ILLINOIS POLLUTION CONTROL BOARD
October 16, 2008

CASEYVILLE SPORT CHOICE, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 08-30
	)	(Citizens Enforcement - Land)
ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER, DECEASED, ERMA I. SEIBER, INDIVIDUALLY and FAIRMONT PARK, INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by G.T. Girard):

On October 3, 2007, Caseyville Sport Choice, LLC (complainant), filed a complaint (Comp.) against Erma I. Seiber, administratrix of the estate of James A. Seiber and individually (respondents). *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.204. On November 1, 2007, the Board accepted the complaint for hearing. On August 26, 2008, complainant filed a motion for leave to add a party and a first amended complaint (Am.Comp.). On September 12, 2008, Fairmont Park, Inc. (Fairmont), the added party, filed a motion to dismiss the count against Fairmont (Mot.). On September 24, 2008, complainant filed a response to the motion to dismiss (Resp.). As discussed below, the Board denies the motion to dismiss, finds the amended complaint is neither duplicative nor frivolous and thus grants the motion to amend. The Board sends the matter to hearing.

The Board will first outline the procedural background. Next the Board will summarize the motion and amended complaint. The Board will follow with a summary of the motion to dismiss and the response. The Board will then discuss the Board's findings.

PROCEDURAL HISTORY

On October 3, 2007, complainant filed a complaint against Erma I. Seiber, administratrix of the estate of James A. Seiber and individually (respondents). *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.204. In the complaint, complainant alleges that respondents violated Sections 21(a), (d) and (e) of the Environmental Protection Act (Act) (415 ILCS 5/21(a), (d) and (e) (2006)) and 35 Ill. Adm. Code 807.201 and 807.202 of the Board's rules. Comp. at 3. Complainant further alleges that respondents violated these provisions by depositing tons of horse manure mixed with "municipal trash" on the surface of the three parcels of land in St. Clair County for a period of time from 1981 to 1993. Comp. at 2-3; Am. Comp. at 3. Complainant asks the Board to reimburse the complainant for the cost of cleaning up the site. Comp. at 4.

On October 22, 2007, respondents filed a motion to dismiss the complaint. Respondents argued that the complaint should be dismissed, as the complaint is identical or substantially similar to a case pending in the U.S. District Court for the Southern District of Illinois. On November 1, 2007, the Board found that the complaint met the content requirements of the Board's procedural rules (s*ee* 35 Ill. Adm. Code 103.204(c), (f)) and that the complaint was neither duplicative nor frivolous.

On August 26, 2008, complainant filed the motion for leave to add a party and a first amended complaint. On September 12, 2008, Fairmont filed a motion to dismiss the count against Fairmont. On September 24, 2008, complainant filed a response to the motion to dismiss.

MOTION AND AMENDED COMPLAINT

Complainant seeks to amend the complaint by adding Fairmont because Fairmont operated a horse track and was a source of the waste deposited at the site. Mot. at 1-2. Complainant argues that Fairmont is an off-site generator within the meaning of the decision in People *ex rel* Ryan v. McFalls, 313 Ill. App. 3d 223, 728 N.E.2d 1152 (3rd Dist. 2000). Mot. at 2. The amended complaint alleges that Fairmont violated Section 21(a) of the Act (415 ILCS 5/21(a) (2006)). Am.Comp. at 7. The amended complaint asserts that Fairmont caused or allowed open dumping by depositing over 159,000 tons of horse manure and over 2,600 tons of "municipal trash" on the property owned by respondents. *Id*.

MOTION TO DISMISS

Fairmont argues that the alleged action took place from 1981 until 1993. Mot. at 1. Fairmont asserts that the complaint fails to allege any actionable conduct by Fairmont since 1993, 14 or 15 years prior to the filing of the complaint. *Id*. Fairmont asserts that the action is barred by the provisions of Section 13-205 of the Code of Civil Procedure (Code) (735 ILCS 5/12-205 (2006)), which establishes a five-year statute of limitations. Mot. at 2. Fairmont asserts that the statute of limitations is applicable to actions between private parties and cites Union Oil Company of California d/b/a UNOCAL v. Barge-Way Oil Company, Inc., PCB 98-169 (Jan. 7, 1999).

RESPONSE

Complainant asserts that Fairmont ignores the fact that the Board's decision in UNOCAL recognized the applicability of the "discovery rule" in citizens' clean up cost recovery actions under the Act. Resp. at 2. Complainant maintains that the Board defined the "discovery rule" as providing that the statute of limitations begins to run on the date that the injured person knew or reasonably should have known of the injury. *Id*. Complainant argues that the complaint alleges that the complainant became aware of the waste allegedly deposited by Fairmont in April of 2005. Resp. at 3. Therefore, complainant argues that under the "discovery rule" the five-year statute of limitations did not begin to run until April 2005. *Id*.

