endorsed and implemented by the site owner, violated the residents' equal protection rights and that the site owner engaged in the implementation of a discriminatory cleanup remedy. The court also holds that the CERCLA § 113(h) bar on federal court jurisdiction does not preclude the residents from raising their constitutional claims. The court further holds that the residents sufficiently alleged claims under the Equal Protection Clause and the Thirteenth Amendment to the Constitution.

FRIEDMAN, J.

Order and Opinion

The Court conducted a hearing on motions to dismiss filed by the defendants in this case. After hearing the arguments of both sides, the Court took the matter under advisement. This Order and Opinion sets forth the Court's decision on the defendants' motions to dismiss.

I. Factual and Procedural History

***2** This case arises out of a claim of discrimination and continued segregation on the part of the United States Environmental Protection Agency ("EPA" or "the federal defendants"), the City of Portsmouth ("City"), Portsmouth Redevelopment and Housing Authority ("PRHA") and Pneumo Abex Corp. ("Abex"), and the named individual

defendants. The plaintiffs are residents of the Washington Park Housing Project in Portsmouth. There are four named plaintiffs in the suit in addition to the Washington Park Lead Committee, and the plaintiffs state in their Complaint that they are bringing this suit as a class action. Plaintiffs have brought this case under the Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983.

The facts as alleged by plaintiffs in their Complaint are as follows: The Washington Park housing project has an African-American population of greater than ninety-five percent. Washington Park was planned, beginning in 1960, and established pursuant to a PRHA and City policy and practice of segregation as “Negro housing.” Washington Park was sited in an area of industrial land use, immediately adjacent to an operating foundry. Plaintiffs claim that Washington Park has remained segregated and unequal throughout the past 34 years.

In 1966, Abex Corporation purchased the foundry site next to the housing project and operated a brass and bronze foundry to recycle used railroad car hearings. Abex Corporation closed its foundry in 1978. Defendant Pneumo Abex Corp. is the successor corporation to Abex Corporation. Plaintiffs claim that in the early 1980s the City and the PRHA knew or should have known that the residents of Washington Park, particularly children, were suffering from lead poisoning due to the activities of Abex. According to the Complaint, some children in the Washington Park housing project at that time had blood lead levels four to five times higher than safe levels.

In 1986, EPA did sampling in the Washington Park area, and the tests indicated that the lead levels in the soil were much higher than the recommended safe levels for residential areas. As a result of the high lead levels, EPA and Abex entered into a consent order to perform an emergency cleanup. In 1990, the site was listed as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). In 1993, Abex, the City and PRHA endorsed a plan which called for the removal of all privately-owned residential property adjacent to the site and the relocation of its residents. The City then rezoned that residential land near the Abex site for commercial or industrial use. Under the Record of Decision (“ROD”) of the EPA executed on August 15, 1994, the only residents who would remain in the cleanup area were the residents of the Washington Park housing project. On January 4, 1996, EPA, the City, PRHA, and Abex submitted a proposed Consent Decree to the Court. A public comment period followed in which the plaintiffs participated, and the decree was entered by this Court on April 25, 1996.

The cleanup of the area is not yet complete.

***3** Plaintiffs allege that the Superfund remedial plan, adopted and implemented by the defendants, “knowingly, willfully, purposefully and effectively reestablishes, recreates and exacerbates” the conditions originally imposed by the policies and practices of *de jure* segregation. They also allege that the plan isolates the residents of Washington Park and leaves them exposed to further lead contamination.

The City, Cruce, PRHA, Abex and the EPA each filed motions to dismiss in June 1998. On July 13, 1998, plaintiffs filed a Consolidated Response in Opposition to defendants’ motion to dismiss. The parties have filed their respective briefs.

