

ILLINOIS POLLUTION CONTROL BOARD
October 2, 1997

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-138
)	(Enforcement - Air)
)	
LEROY CECH d/b/a L & K AMERICAN)	
WRECKING,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Theodore Meyer):

On September 26, 1997, complainant filed a motion for leave to serve respondent Leroy Cech d/b/a L & K American Wrecking (respondent) with the complaint in this matter by publication. Complainant requests that it be allowed to serve respondent by publication because it has been unable to effectuate service of the underlying complaint, filed on February 18, 1997, on respondent. For the following reasons, the Board grants complainant's motion.

Specifically, complainant's motion alleges that on February 18, 1997, complainant attempted to serve the underlying complaint in this matter on respondent by certified mail. Mot. at 2. The envelope containing the complaint, however, was returned unopened and marked "unclaimed." Mot. at 2. The motion further states that from March 1997 to May 1997 an investigator with the Illinois Attorney General's Office made numerous attempts to personally serve respondent at his residence. The investigator verified respondent's address through the Secretary of State's Office and the United States Post Office. Respondent, however, did not respond to the investigator's attempts to contact him. Based on respondent's actions, complainant alleges that respondent is avoiding service and requests that it be allowed to serve respondent by publication, pursuant to Section 2-206(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-206(a) (1996)). Mot. at 2.

Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (1996)) provides that any person may file with the Board a complaint against any person allegedly violating the Act or any rules or regulations promulgated thereunder. Section 31(d) further directs that the complainant must immediately serve a copy of such complaint upon the person named in the complaint. See 415 ILCS 5/31(d) (1996). The Board's procedural rules establish the methods of service of the complaint, including personal service, registered mail, and certified mail. See 35 Ill. Adm. Code 103.123(a).

While Section 103.123 provides for the method of service of a complaint in an enforcement action, the Board's procedural rules do not cover the situation where service has been attempted, but respondent deliberately avoids service. Section 101.100(b) of the Board's

procedural rules does provide, however, that “in [the] absence of a specific provision of the rules to govern a particular situation, the parties or participants may argue that a particular provision of the Code of Civil Procedure or the Illinois Supreme Court Rules provides guidance for the Board or hearing officer.” 35 Ill. Adm. Code 101.100(b). In the present case, complainant argues that Section 2-206(a) of the Code which allows for service by publication should apply in this case. The Board agrees.

Section 2-206(a) provides in pertinent part:

Whenever, in any action affecting property or status within the jurisdiction of the court . . . plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place of residence of the defendant in known, or that upon diligent inquiry his or her place of residence cannot be ascertained, the Clerk shall cause publication to be made in some newspaper published in the county where the action is pending The publication shall contain notice of the pendency of the action, the title of the court, the title of the case, showing the first named plaintiff and the first named defendant, the number of the case, the names of the parties to be served by publication, and the date on or after which default may be entered against such party. 735 ILCS 5/2-206(a) (1996).

As noted earlier, the Board’s procedural rules do not cover the situation where attempts at serving respondent with the complaint have been made, but respondent deliberately avoids service. In this type of situation, the Board finds it appropriate to look to Section 2-206(a) of the Code for guidance because if service by publication were not allowed, attempts to serve respondent may go on indefinitely and would frustrate the State’s attempt to enforce the Act. Although Section 2-206(a) of the Code directs the clerk of the court to cause publication of the notice, the Board believes that in the context of proceedings before the Board it is more appropriate to have the complainant bear the burden of publication as it is complainant’s duty under the Act to serve respondent with the complaint. See 415 ILCS 5/31(d) (1996). Additionally, the Board finds that it is more appropriate for the notice to be published in the county where respondent resides, if known, or in the county of respondent’s last known address, rather than the county where the action is pending.

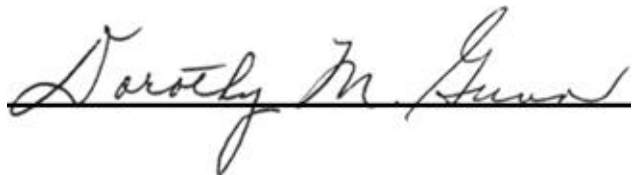
In the present case, the motion and attached affidavit indicate that service of the underlying complaint in this case has been attempted on respondent several times. Mot. at 2; Aff. at 1-2. Service on respondent has been attempted by registered mail, but respondent will not accept any registered mail in person. Moreover, personal service has been attempted on respondent on several different occasions. On each occasion, no one at respondent’s residence answered the door, nor did the investigator receive a response, even though he left his business card at respondent’s address. Aff. at 1. Based on these circumstances, the Board finds that complainant has diligently attempted to serve respondent by the methods contained in Section

103.123, that upon due inquiry respondent cannot be found, and that any further attempts at personal service would be futile. Accordingly, the Board grants complainant's motion to serve respondent by publication, pursuant to Section 2-206(a) of the Code.

Complainant shall cause publication of a notice of the pendency of this action in a newspaper of general circulation published in the county in which respondent resides, if known, or in the county of respondent's last known address. If no newspaper is published in the county in which respondent resides, if known, or in the county of respondent's last known address, then publication shall be in a newspaper published in an adjoining county, having circulation in the county in which respondent resides, if known, or in the county of respondent's last known address. The publication shall contain notice of the pendency of the action, the title of the Board, the title of the case, the number of the case, the name of the party to be served by publication, and the day on or after which default may be entered against such party. The notice shall be published at least once in each week for three successive weeks. Complainant is further directed to send a copy of the notice to the addresses listed in the notice within 10 days of the first publication of the notice by mail. Complainant shall also file with the Board proof that it has sent a copy of the notice to respondent and has caused publication of the notice in conformity with these provisions immediately upon completion of the final publication. No hearing shall be scheduled in this matter until at least 30 days after the date of the first publication. If respondent fails to appear at the hearing, a default order may be entered at that time. See 35 Ill. Adm. Code 103.220.

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 2nd day of October 1997, 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