

ILLINOIS POLLUTION CONTROL BOARD

October 5, 2000

CHRYSLER REALTY CORPORATION,)
)
Complainant,)
)
v.) PCB 01-25
) (Enforcement – UST)
THOMAS INDUSTRIES, INC., and TDY)
INDUSTRIES, INC.,)
)
Respondents.)

ORDER OF THE BOARD (by M. McFawn):

Complainant Chrysler Realty Corporation (CRC) initiated this action by filing a complaint on August 7, 2000 (complaint). Before the Board are the following issues: motions from Respondent Thomas Industries, Inc.'s (Thomas) attorneys to appear *pro hac vice*; Thomas' September 20, 2000 Motion for Enlargement of Time to respond to the complaint via motion or other papers; and a *res judicata* issue raised by Respondent TDY Industries, Inc. (TDY), answer to the complaint.

The first issue before the Board in this matter concerns motions to appear *pro hac vice* from Thomas' attorneys, Bradley E. Dillon and Eric A. Braun. Dillon and Braun are both licensed and in good standing to practice law in the Commonwealth of Kentucky. Pursuant to Section 101.107, "[a]ttorneys not licensed and registered to practice in the State of Illinois may request to appear on particular matter on motion filed with the Board." 35 Ill. Adm. Code 101.107. The Board allows Dillon and Braun to appear *pro hac vice* as co-counsel for Thomas.

The second issue before the Board is Thomas' motion, which requests that the Board grant a 14-day enlargement of the time period requirements contained in 35 Ill. Adm. Code 101.243. In support of this request, Thomas states that the Board has not yet made a frivolous/duplicious determination with respect to this action, and that a hearing officer has not yet been assigned to preside over this matter. Mot. at. par. 2. Thomas further states:

Recognizing that the Board would likely act on the matter in due course, and anticipating the need to respond to the Complaint, Thomas requested that Complainant Chrysler Realty Corporation ("CRC"), through counsel, agree to a reasonable enlargement of the time period set forth in Section 101.243, in order to allow Thomas to preserve its right to respond to the Complaint via motion or other papers. Mot. at par. 3. Thomas represents that counsel for complainant agrees to a "reasonable enlargement of time." Mot. at par. 4.

DISCUSSION

The Board first takes note of the time periods of the relevant filings in this matter, and then the relevant procedural rules. CRC filed its complaint on August 7, 2000. Thomas filed its motion on September 20, 2000, 44 days after receipt of the complaint.¹

Three Board procedural rules are relevant in this matter. Thomas' motion cites Section 101.243, Motions Attacking Jurisdiction or Sufficiency of the Pleadings. This section states that "[a]ll motions to strike or dismiss challenging the sufficiency of any pleading filed with the Board shall be filed within 21 days after the service of the challenged document" 35 Ill. Adm. Code 101.243(a). However, the applicability rule of Subpart 101 provides that "to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs." 35 Ill. Adm. Code 101.240. The regulations found in Sections 103.122 and 103.140 contain more specific regulations applicable to this matter, and the Board will apply the requirements of those sections to Thomas' motion.

Section 103.122, Notice, Formal Complaint, and Answer, states in relevant part that "[r]espondent may file an answer within 30 days of receipt of the complaint." 35 Ill Adm. Code 103.122(d). Section 103.140, Motions and Responses, states in relevant part that "[a]ll motions by respondent to dismiss or strike the complaint or challenge the jurisdiction of the Board shall be filed within 14 days after receipt of the complaint" 35 Ill. Adm. Code 103.140(a). Again, Thomas filed its motion 44 days after receiving the complaint. The Board thus is interpreting Thomas' motion as a motion for leave to file an answer to the complaint.

The Board has not yet accepted this case for hearing. While the relevant time periods under the Board's regulations have expired, the Board finds that the circumstances in this case warrant a grant of an extension of time allowing Thomas to file an answer to the complaint.

Thomas' motion is granted in part. Respondent Thomas shall have 30 days after the Board determines to accept the case in which to file an answer, if any, to the complaint. To the extent that Thomas' motion requests leave to file any other motions, objections, or challenges to the complaint, such motion is denied. If Thomas desires to file any such pleadings, it must first file a motion for leave to file such pleading in accordance with the Board's procedural regulations.

The third and final issue before the Board is raised by TDY's answer to the complaint. On September 5, 2000, TDY filed its answer to the complaint. Within its answer, TDY listed 12 affirmative defenses to the allegations raised by CRC's complaint. TDY's tenth affirmative defense states as follows: "CRC's claims are barred, in whole or in part, by the common law doctrines of law of the case, collateral estoppel and/or *res judicata*, in that a federal district court already has held that CRC's claims are not cognizable under Illinois law." Ans. at 28. No additional information or argument is presented other than this assertion.

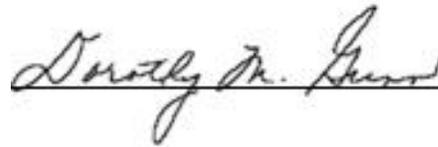
Pursuant to Section 31(d) of the Environmental Protection Act and Section 103.124(a) of the Board's procedural rules, the Board must make a determination about whether this type of complaint is duplicitous or frivolous. 415 ILCS 5/31 (1998) and 35 Ill. Adm. Code 103.124.

¹ On August 31, 2000, CRC filed copies of the Certified Mail/Return Receipts for the complaint. The receipt for respondent Thomas indicates a receipt date of August 7, 2000.

Also, see Walsch v. Kolpas (September 32, 1999), PCB 00-35; Brandle v. Ropp (June 13, 1985), PCB 85-68 pertaining to “duplicitous”; and People v. State Oil (August 19, 1999), PCB 97-103; Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80 pertaining to “frivolous.” So the Board can make such a determination, TDY is ordered to provide to the Board, within 14 days of this order, additional information regarding this affirmative defense. At a minimum, TDY should provide a detailed explanation, with citations, and a copy of the federal district court ruling referred to in its affirmative defense.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 5th day of October 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board