II. Standard of Review

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept the facts pleaded by the plaintiffs as true. The claim should not be dismissed unless it appears to a certainty that the plaintiffs can prove no facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Bruce v. Riddle*, 631 F.2d 272, 273–74 (4th Cir.1980). The court must accept the factual allegations in the complaint and must construe them in the light most favorable to the plaintiffs. *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir.1992). The court can only rely upon the allegations in the complaint and those documents attached as exhibits or incorporated by reference. *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir.1985), *cert. denied*, 474 U.S. 1054 (1986).

III. Summary of Arguments

A. Standing Arguments of EPA, the City and PRHA

1. EPA’s Standing Argument

The defendant EPA argues that the Court should dismiss the plaintiffs’ case because the plaintiffs lack standing to bring their equal protection claim against them. EPA contends that the plaintiffs cannot trace their purported

injury, which EPA characterizes as living in an allegedly segregated housing project, to any action by the EPA. EPA maintains that its only contact with Washington Park has been in testing and formulating a remedial cleanup plan for the area.

Plaintiffs characterize their injury as the continued conditions of segregation in housing and discriminatory exposure to inappropriate land use and toxins. Plaintiffs argue that the continuing segregation and isolation of the Washington Park housing project is a direct result of EPA's actions in adopting and implementing a CERCLA remedial plan which "insures" that Washington Park will remain segregated, isolated and exposed to continuing and increased industrial land uses and associated exposures. According to the plaintiffs, if the remedial plan selected by the EPA had called for the relocation of Washington Park residents, *de jure* segregation would not have been perpetuated. Essentially, plaintiffs claim that EPA acted discriminatorily in selecting a cleanup remedy which did not provide for the relocation of the residents of Washington Park.

Analysis

***4** Article III of the United States Constitution limits the federal courts to the resolution of live "cases and controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Standing is an essential component of the case or controversy requirement of federal jurisdiction. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976); *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir.1997). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright* at 749. In order to have standing in a federal court, a federal complainant must demonstrate: (1) he has suffered an actual or threatened injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 [22 ELR 20913] (1992); (2) a causal connection between the injury complained of and the challenged action, *id.*; and (3) the injury can be redressed by a favorable decision. *Id.*

In order to meet the causation prong of the standing requirement, the plaintiffs must show that their injury "fairly can be traced to the challenged action." *Marshall v. Meadows*, 105 F.3d at 906. The indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. *Warth v. Seldin*, 422 U.S. 490 (1975). However, "Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not

injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41. The standing inquiry requires careful judicial examination of a complaint's allegations to determine whether the line of causation between the illegal conduct and the injury is too attenuated. *Allen*, 468 U.S. at 752.

In the case at bar, the plaintiffs allege that, in choosing a remedial plan which did not include the relocation of Washington Park residents, the EPA perpetuated the continued conditions of segregation and discriminatory land use and toxins in violation of plaintiffs' constitutional right to equal protection. Even though the conditions of segregation and discriminatory land use may not fairly be traced to the actions of the EPA, viewing the facts alleged in the Complaint in the light most favorable to the plaintiffs, the Complaint can be read to allege discriminatory action on the part of the EPA in its selection of the overall remedy and that the plaintiffs were injured thereby. Whether the EPA in fact acted discriminatorily in the selection of a remedy is not properly addressed at this stage. Accordingly, the Court FINDS that the plaintiffs have at this stage sufficiently alleged standing to bring this claim against the EPA.

2. PRHA's and the City's Standing Argument

PRHA and the City argue that the plaintiffs lack standing because they have been offered the remedy that they seek by PRHA. Specifically PRHA points out that all the residents of Washington Park were extended an unconditional offer to be relocated to another Portsmouth public housing park if they did not believe that Washington Park was safe for them or their families. PRHA and the City contend that, because all the residents of Washington Park were offered the option of moving by PRHA in September 1993, which is the remedy they are seeking in the instant case, the plaintiffs' claims are moot. The plaintiffs maintain that PRHA's offer of individual transfers is insufficient to redress the constitutional wrongs, and it fails to remedy the substandard conditions at Washington Park.

