ILLINOIS POLLUTION CONTROL BOARD
April 3, 1997

EDWARD M. PEARL,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-265
	)	(Enforcement - Land)
BICOASTAL CORPORATION, SINGER CORPORATION, and EATON CORPORATION,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on a complaint filed June 28, 1996, by Edward M. Pearl, against Bicoastal Corporation, Singer Corporation, Controls Corporation of America Profit Sharing and Retirement Trust, and Eaton Corporation. The complaint alleges that the respondents individually or collectively violated Sections 21(a), 21(d)(2), 21(e), and 21(f)(1) of the Environmental Protection Act (Act). (415 ILCS 5/21(a), 5/21(d)(2), 5/21(e) and 5/21(f)(1).) On August 15, 1996 the Board issued an order directing the complainant to file proof of service or an appropriate motion on or before September 1, 1996. On September 5, 1996 the Board granted an extension of time to file complainant's proof of service until September 27, 1996. On September 26, 1996, complainant filed a motion for an extension of time to file proof of service until October 21, 1996 on respondents and proof of service on the respondent Eaton Corporation. The Board granted that motion. On October 1, 1996 complainant filed proof of service of respondents Bicoastal Corporation and Singer Corporation. Proof of service was not filed for respondent Controls Corporation of America Employees Profit Sharing and Retirement Trust.

On October 16, 1996 respondent Bicoastal Corporation formerly known as Singer Corporation copied the Board on a letter sent to complainant. The letter indicates that Bicoastal Corporation filed a petition for Chapter 11 with the United States Bankruptcy Court, Middle District of Florida, Tampa division on November 10, 1989. There is no indication that Bicoastal intended the Board to act on this letter. Therefore the Board will not act until Bicoastal directs an appropriate motion to the Board. The Board notes that in certain circumstances filing for bankruptcy is not always a defense to enforcement. (See People of the State of Illinois v. Michel Grain Company, Inc. (August 1, 1996), PCB 96-143 and People of the State of Illinois v. Robert D. Fosnock (September 15, 1994), PCB 94-1.)

In the Board's order of November 7, 1997 we dismissed Controls Corporation of America Profit Sharing and Retirement Trust from this action because no proof of service was ever filed and sent this matter to hearing.

On February 7, 1997, Eaton Corporation (Eaton) filed a motion to dismiss the complaint filed against Eaton by complainant, Edward M. Pearl (Pearl or complainant), as duplicitous and frivolous pursuant to 35 Ill. Adm. Code 103.124(a) or, in the alternative to stay the proceedings, pending examination of the site which is the subject of this action, by the Illinois Environmental Protection Agency (Agency) under the Illinois Site Remediation Program, 415 ILCS 5/58 et seq. On February 14, 1997 complainant filed a response to the motion to dismiss requesting the Board deny Eaton's motion to dismiss. However, complainant in its response concurs with Eaton's alternative request for a stay in the matter.[1]

For the reasons stated below the Board denies Eaton's motion to dismiss but grants a stay in this matter.

BACKGROUND

This action was filed with the Board on June 28, 1996, and Eaton was served with the compliant on September 20, 1996. The complaint requests the Board find respondents in violation and order civil penalties, cease and desist alleged violations, and direct respondents to undertake corrective action at the site.

Eaton leased the property located at 110 W. Woodstock Street, Crystal Lake, Illinois (site) on or about May 9, 1986. (Mot. at 1-2.) Eaton conducted automotive and appliance manufacturing operations at the Site, including assembling, machining and injection molding until May 1996. (Id.) On June 30, 1996, Eaton's lease terminated and Eaton vacated the site and has not since had access or any right of access to the Site. (Id.)

On January 10, 1997, complainant served upon Eaton a complaint filed in the District Court of the Northern District of Illinois, Western Division (Federal Complaint). (Mot. at 5-6, Resp. at 6.)

PARTIES ARGUMENTS

The Complaint should be Dismissed as Frivolous.

