UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3109
Summary Calendar

V.J. SCOGIN, SR., in proper person,

Plaintiff-appellant,

VERSUS

REGION 6 ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 91-2753 E)

(March 1, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Virgil J. Scogin, Sr. is a land and business owner whose property, including shoreline, abuts an area designated by the Environmental Protection Agency (EPA) as the Bayou Bonfouca Superfund Site (Site). The Site is an abandoned creosote wood treatment facility located within the City of Slidell, Louisiana,

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and consists of approximately 53 acres of property as well as 4000 feet of frontage on Bayou Bonfouca, a navigable waterway. Due to the existence of numerous "hazardous substances" as defined by § 101(14) of CERCLA, 42 U.S.C. § 9601(14) and 40 C.F.R. § 300.5, the EPA intends to dredge the contaminated sediment from a portion of Bayou Bonfouca. Scogin's land is adjacent to the area the EPA intends to dredge.

The EPA notified all property owners adjacent to Bayou Bonfouca and the Site concerning the planned dredging and requested access to their properties. The notification letters included a Consent Access Agreement which stated that EPA was authorized access to the various properties in order to conduct a remedial action pursuant to § 104(a) of CERCLA, 42 U.S.C. § 9604(a). After some correspondence between Scogin and the EPA, Scogin indicated that he would not voluntarily grant access to his property, absent certain conditions the EPA deemed unacceptable. By correspondence dated November 1, 1990, the EPA informed Scogin that his refusal to sign the access form could result in the issuance of an administrative order by the EPA, pursuant to § 104(e) of CERCLA, 42 U.S.C. § 9604(e), which would authorize EPA's access to the property. The November 1, 1990 letter also stated that it constituted notice to Scogin as well as an opportunity for consultation with the EPA prior to the issuance of the administrative order. Scogin was given a 60-day opportunity to contact the EPA for consultation.

Approximately six months later, the EPA issued Scogin an Administrative Order (Order) authorizing EPA access to his property. The Order set forth its factual and legal basis, the area of Scogin's land involved, and the EPA activities which would be permitted on that area. The Order also stated that it would become effective 20 business days after receipt by Scogin and that he had 10 business days following receipt of the Order to request and schedule a conference with EPA prior to the Order's effective date. Scogin conferred with Mr. Ben Harrison, an EPA attorney.

A day after the Order issued, Scogin filed a "Petition for Review" of that Order in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Eight days thereafter, he filed the instant pro se complaint, seeking a permanent injunction against various EPA officials, as well as monetary damages from the EPA, asserting that their access to his property would work an unconstitutional "taking" thereof without due process of law. The district court later determined that the monetary damages sought would be in excess of $10,000 based on Scogin's estimation that he would lose the "substantial use of his business property for a period of seven (7) years."

The EPA moved to dismiss the complaint on several grounds asserted under Fed. R. Civ. P. 12(b). Scogin opposed that motion, and also moved to stay the proceedings pending a decision of his "Petition for Review" from the D.C. Circuit or, alternatively, to transfer his claim for monetary damages to the U.S. Court of Claims (Claims Court). The district court entered an Order and Reasons,

granting the EPA's Motion to Dismiss and dismissing Scogin's complaint without prejudice due to lack of subject matter jurisdiction and because the matter was not yet ripe. The court further ordered that Scogin's Motion for a Stay or alternatively, Transfer to the Claims Court, be denied. Judgment was entered accordingly.

Sometime after Scogin filed his Notice of Appeal, and after the parties had briefed the instant matter, the EPA filed a Complaint for Injunctive Relief, seeking access to Scogin's property. That case was also assigned to Judge Livaudais. In that action, the EPA also filed a Motion for an Immediate Order in Aid of Access which Judge Livaudais granted. Judge Livaudais then entered an order authorizing complete access to the relevant portion of Scogin's property for all purposes connected with the remedial actions of the Site. The order also enjoined Scogin and his company, Standard Materials, Inc., from interfering with EPA access.

This Court reviews de novo a district court determination that subject matter jurisdiction is lacking. Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380, 1384-85 (5th Cir. 1989) (citations omitted).