Analysis

***5** The plaintiffs' Complaint requests that the Court grant relief in the following ways:

1. Declare that the actions, determinations, agreements,

and failures or refusals to act of EPA, the Authority, the City, and Pneumo Abex violate the Fifth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983;

2. Order the Defendants promptly to take effective action to disestablish the continuing de jure segregation of Washington Park and the conditions, features, and effects of that segregation, including the isolation and exposure of Washington Park to contamination, and industrial and other adverse land use conditions.

3. Award plaintiffs reasonable attorneys fees and costs; and

4. Grant such other relief as may be just and appropriate.

Thus, from the pleadings it appears that the plaintiffs seek more than simply relocation from Washington Park into another housing project. The Complaint does not specifically request relocation, but requests whatever remedy that would disestablish the segregation of Washington Park. While not making a ruling that plaintiffs are entitled to the requested relief, the Court FINDS that the plaintiffs have pled standing and requested a remedy demonstrating a live case and controversy against PRHA and the City at least at this early stage.

B. Statute of Limitations

All of the defendants except the EPA contend that plaintiffs' claims are barred by the statute of limitations. The point of contention between the plaintiffs and defendants is as to when the plaintiffs' cause of action accrued. Defendants contend that plaintiffs' cause of action accrued in September 1994, when the EPA selected the environmental remedy and published it in the ROD.¹ The selected remedy did not include the relocation of Washington Park residents. Plaintiffs argue that their cause of action did not accrue until this Court entered final judgment on the consent decree between Abex and EPA on April 25, 1996.

Analysis

Because 42 U.S.C. § 1983 has no explicit statute of limitations, federal courts must look to the state law statute of limitations for a comparable cause of action.

Wilson v. Garcia, 471 U.S. 261 (1985). The Fourth Circuit has held that section 1983 actions in Virginia's federal courts are personal injury tort actions for the purposes of the statute of limitations, and therefore Virginia's two-year limitations period thus applies. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1162 (4th Cir.1991). However, the time of accrual of a civil rights action is a question of federal law. *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir.1975). Federal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action. *Id.*

Defendants claim that the plaintiffs had reason to know of their alleged injury in 1994 when the ROD was issued. Plaintiffs argue that they did not have reason to know of their injury until 1996 when the Court entered final judgment on the consent decree. Defendants cite many cases in support of this proposition. See *Jersey Heights Neighborhood Assoc. v. Parris Glendening*, C.A. No. S-97-3127 (D.Md.1998) (section 1983 claim dismissed because claim accrued when ROD was issued); *Rozar v. Mullis*, 85 F.3d 556 [26 ELR 21472] (11th Cir.1996) (Section 1983 claim dismissed because claim accrued when county made decision to site landfill in plaintiff's neighborhood); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 [27 ELR 21159] (3d Cir.1997). Plaintiffs distinguish the cases cited by defendants on the basis that those cases arose in the context of the National Environmental Policy Act, 42 U.S.C. § 4321, rather than under constitutional claims regarding CERCLA remedies.

***6** It appears that CERCLA itself contemplates that an order does not become final until final judgment on the consent decree. Under CERCLA, before the EPA can enter into a cleanup agreement through a consent decree, section 9622(d)(1)-(2) requires public participation by means of a period of public comment between the filing of a proposed consent decree and subsequent entry of final judgment. According to section 9622(i)(3), the agency may withdraw or withhold consent if the comments received indicate that the proposed settlement is inappropriate. Since the statute provides for public comment and for agency consideration of public comment before final entry of judgment on a proposed consent decree, a consent decree would not become final until entered by a court (since before that time, the EPA may withdraw or withhold its consent). Therefore, because the judgment was not entered on the consent decree until April 25, 1996, the Court FINDS that the plaintiffs' cause of action did not accrue until 1996. Accordingly, the plaintiffs' claims are not barred by the statute of limitations.

the original litigation ending in the Court's entering final judgment on the consent decree.