Eaton argues that the complaint should be dismissed as frivolous, because complainant requests relief which, under the current factual situation, cannot effectively be granted. (Mot. at 3.) Eaton asserts that a complaint is frivolous if it fails to state a cause of action upon which relief can be granted and in support of this contention cites to Tonne v. Leamington Foods, PCB 93-44, (April 21, 1994) and Lefton Iron and Metal Co., Inc, et al. v. Moss-American Corp., et al., PCB 87-191, (November 29, 1990). (Mot. at 3.) Eaton claims that each of the requested forms of relief are either unwarranted, unnecessary and will not serve any purpose under the Act. The next sections of the opinion set forth these arguments.

[1] The motion to dismiss filed by Eaton will be referred to as "Mot. at ", and complainant's response will be referenced to as "Resp. at ".

Requested Relief of Civil Penalties is Unwarranted and Serves No Purpose Under the Act. In further explanation of its contention that the requested relief is not warranted, Eaton claims that "to impose any penalty upon Eaton would serve no purpose under the Act." (Mot. at 3.) Citing to Lefton Iron and Metal, Eaton asserts that the primary purpose of fines is to achieve compliance under the Act. (Mot. at 3.) Eaton maintains that in Lefton Iron and Metal the Board found that "the goal of compliance would not be achieved by imposing a fine on the respondent because the respondent no longer conducted operations at the site in question and had committed to clean up the site." (Mot. at 3-4.) Eaton argues that since it no longer operates the site and it intends to enter the ISRP, relief in the form of a penalty is unwarranted and would achieve no purpose under the Act. (Mot. at 4.)

Requested Relief of Cease and Desist is Unnecessary. Eaton claims that if the Board finds a violation, a cease and desist order would be meaningless and unenforceable since it no longer occupies or has access to the property. (Mot. at 4.) Eaton cites to Leamington Foods, for the contention that a cease and desist order is unenforceable where respondent no longer operates a facility thereby warranting dismissal of an enforcement action. Eaton cites to Lefton Iron and Metal, for support of dismissal of action where former operator had ceased operations and agreed to perform clean up at the site. (Mot. at 4.) Eaton argues it cannot now cease and desist anything at the site and that the request for a cease and desist order is frivolous. (Mot. at 4.)

Requested Relief of Corrective Action is Unnecessary. Finally, Eaton argues that its proposed entry into the ISRP eliminates any need for the Board to order corrective action. (Mot. at 4.) Eaton asserts that its commitment to entry into the ISRP ensures that the site will meet the State's environmental standards, and thus the purpose of the Act will be achieved. (Mot. at 4.) Eaton argues that "[t]herefore, Pearl's request for corrective action is frivolous." (Mot. at 4.)

The Complaint should be Dismissed as Duplicitous.

Eaton also argues that the complaint should be dismissed as being duplicitous as a result of complainant filing a claim against Eaton in the Federal District Court. (Mot. at 5.) Eaton, citing to Northern Illinois Anglers' Association v. Kankakee, PCB 88-183, (January 5, 1989); and In re Duplicitous or Frivolous Determination RES 89-2, 100 PCB 53 (June 8, 1989), argues that a "citizen's complaint should be dismissed as duplicitous where an identical or substantially similar matter has been brought in another forum." (Mot. at 5-6.) Eaton asserts that the Federal Complaint "asserts a number of claims with respect to the Site, including several environmental claims that Eaton and others are responsible for contaminated conditions at the Site and must remediate the Site and pay response costs, penalties and damages." (Mot, at 5.) Furthermore, Eaton maintains that "Count 12 of the Federal Complaint alleges identical violations of the Act and seeks the identical relief as contained in this action." (Mot. at 6.) Eaton argues that since both actions contain identical claims in different forums, the action before the Board should now be dismissed as duplicitous. (Mot. at 6.)

