IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Erwin La Bast, **Plaintiff,** **v.** **St. Croix Alumina, *et al,* Defendants.**	**SX-07-CV-502**

Order on Motion to Dismiss and Motion to Amend

This matter is before the Court on the Motion of Alcoa, Inc. ("Alcoa") to Dismiss. Alcoa alleges that Plaintiff has failed to plead adequately under the standard enunciated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Robles v. HOVENSA,* 49 V.I. 491 (V.I. 2008). In response, Plaintiff has filed a Motion to Amend. Alcoa has opposed the Motion to Amend, contending that the Proposed Amended Complaint would itself fail under the *Twombly* standard, and amendment would therefore be futile. For the reasons set forth below, the Motion to Dismiss is denied, and the Motion to Amend is denied in part and granted in part.

The Motion to Dismiss points out that, in Plaintiff's original Complaint, the acts alleged in Plaintiff's First Cause of Action[1] are all alleged to have been performed by owners of the premises upon which Plaintiff worked, and that it is nowhere alleged that Alcoa ever owned the premises. Plaintiff concedes that Alcoa did not own the premises, but proposes to remedy deficiencies in the First Cause of Action by adding the words "including Alcoa" to paragraphs 8, 10, 14, and 22 of the Complaint, and adding a paragraph 6(a) to the General Allegations section of the Complaint stating as follows:

> Defendant Alcoa during the years that its subsidiary St. Croix Alumina, LLC operated the alumina process plant and established and controlled safety procedure for the operation of said plant, conducted safety audits but negligently failed to enforce adequate safety procedures for handling bauxite and asbestos with actual knowledge that the workers were neither warned of the danger of handling the materials nor given adequate respiratory equipment.

[1] Negligence, gross negligence, recklessness, and intentionally wrongful acts enumerated in paragraphs 15(a)-(r) of Plaintiff's complaint, which Plaintiff alleges caused him to be exposed to silica and asbestos containing products.

Alcoa responds that the proposed paragraph 6(a) would be futile, since Plaintiff has failed to plead that Alcoa had any duty to Plaintiff in connection with the safety audits. Alcoa also responds that the allegations of the Second and Third Cause of Action, as amended, would fail to state a claim because they are mere formulaic recitations and do not plead sufficient underlying facts.

Analysis

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), the United States Court appears to have wrought a sea change in the standard applicable to the determination of motions brought under F.R.Civ.P. 12(b)(6). The Third Circuit has stated, in *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008),[2] that *Twombly* has introduced two new concepts.

The first is that, while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation under F.R.Civ.P. 8 to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. Instead, Rule 8 requires a showing, rather than a blanket assertion, of entitlement to relief. Rule 8(a)(2) requires that Plaintiff's 'plain statement' possess enough heft to show that the pleader is entitled to relief, and that the factual allegations must be enough to raise a right to relief above the speculative level. *Phillips*, 515 F.3d at 231-32.[3] The *Phillips* Court ultimately found that the Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest the required element.' *Id.* at 234.

Second, the *Phillips* Court found that the Supreme Court in *Twombly* disavowed certain language that it had used many times before, that dismissal for failure to state a claim upon

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[2] Cited by the Supreme Court of the Virgin Islands in support of its holding in *Robles v. HOVENSA,* 49 V.I. 491 (V.I. 2008).

[3] The *Phillips* Court went on to note that in *Twombly*, however, the Supreme Court also expressly reaffirmed that Rule 8 requires only a short and plain statement of the claim and its grounds. *Id.* at 232.

which relief may be granted does not require appearance, beyond a doubt, that the plaintiff can prove no set of facts in support of claim that would entitle him to relief.[4]

The *Phillips* Court went on to find that these two aspects of *Twombly* are intended to apply to the Rule 12(b)(6) standard in general. *Phillips*, 515 F.3d at 231-32; *see Iqbal v. Hasty*, 490 F.3d 143, 157 n. 7 (2d Cir.2007).