Complainant maintains that the respondents acted as the agent for Fairmont in hauling the waste. Resp. at 3. Complainant opines that the knowledge of respondents should not be attributed or otherwise counted against the complainant. Resp. at 4. Complainant argues that the "discovery rule" requires that April 2005 should be considered the time when the statue of limitations begins to run. Resp. at 4. Therefore, complainant asserts the complaint was timely filed and the motion should be denied. Resp. at 4-5.

STATUTORY AND REGULATORY BACKGROUND

Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

DISCUSSION

The Board will first address the motion to dismiss the complaint. Then the Board will discuss a finding on whether or not the complaint is duplicative or frivolous. Finally the Board sets this matter for hearing.

Motion to Dismiss

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991). Thus, the Board must determine whether the pleadings, taken in a light most favorable to complainant, would entitle complainant to relief.

As the Board stated in UNOCAL, "the Board has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest. *See* Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374 (5th Dist. 1982)." The Board then noted that "the instant case, however, does not fall under this exception." UNOCAL, PCB 98-169 slip op. at 5, n. 1 (Jan. 7, 1999). As in UNOCAL, the complainant here has brought a private cost recovery action. Thus, pursuant to the Board's decisions in UNOCAL, an argument can be made that the statue of limitations in Section 13-205 of the Code (735 ILCS 5/12-205 (2006)) applies in this context. However, taking all well-pled allegations as true and drawing all inferences from them

in favor of the complainant, the Board is unconvinced that the statute of limitations bars the action in the instant case.

In addition to the January 7, 1999 order in UNOCAL cited by Fairmont, the Board also ruled on a motion for summary judgment on February 15, 2001. As pointed out by complainant, in that order, the Board discussed the application of the "discovery rule" when applying the statute of limitations. UNOCAL, PCB 98-169 slip op. at 4 (Feb. 15, 2001). The Board found that summary judgment was not appropriate, because there were factual questions concerning the application of the "discovery rule" and the cases delineating that rule. *Id*.

The "discovery rule" provides that a statute of limitations begins to run not on the date that an injury actually occurred, but on the date that the injured person knew or reasonably should have known of the injury and that the injury was wrongfully caused. *See* Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 651 N.E.2d 1132 (1995). In Hermitage, the Court explained the origins of the "discovery rule" stating:

> Literal application of the statute of limitations, however, sometimes produced harsh results, and in response, the discovery rule was developed. When the discovery rule is applied, it "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 198 Ill. Dec. 786, 633 N.E.2d 627 (1994). This rule developed to avoid mechanical application of a statute of limitations in situations where an individual would be barred from suit before he was aware that he was injured. Hermitage, 166 Ill. 2d at 77-78.

Based on the pleadings in this case, the Board finds that the statute of limitations does not bar the complaint. Under the Board's prior application of the statute of limitations in Section 13-205 of the Code (735 ILCS 5/12-205 (2006)), the facts, taken in a light most favorable to complainant, indicate that complainant did not discover the alleged culpability of Fairmont until April 2005. Therefore, based on these pleadings, the Board finds that under the "discovery rule" the statue of limitations has not run. *See* UNOCAL, PCB 98-169 slip op. at 4 (Feb. 15, 2001). The Board accordingly denies Fairmont's motion to dismiss.

Duplicative or Frivolous Finding

The motion to dismiss makes no allegations that the amended complaint is either duplicative or frivolous. The Board finds that the amended complaint does not state a cause of action identical or substantially similar to one brought before the Board or another forum. Furthermore, the Board finds that the amended complaint states a cause of action upon which the Board may grant relief and requests relief that the Board has the authority to grant. Therefore, the Board finds that the amended complaint is neither duplicative nor frivolous.

Set for Hearing

The Board accepts the amended complaint for hearing. *See* 415 ILCS 5/31(d) (2006); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). Fairmont's filing of the motion to dismiss stayed the 60-day period for filing an answer to the amended complaint and that stay ends with today's order by the Board. *See* 35 Ill. Adm. Code 103.204(e). Fairmont therefore has 60 days from receipt of the Board's order to file an answer to the amended complaint. The Board directs the hearing officer to proceed expeditiously to hearing.

CONCLUSION

The Board denies the motion to dismiss Fairmont Park, Inc. as a party to this proceeding, and grants the motion to amend the complaint. The Board finds that the amended complaint is neither duplicative nor frivolous. The Board accepts the amended complaint for hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 16, 2007, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board