To conclude Eaton states that granting the motion will not prejudice complainant. (Mot. at 6.) Eaton asserts that no prejudice will be caused by dismissing the complaint because

complainant has another forum to consider all claims against Eaton, including those asserted here, and a forum to grant essentially the same relief sought in this action. (Mot. at 6.)

Alternative Request for the Matter to be Stayed Pending Agency Examination of the Site.

In the event that the Board decides not to dismiss this action, Eaton requests that the action be stayed pending examination of the site by the Agency in the ISRP. (Mot. at 5.) Eaton argues that the Board has the authority to grant a stay under certain circumstances. (Mot. at 5.) Eaton asserts that its entry into the ISRP supports granting a stay and will not prejudice complainant in any way. (Mot. at 5.) Eaton claims that allowing it to remediate the site through the ISRP "will achieve the same results of any corrective action that Pearl seeks, and will promote the integrity of the environment." (Mot. at 5.) Additionally, Eaton claims that the stay will lead to an expeditious resolution of this action thereby saving resources of the parties and the Board. (Mot. at 5.) Eaton offers in conclusion that it will advise the Board on a regular basis of its progress under the ISRP. (Mot. at 5.) In summary Eaton requests the Board to dismiss complainant's action in its entirety or, in the alternative, stay the proceedings pending Eaton's completion of its work with the Agency in the ISRP. (Mot. at 6.)

Complainant raises several arguments in response to Eaton's motion to dismiss. Those arguments are set forth in the following sections of the opinion.

Eaton's Motion is Untimely.

Complainant argues that Eaton's motion should be dismissed as untimely. In support of its argument, Complainant cites to 35 Ill. Adm. Code 101.243 which states in pertinent part:

> a) All motions to strike or dismiss challenging the sufficiency of the pleading filed with the Board shall be filed within 21 days after service of the challenged document,...

Complainant states that although Eaton was served with the complaint in September, 1996, Eaton is now moving the Board to dismiss the instant action. (Resp. at 3.) Complainant further states that Eaton provides no justification for delaying four months to file such a motion and asserts that Eaton could have made the same claim when served. (Resp. at 3.)

Complainant also argues that Eaton's motion to dismiss the action as duplicitous is also untimely. (Resp. at 3.) Complainant asserts that Eaton was served with the Federal Complaint on January 10, 1997 and that Eaton's motion should have been filed within 21 days of being served. (Resp. at 3, Exh. D[2].) Complainant argues that "based on the proof of service, there is no question that Eaton was properly served and had knowledge of the action; however, Eaton makes no showing of a reason for its failure to file this motion within the time frame provided by Board rules." (Resp. at 3) Therefore, complainant concludes that Eaton's motion should be dismissed as untimely.

[2] The complainant's exhibits attached to the response will be referred to as "Exh. ".

Eaton's Motion Creates Poor Policy.

Complainant claims that "granting Eaton's request for dismissal, after Eaton vacated the site with knowledge of alleged on-going violations, would be the creation of bad case law, wherein defendants, with knowledge of alleged violations, flee the site of alleged violations; thereby becoming immune from prosecutions for their alleged illegal behavior." (Resp. at 4). Complainant argues that "Eaton should not be allowed to manipulate the Act to create 'frivolousness' by abandoning the premises" because "[s]uch relief cannot be what the General Assembly intended in conferring standing upon private citizens to enforce the provisions of the Act." (Resp. at 4.)

Furthermore complainant claims that the respondent cannot make the requested relief frivolous by leaving the site in cases, as here, when the complaint alleges on-going violations of the Act. (Resp. at 4.) To conclude, the complainant maintains that Eaton is requesting that the Board allow it to "knowingly flee its former site; thereby creating the basis of a motion that would relieve Eaton from liability for alleged past and on-going violations of the Environmental Protection Act." (Resp. at 4.) Complainant respectfully moves this Board to deny Eaton's motion to dismiss.

Complainant's Action is Not Frivolous.