Plaintiff's First Cause of Action

Plaintiff's First Cause of Action in his Proposed Amended Complaint alleges that Defendants, including Alcoa, by their actions and failure to act, caused Plaintiff to be exposed to silica and asbestos-containing products, and therefore, are guilty of negligence, gross negligence, recklessness and intentional wrongful acts which proximately caused Plaintiff's injuries. The factual allegations of the Proposed Amended Complaint which appear to be intended to support the First Cause of Action are found in paragraphs 6(a) and 15.[5] Paragraph 6(a) alleges that Alcoa conducted safety audits during the years that its subsidiary, St. Croix Alumina, LLC, operated and established and controlled safety procedure for the operation of the alumina process plant. Paragraph 15 states as follows:

> 15. Defendants', including Alcoa, actions and failure to act, include, but are not limited to, the following:
>
> (a) Failing to monitor the concentration of asbestos and silica in the air at the alumina plant by machines, personnel, or any other method;
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> (b) Failing to keep relevant records required be the applicable statutes and regulations;
>
> (c) Failing to take appropriate safety precautions regarding asbestos and silica exposure to Plaintiff Workers;
>
> (d) Failing to provide and require the wearing of protective clothing by Plaintiff;
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> (e) Failing to provide effective respirators and/or fresh air sources;
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> (f) Failing to provide changing rooms for exposed workers;

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[4] Abrogating *Conley v. Gibson*, 355 U.S. 41 (1957).
[5] Paragraph 6 being inapplicable because of Plaintiff's concession that Alcoa did not, at any time, own the premises.

(g) Failing to post warning signs and to keep areas clear of non-involved workers;

(h) Failing to inform Plaintiff, whom they knew had no reason to realize it, of the inherently dangerous nature of asbestos exposure and of silica exposure and of the grave health risks associated with such exposure;

(I) Failing to warn Plaintiff of the risks and hazards associated with working in close proximity to silica and asbestos-containing products;

(j) Failing to keep adequate medical records regarding exposed Plaintiff;

(k) Failing to arrange for appropriate medical examination and the retention of records relating thereto;

(l) Failing to provide follow-up medical care for exposed Plaintiff;

(m) Failing to place exposed asbestos and silica-containing products in impermeable bags or containers;

(n) Causing exposed asbestos and asbestos-containing products to be hauled to an open-air dump in open-back trucks, and failing to cover the dumped asbestos and silica-containing products for days on end;

(o) Failing to wet down exposed asbestos and silica-containing products;

(p) Failing to investigate and discover the locations of all asbestos and silica-containing products as the alumina plant, and failing to provide information dealing with asbestos and silica-containing products, including designation of areas where they are located, in any Lockheed Martin, Martin Marietta, MMM, Safety policy literature;

(q) Failing to investigate, test or otherwise evaluate the products used a their facilities to determine the products' hazardousness;

(r) Specifying the use of, inspecting and/or installing asbestos and silica-containing products at the alumina plant and, and as a result thereof, knowing of the existence and location of said asbestos and silica-containing products in the alumina plant, failing to warn Plaintiff of the existence and location of same; and

(s) Defendant G.E.C. failed to take adequate safety measures, including warning to Plaintiff that the asbestos dust released into the air by their construction activities was dangerous and failure to isolate their work site.

The Court finds that the allegation of paragraph 6(a) that Alcoa performed safety audits does not contain sufficient factual matter, taken as true, to establish that Alcoa owed any of the duties to Plaintiff that paragraph 15 alleges that Alcoa failed to perform. The Court agrees with the cases cited by Alcoa for the proposition that, in order to meet the *Twombly* standard, the Plaintiff would have to allege that Alcoa specifically undertook to warn Plaintiff of the results of such audits. For example, in *Sheridan v. NGK Metals*, 2008 WL 2156718 (E.D.Pa.), the court

held that the foreseeability of injury in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability, and that foreseeability does not excuse the requirement, in a negligence action, that a plaintiff must prove the existence of a legal "duty" owed by the defendant to the plaintiff in order for the plaintiff to recover.[6] Also, the Court finds that the more general allegations of paragraphs 15(n) and (r) of the Proposed Amended Complaint cannot be sustained under the *Twombly* standard in light of the specific allegation of paragraph 6 that St. Croix Alumina, LLC operated and established and controlled safety procedure for the operation of the alumina process plant.