C. Laches

The City argues that plaintiffs' claims should be barred on the basis of the equitable doctrine of laches, because plaintiffs have delayed in asserting their rights and the delay was not excusable. The City further contends that it will be harmed by delaying the response action it has already commenced. The plaintiffs argue that they did not engage in any unreasonable delay because the plaintiffs have "diligently participated at every available instance in the process ... including submitting comments to the final EPA plan presented to the Court." Plaintiffs maintain that they should not be penalized for attempting to resolve their dispute without resorting to the courts.

Analysis

Laches applies when the defendant can show "(1) lack of diligence by the plaintiff; and (2) prejudice to the defendant." The doctrine of laches may properly be applied in environmental litigation. *Quince Orchard Valley Citizens Association, Inc. v. Hodel*, 872 F.2d 75, 79 [19 ELR 20942] (4th Cir.1989); *Save Our Wetlands v. U.S. Army Corps of Engineers*, 549 F.2d 1021, 1026 [7 ELR 20353] (5th Cir.1977). From the pleadings it appears to the Court that the plaintiffs participated in the decision making process at every available opportunity. They filed written comments at the appropriate time, and they attended meetings dealing with the proposed cleanup. Therefore, the Court can find no lack of diligence on the part of the plaintiffs that would merit the dismissal of the case at this point in the proceedings. Accordingly, the Court FINDS that the plaintiffs' claims are not barred by laches.

D. Issue Preclusion

The City contends that under the doctrine of collateral estoppel or issue preclusion, the consent decree is finally dispositive of whether the CERCLA remedial action is appropriate. Therefore, according to the City, the plaintiffs' claims are precluded. Plaintiffs argue that issue preclusion does not apply to their suit because their claims were not litigated in Court when the Court entered judgment on the consent decree, nor were they parties to

Analysis

*7 In order for issue preclusion to apply to a particular party, that party must have been a party to the earlier action or be in privity with the party to the earlier action under the doctrine of virtual representation. *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir.1992). Traditional notions of due process require that parties not be bound by decisions where they (or their privies) did not play a role in the litigation. *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

In the case at bar, the plaintiffs were not "parties" to the consent decree between the defendants. Their participation began when they made comments during the CERCLA comment period. Furthermore, it does not appear that plaintiffs are in privity with any of the parties to the consent decree, and indeed it seems that plaintiffs' interests are opposed to the interests of the parties to the consent decree. Therefore, based on the pleadings which are before the Court at this stage in the litigation, the Court FINDS that the plaintiffs are not collaterally estopped from bringing their suit.

E. Abex's Motion to Dismiss

Defendant Pneumo Abex contends that the Court should dismiss plaintiffs' claim against it because Abex's conduct did not constitute state action. Abex argues that the plaintiffs' "conclusory allegation" that Abex acted under color of state law or that Abex "conspired with" a government entity is not enough to show the required state action. The plaintiffs maintain that the Complaint alleges that Abex acted in concert with the other defendants in endorsing and implementing a plan which discriminated against the residents of Washington Park. The plaintiffs argue that Abex acted under color of state law in advocating and implementing the plan.

Analysis

In order to obtain relief for a violation of plaintiffs' Thirteenth and Fourteenth Amendment rights, the

plaintiffs must show that Abex acted “under color of,” “state law.” *Davis v. Hudgins*, 896 F.Supp. 561, 569 (E.D.Va.1995) (dismissing section 1983 claims of private parties because they were not acting pursuant to state law). The United States Supreme Court has said that the statutory requirement of action “under color of state law” and the “state action” requirement of the Fourteenth Amendment are identical. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922.

Where the defendant is not a governmental entity, the Supreme Court has recognized three exceptions to the state action requirement: (1) the existence of a symbiotic relationship to the extent that the actions of the private party are fairly treated as those of the state; (2) the exercise of coercive power by the state over the private entity; and (3) where the private party exercises powers traditionally the exclusive prerogative of the state. The Supreme Court has found that private parties jointly engaged with state officials in the prohibited actions act under color of state law for purposes of section 1983. *Id.* In *Lugar*, the defendants had attached plaintiff's property before judgment. *Id.* The Court therefore ruled that the defendants had acted jointly with the state to deprive the debtor of his property. Courts have dismissed claims on 12(b)(6) motions where there were only “mere conclusionary allegations” that there was an agreement under color of state law to violate the plaintiff's constitutional rights. *Grow v. Fisher*, 523 F.2d 875 (7th Cir.1975).