Complainant asserts that "[f]or purposes of a motion to dismiss, the Board considers all well-pleaded facts as true" and cites to Miehle v. C.B.I., PCB 93-150, (November 4, 1993), Import Sales v. Continental Bearings, Inc., 217 Ill. App. 3d 893, 577 N.E.2d 1205, 160 Ill. Dec. 634 (1st Dist. 1991); Callaizakis V. Ator Development Co., 4 Ill. App. 3f 163, 280 N.E.2d 512 (1st Dist. 1972). (Resp. at 5.) Complainant argues that for purposes of deciding the motion to dismiss the Board should deem the pending allegations of past and on-going violations true and correct. (Resp. at 5.) Furthermore, complainant argues that abandonment of the site does not eliminate this Board's authority to address and correct continuing violations of the Act caused by Eaton. (Resp. at 5.)

Complainant argues that Eaton's entry into the ISRP does not eliminate this Board's authority to address violations of the Act. (Resp. at 5.) Complainant asserts that the ISRP does not relieve Eaton from penalties for prior and ongoing alleged violations. (Resp. at 5.) Complainant also discusses the fact that Eaton did not enter the ISRP program in July of 1996 when the opportunity first became available and only entered the ISRP several months later as part of its motion to dismiss. (Resp. at 5.) Additionally, complainant "asks this Board to be mindful that Eaton can always withdraw from the Site Remediation Program without this Board's permission or authority, pursuant to 415 ILCS 5/58.7(b)(3)." (Resp. at 5.) Complainant argues that the best way for the Board to ensure that Eaton will remain in the ISRP is to deny respondent's motion to dismiss and retain jurisdiction over alleged violations of the Act. (Resp. at 6.) Complainant surmises that "[i]f Eaton joins the program and receives a release under that program, the Board can then decide whether to deny the request for a corrective action order and issue of penalties for alleged prior and on-going violations." (Resp. at 6.)

Complainant's Action is Not Duplicitous.

Complainant maintains that "[p]ursuant to state law, this Board has original, exclusive jurisdiction over complainant's action." (Resp. at 6.) Complainant asserts that the state-based allegations within the federal pleading are within the discretion of the federal judge to proceed within the federal action. (Resp. at 6.) Complainant states "[b]ecause Eaton's alleged conduct occurred under the prior laws, complainant brought this action under the law that applied during the time of Eaton's alleged violations" and if the Board grants the motion "before the federal judge decides whether he will allow supplemental jurisdiction over pendant state claims, Eaton will be successful in manipulating this Board and the Environmental Protection Act, to avoid application of the law in effect when Eaton's alleged wrongful conduct occurred." (Resp. at 6.) Finally, complainant states that the grant of the motion could significantly alter the law applicable to Eaton's actions and requests the Board to grant Eaton's request for stay in this matter. (Resp. at 6-7.)

Eaton's Request for Stay should be Granted.

Complainant states that it agrees with Eaton's request for stay in the matter. (Resp. at 7.) Pearl states that it agrees with the request because if Eaton proceeds with remediation at the site pursuant to the ISRP it may be the most expedient manner in which remediation may occur after which the Board can determine if penalties for the violations of the Act are appropriate. (Resp. at 7.) Additionally, complainant asserts that granting the stay for six months will allow time for the federal court to decide whether it will allow supplemental jurisdiction over the state claims. (Resp. at 7.) Finally, complainant claims that there will be no prejudiced to any party and contrary to the open-ended stay requested by Eaton, complainant requests that the Board grant a six month stay, subject to the condition that the stay terminates either upon the expiration of the six month time period or upon Eaton's withdrawal from ISRP.

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476.) The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency, (April 20, 1995), PCB 95-98.)

DISCUSSION

The Board will allow Eaton's late filing in this matter. Nonetheless, the Board denies Eaton's motion to dismiss but grants stay in the matter. The Board finds that the complaint is

neither frivolous as a result of Eaton's proposed entry into the ISRP and its vacating the site, nor duplicitous due to the filing of the Federal Complaint.