Injunctive Relief

Under CERCLA, and as amended in 1986 by the Superfund Amendments and Reorganization Act, (SARA) 100 Stat. 1615 (October 17, 1986), the EPA has authority to enter properties that are adjacent to a contaminated site. 42 U.S.C. §§ 9604(e)(1),

9604(e)(3)(D), and 9604(e)(4)(A). Furthermore, federal district courts have no jurisdiction to review a challenge to EPA remedial clean-up activities until the United States (in this case, through the EPA) commences a cost-recovery enforcement action in federal district court. CERCLA, § 113(a); 42 U.S.C. § 9613(a); Voluntary Purchasing Groups, 889 F.2d 1380, 1387-88 (5th Cir. 1989). In other words, pre-enforcement review of an EPA administrative order is unavailable in the district court, absent one of the exceptions listed in CERCLA, § 113(h), 42 U.S.C. § 9613(h). Voluntary Purchasing Groups, 889 F.2d at 1389.

Scogin contends that he is merely an innocent owner of land adjacent to the Site, and thus, the § 113(h) bar to pre-enforcement review does not apply to him. His argument lacks support. He cites no authority for his assertion. Additionally, the text of CERCLA fails to differentiate between responsible parties and adjacent landowners with regard to the pre-enforcement ban. The text does not support his position. Furthermore, legislative history supports the contrary position. Section 113(h) was "intended to be comprehensive. Citizens, including potentially responsible parties, cannot seek review . . . unless the suit falls within one of the [exceptions to § 113(h)]." Voluntary Purchasing Groups, 889 F.2d at 1389 (internal quotation and emphasis omitted).

A review of the record indicates that none of the exceptions to CERCLA, § 113(h) are applicable. Scogin only argues that the exception concerning diversity jurisdiction under 28 U.S.C. § 1332 applies. He is wrong. Section 1332 permits suit between citizens

of different states. However, the EPA is a governmental agency. Scogin fails to offer any support for why diversity jurisdiction is present and his contention that diversity exists is facially frivolous. The district court was without jurisdiction to review the Order in question or afford Scogin any relief upon his complaint to the extent that it sought injunctive relief from the Order.

Scogin relies on Reardon v. U.S., 947 F.2d 1509, 1512-14 (1st Cir. 1991) (en banc). His reliance is misplaced. In Reardon, the First Circuit held that the 42 U.S.C. § 9613(h) pre-enforcement bar to district court subject matter jurisdiction did not divest a district court of subject matter jurisdiction over a due process challenge to the filing of a lien on property to secure the payment of clean-up costs incurred because the activity of filing the lien was an enforcement action, not a pre-enforcement activity. 947 F.2d at 1512-13. Additionally, the Reardon court held that § 9613(h) does divest

> federal courts of jurisdiction over challenges to EPA's administration of the statute -- claims that EPA did not "select[]" the proper "removal or remedial action," in light of the standards and constraints established by the CERCLA statutes. The Reardons' due process claim is not a challenge to the way in which EPA is administering the statute; it does not concern the merits of any particular removal or remedial action.

Reardon, 947 F.2d at 1514.

In this case, Scogin challenges both the EPA's administration of a particular remedial action as it impacts his property and business, as well as whether the statutory scheme permits a

"taking" without due process. In either event, Reardon affords him no basis for relief, even assuming that this Court should wish to adopt its rationale, because no "enforcement activity" has occurred. The pre-enforcement bar to district court subject matter jurisdiction has not been overcome.

Monetary Relief

A claim for compensatory damages in excess of $10,000 for the wrongful "taking" of property by the United States is in the sole jurisdiction of the Claims Court. Bowles v. U.S. Army Corp. of Engineers, 841 F.2d 112, 113-14 (5th Cir.), cert. denied, 488 U.S. 803 (1988), transferred to the Court of Claims, 23 Cl. Ct. 443 (1991). Therefore, any claim that Scogin may have against the United States for monetary damages should be made in the Claims Court.

Scogin made an alternative request that the district court transfer the instant matter to the Claims Court, rather than dismiss it for lack of subject matter jurisdiction. He reurges that claim on appeal.

The district court declined to transfer Scogin's monetary claim although it stated that it would be "in the interests of justice to transfer [the monetary claim] to the Court of Claims . . . [i]f this complaint were not premature and if it were not subject to a motion for dismiss for ripeness." The district court reasoned that the claim was not ripe because, inter alia, "EPA has not yet had access to the property [and Scogin] has not suffered monetary damages for loss of use of his business property."

In light of the district court's grant of an injunction permitting EPA access to Scogin's property, it appears that Scogin's claim for monetary damages is no longer premature and may have ripened to the point where transfer to the Claims Court would be appropriate. Therefore, in the interest of economy of judicial effort, we vacate that portion of the district court's order which denied Scogin's motion to transfer and remand that claim to determine whether Scogin's claim for monetary damages should now be transferred to the Claims Court. Otherwise, we affirm the district court's dismissal in all other respects.