***8** The Complaint alleges that the remedial plan, endorsed and implemented by Abex, violated the plaintiffs' equal protection rights because it reestablished and perpetuated segregation. The Complaint alleges that Abex is a private party which engaged in the implementation of a discriminatory cleanup remedy. Construing the Complaint in the light most favorable to the plaintiffs, the Court FINDS that the plaintiffs' allegations of concerted action on the part of Abex and the state actors are sufficient to withstand Abex's motion to dismiss.

F. CERCLA Bar

All of the defendants move the Court to dismiss them based on the argument that 42 U.S.C. § 9613(h) of CERCLA explicitly prohibits, with limited exceptions, federal court jurisdiction prior to the completion of a CERCLA remedial action and cleanup. Section 9613(h) states:

No Federal Court shall have jurisdiction under Federal law other than [under diversity of citizenship jurisdiction] or under State law which is applicable to or relevant and appropriate under [sections relating to cleanup standards] to review any challenges to removal or remedial action selected under 42 U.S.C. § 9604, or to review any order issued under 42 U.S.C. § 9606(a) in any action except the following

Under section 9613(h)(4) there is an exception for citizen suits alleging that the removal or remedial action undertaken was in violation of any requirement of CERCLA.

Defendants contend that courts have recognized that “Congress intended to preclude all citizens' suits against EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause.” *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1022 [27 ELR 21397] (3d Cir.1997); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 [25 ELR 20628] (3d Cir.1998). Defendants go on to cite many other cases which they argue support the proposition that Congress intended to preclude judicial involvement in EPA removal and remedial actions until after such actions are complete.

Plaintiffs contend that CERCLA does not preclude judicial review of their claims because their claims are constitutional, and are not brought “under Federal law or under state law.” Plaintiffs argue that they are using section 1983 as a vehicle for their constitutional claims, which CERCLA does not mention. Plaintiffs cite *Reeves Brothers, Inc. v. EPA*, 956 F.Supp. 665 [27 ELR 21011] (W.D.Va.1995), for the proposition that while section 9613(h) of CERCLA precludes statutory claims, it does not extend to constitutional challenges to the actions of the EPA in executing the statute's commands. In *Reeves*, the plaintiffs were claiming a violation of their Fourth Amendment rights because the EPA came on their land and took soil samples to conduct tests. *Id.* The court allowed the plaintiffs to bring their Fourth Amendment claims because the court reasoned that to interpret CERCLA in such a way as to prevent any review of the constitutionality of EPA's administrative actions “would itself raise constitutional questions.” *Id.* at 674.

Analysis

***9** The issue that the instant case raises is essentially one of first impression, and the Court is wary of granting the defendants' motion to dismiss on this basis. Plaintiffs are in a position, such that if the CERCLA bar applied, they could not raise their constitutional claims until the cleanup was concluded. However, at that point the case would be moot. Viewing the Complaint in the light most favorable to the plaintiffs at this stage in the litigation, the Court assumes that one of the remedies that the plaintiffs seek is relocation and not to put a stop to the remedial action.² The Court reads the Complaint to allege that the defendants acted discriminatorily in the selection of a remedial action and purposefully refused to relocate the plaintiffs because of their race. Thus it appears that the Complaint alleges that the defendants violated the plaintiffs' constitutional rights in their administration of the statute, which is similar to the situation in *Reeves*. Therefore, the Court FINDS that the CERCLA bar does not preclude the plaintiffs from raising their constitutional claims in this case.