The Board determines that a complaint is frivolous when the Board finds that it fails to state a cause of action upon which relief can be granted. (Citizens for a Better Environment v. Reynolds Metal Co. (May 17,1973), PCB 73-173.) Eaton argues pursuant to Lefton Iron and Metal and Tonne that this matter is frivolous. These cases are distinguishable from this matter.

In Lefton Iron and Metal the Board was confronted with the following fact situation when it determined that the matter was frivolous. In Lefton Iron and Metal there were two private parties disputing the extent of their liability while the same matters were pending before another jurisdiction. (Lefton at 4.) Additionally, a consent decree had been entered into by one of the parties which documented that party's operation and the contamination which resulted due to that operation. (Lefton at 4.) The Board reasoned that due to the existence of the consent decree, the question of whether the party had violated the Act was moot and that the party had undertaken full liability and, as such, the purpose of the Act was achieved. Here, unlike in Lefton Iron and Metal, there is no consent decree which has assessed liability and responsibility for the remediation of the site. Eaton argues that its proposed entry into ISRP demonstrates that it has taken full liability and responsibility for remediation at the site. The Board disagrees. The Board finds that it would be premature to determine that this matter is frivolous based on an intention to enter the ISRP. Furthermore, since the regulations implementing the ISRP have not been finalized any determination at this time would be based on assumptions concerning the ISRP. We find that Eaton's intention to enter the ISRP at this time does not cause this matter to be frivolous.

In Tonne the Board decided that a citizens enforcement action under the noise nuisance provisions, wherein the only requested relief was to alleviate the noise, was frivolous as a result of respondent leaving the premises. Unlike in this case, in Tonne it was clear that upon finding a violation any form of relief would be frivolous because the named respondent had left the premises leaving no possibility of an on-going violation or future violation resulting from the noise source. Here, relief can be granted if Eaton is found in violation due to complainant's claims of on-going violations as a result of contamination as well as a request for civil penalties.

We find that Eaton's arguments based on Lefton Iron and Metal and Tonne are misplaced. The Board's findings in those matters were based on specific set of facts which are not present in this matter. Similarly, we find that since there is an allegation of on-going violations the requested relief of cease and desist and remediation of the site may be granted and is not frivolous. Therefore the Board finds that this matter is not frivolous and denies Eaton's motion to dismiss the complaint as frivolous.

Eaton also alleges that the compliant is duplicitous and requests the Board to dismiss the action. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp (June 13, 1985), PCB 85-68, 64 PCB 263.)

In Winnetkans Interested in Protecting the Environment (WIPE) v. Illinois Pollution Control Board, 55 Ill.App.3d 475, 12 Ill.Dec. 149, 370 N.E.2d 1176, 1179, in deciding whether an action was duplicitous the court considered whether the two actions were based on separate events which occurred in separate periods of time. In this case Eaton claims that Count 12 of the Federal Complaint alleges the exact same violations based on the same occurrences.

Complainant argues that the Board has exclusive jurisdiction over the action and that federal court may in its discretion proceed with the action excluding Count 12. Complainant does not address whether the actions are duplicitous but only that if the Board grants the motion there is a possibility that the federal court will not hear Count 12 thus allowing Eaton to avoid application of the law in effect when Eaton's alleged wrongful conduct occurred which could significantly alter the law applicable in this action.

Since the federal court has not determined whether it will except the jurisdiction of the state based claims and the Federal Complaint was filed after this matter was filed with the Board, we find no reason, at this time, to relinquish jurisdiction. Therefore, the Board finds that the matter is not duplicitous. However, since the parties agree that a stay will be beneficial, the Board grants a six month stay.

CONCLUSION

The Board denies Eaton's motion to dismiss this action and grants a six month stay in the matter until September 26, 1997. During the six month stay the parties are directed to file status reports in this matter. The parties shall file status reports on May 23, 1997, July 25, 1997, and September 12, 1997. The parties may file any other appropriate motion(s) to address any change in circumstances during the period of the stay.

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 _____ day of _____, 1997, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board