Therefore, the Court will grant Alcoa's Motion to Dismiss with respect to the First Cause of Action, and deny the Motion to Amend to the extent that it proposes to add paragraph 6(a) and amend paragraphs 14 and 15.

Plaintiff's Second and Third Causes of Action

Plaintiff's Second Cause of Action alleges that Alcoa supplied asbestos and silica containing products to be used for Defendants' business purposes, and failed to exercise reasonable care to make the asbestos and silica products safe for the uses for which they were supplied and/or failed to exercise reasonable care to discover their dangerous condition or character and to inform those to whom they expected to be exposed to them, especially Plaintiff. Alcoa claims that this does not meet the *Twombly* standard because it is a mere "formulaic recitation" and does not allege facts as to how Alcoa allegedly supplied these products.

Plaintiff's Third Cause of Action alleges that Alcoa supplied asbestos and silica containing products to be used for the Defendants' business purposes, that these products were unreasonably dangerous and caused Plaintiff injury, and that Alcoa is therefore strictly liable.

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[6] *See also Blewitt v. Man Roland, Inc.* 168 F.Supp. 466 (E.D. Pa. 2001) and *Santillo v. Chambersburg Engineering Co.*, 603 F. Supp. 211 (E.D. Pa. 1985), cited by the Court in *Sheridan.*

Alcoa claims that this does not meet the *Twombly* standard because it is a mere "formulaic recitation," because there is no allegation that Alcoa is in the business of selling such products, and because there is no allegation that Plaintiff was an intended consumer of the products.

The Court finds, however, that the factual allegations of the Proposed Amended Complaint contain enough factual matter to suggest the elements of these causes of action. Plaintiff has alleged that Alcoa provided a specific type of product to the alumina process facility, where he was employed, that the product was unreasonably dangerous, and that the product caused injuries to the Plaintiff, see paragraphs 1, 3, 6, 8, 18, 19, 22, and 23.

Plaintiff's Claim for Punitive Damages

Claims for punitive damages are governed by the standard set forth in *Twombly, Woodruff v. Sullivan County Rural Elec. Co-op.*, 2008 WL 1924119 (M.D.Pa.,2008). To recover punitive damages, a party is required to prove, by clear and convincing evidence, the existence of outrageous conduct, done with evil motive or outrageous indifference to the party's rights. *Guardian Insurance Co. v. Joseph,* 31 V.I. 145 (D.V.I. App. Div. 1994*); Justin v. Guardian Insurance Co.,* 670 F. Supp. 614 (D.V.I. 1987). Given the dismissal, by this Order, of Plaintiff's First Cause of Action against Alcoa, the Court can find no allegations in the Complaint that would suggest or permit an inference of such conduct or such a motive. *See Robles v. HOVENSA,* 49 V.I. 491 (V.I. 2008), affirming that *Twombly* required dismissal of a complaint when the facts alleged therein did not support the intent on the part of the defendant that the plaintiff was required to prove in order to maintain a cause of action.

Conclusion

For the reasons set forth above, the Court orders as follows:

1. Plaintiff's First Cause of Action is dismissed as against Defendant Alcoa, and the Plaintiff's Motion to Amend is denied as to paragraphs 6(a), 14, and 15 of the Proposed Amended Complaint;
2. Plaintiff's claim for punitive damages is dismissed as against Defendant Alcoa;
3. Plaintiff's Motion to Amend is granted in all other respects. Plaintiff shall file his Amended Complaint within ten(10) days of the date of entry of this order, and Defendants will respond within the time provided for by applicable rule; and
4. The Motion to Dismiss is denied in all other respects.

DONE and so ORDERED this 17th day of March 2009.

ATTEST:
Venetia Harvey-Velasquez
Clerk of the Court

By: _____
Deputy Clerk
Court Supervisor
3/18/09

FRANCIS J. D'ERAMO
Judge of the Superior Court