G. Plaintiffs' Fifth, Thirteenth, and Fourteenth Amendment Claims

1. Equal Protection Claims

The defendants argue that plaintiffs fail to state a claim under the equal protection clauses of either the Fifth Amendment (with respect to the EPA) or the Fourteenth Amendment, because the plaintiffs have not alleged that similarly situated people have been treated differently. Defendants assert that the plaintiffs have not alleged that the defendants treated the black tenants of the Washington Park housing project any differently than any white residents in the area. According to the defendants, while plaintiffs note that the EPA's remedy provides for relocation of the residents of the single-family homes on the site, they do not allege that these residents are white.

The plaintiffs contend that they do not have to allege that similarly situated non-minorities were treated differently than Washington Park residents, because they have alleged that Washington Park was established as a *de jure* segregated project and that the conditions and effects of that *de jure* segregation have been perpetuated and replicated by defendants' actions and decisions. Plaintiffs

claim that the fact that they "have been and are being treated differently is established by the fact that the project has been and remains a *de jure* segregated facility."

Analysis

In *McCauley v. City of Jacksonville*, 829 F.2d 36 (4th Cir.1987) (unpublished), the United States Court of Appeals for the Fourth Circuit held that a real estate developer who alleged that the city's acts and omissions had perpetuated existing residential segregation stated a claim for violation of equal protection. In *McCauley*, the plaintiff contended that the city revoked his building permit, denied sewer service, and rezoned his property to prevent racial integration of his apartment project. *Id.* The defendants in *McCauley*, like the defendants in the case at bar, argued for dismissal of the plaintiff's equal protection claims because they asserted that the complaint did not allege unequal treatment of persons similarly situated. However, the Fourth Circuit denied the defendant's motion to dismiss, stating that, "McCauley's allegation about the 'purpose and effect' of the city's action is sufficient to state a claim of intentional discrimination under the Fourteenth Amendment." *Id.* at 36.

***10** The defendants, in their motion to dismiss, argue that the plaintiffs' equal protection claim is insufficient to withstand a motion for judgment on the pleadings because the plaintiffs have failed to allege a similarly situated group who were treated more favorably than the plaintiffs. The defendants further argue that the plaintiffs cannot allege that there is a group of individuals similarly situated to them. The defendants cite several cases, including *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir.1991), for the proposition that a complaint which does not allege that the defendants treated similarly situated groups differently fails to state a claim.

It is a close call as to whether plaintiffs' Complaint sufficiently states an equal protection claim. Nevertheless, under a fair reading of the Complaint, drawing all reasonable inferences in favor of the non-moving plaintiffs, the Court is convinced that they have adequately pled an equal protection claim. The plaintiffs' Complaint alleges that the defendants knowingly, willfully and purposefully acted to perpetuate and preserve the *de jure* segregation of Washington Park. The Complaint further alleges that the defendants' actions have the effect of continuing the plaintiffs' risk of lead exposure because of the discriminatory actions of the defendants. Although the plaintiffs did not explicitly

allege that there were other groups who were treated more favorably by the defendants, the Complaint does allege that the defendants acted with an impermissible motive in formulating the cleanup remedy. Therefore, the Court respectfully declines to follow *Samaad* and the other cases cited by the defendants. The Court FINDS that the plaintiffs' allegations, in light of the Fourth Circuit's holding in *McCauley*, are sufficient to state an equal protection claim at this early stage in the proceedings. Accordingly, the Court DENIES the defendants' motion to dismiss the plaintiffs' equal protection claims.

2. Thirteenth Amendment Claims

The defendants argue that plaintiffs have failed to state a claim under the Thirteenth Amendment because they have not alleged that they were either compelled to remain in Washington Park or that they were prohibited from living elsewhere, or both. The defendants further assert that plaintiffs have no cause of action under the Thirteenth Amendment unless there is an allegation of slavery or involuntary servitude. Finally defendants argue that section 1983 was not enacted to enforce the Thirteenth Amendment.

Plaintiffs contend that they have adequately stated a claim under the Thirteenth Amendment because the segregation of their housing project constitutes a "badge or incident" of slavery. At the hearing on the defendants' motions to dismiss, the plaintiffs moved to add claims under 42 U.S.C. §§ 1981, 1982 to their Complaint.

Analysis

Section 1982 of the Civil Rights Act was passed as a means to enforce the Thirteenth Amendment. Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 441 (1968) the United States Supreme Court stated that section 1982 "appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities." In *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981), the United States Supreme Court noted:

***11** Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.

Thus, according to the Supreme Court, in order for a plaintiff to prevail on a Thirteenth Amendment claim, the party must prove a severe stigma on blacks. Nevertheless, the Complaint, read in the light most favorable to the plaintiffs at this early stage of the litigation without considering any evidence, contains allegations of intentional segregation on the part of Pneumo Abex, the City and PRHA with regard to the rental of housing units in Washington Park. Therefore the Court FINDS that the Complaint does state a Thirteenth Amendment claim sufficient to withstand a motion to dismiss. However, in light of the fact that the Complaint does not allege a cause of action pursuant to 42 U.S.C. § 1982, the Court ORDERS the plaintiffs to amend the Complaint within ten (10) days from the date of this Order.

H. Defendant Danny Cruce's Motion to Dismiss

Defendant Danny Cruce ("Cruce"), Executive Director of PRHA, filed a motion to dismiss claiming that he should be dismissed because he was only named in his official capacity, and because there are no specific causes of action directed at him. Plaintiffs argue in response that, in the absence of a stipulation by the Housing Authority or a finding by the Court as to the capacity to afford the plaintiffs relief in the absence of Mr. Cruce, there is no basis for his dismissal.

Analysis

The Supreme Court has noted that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."

Monell v. Dept. of Soc. Serv. of City of N.Y., 98 S.Ct. 2018 (1978). Courts often dismiss individual defendants because they were named in their official capacity only, which the courts have found to be redundant. *See, e.g., Mainstream Loudoun, et al. v. Board of Trustees of Loudoun County Library*, C.A. No. 97-2049-A (E.D.Va.1998). In the case at bar, Cruce has been named in his official capacity as Executive Director of PRHA only. It would therefore be redundant to sue both PRHA and Cruce. Accordingly the Court DISMISSES Cruce as a defendant in this case.

V. Conclusion

For the foregoing reasons, the Court FINDS that the plaintiffs have standing to bring their claims against the EPA, the City and PRHA. The Court also FINDS that the plaintiffs' cause of action is not barred by the statute of limitations, nor is it barred by laches. The Court FINDS that the plaintiffs are not collaterally estopped from

bringing their lawsuit. Further, the Court FINDS that the Complaint sufficiently alleges concerted action on the part of Abex and the state actors. The Court also FINDS that CERCLA does not bar the plaintiffs' claims. The defendants' motions to dismiss for failure to state claims under the Fifth, Thirteenth, and Fourteenth Amendments are DENIED. Defendant Danny Cruce is DISMISSED as a defendant in this case. The plaintiffs are ORDERED to file amendments to their Complaint as instructed herein within ten (10) days from the date of this Order.

***12** The Clerk is REQUESTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 1998 WL 1053712, 50 ERC 1331, 29 Env'tl. L. Rep. 20,540

Footnotes

- 1 A Record of Decision ("ROD") is EPA's statutorily required legal description, explanation, and justification of its remedy decision under CERCLA. The Abex ROD was initially issued in 1992 and was finally executed on August 15, 1994.
The Court may consider EPA's RODs and any other pertinent official public records without converting defendants' motion to one for summary judgment. *See Ganer v. County of Dinwiddie*, 162 F.R.D. 280 (1995); *Bennett v. Protective Ins. Co.*, C.A. No. 97CV376 (4th Cir.1997). The defendants have attached to their briefs the RODs and the consent decree entered into by EPA and Abex.
- 2 In light of this ruling, the Court observes that the plaintiffs may have difficulty showing that their injuries are redressable by the Court as to some of the defendants.

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