BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION,	)	
Complainant,	)	
v.	)	PCB No. 08-96 (Enforcement-Land, Air, Water)
HAMMAN FARMS,,	)	
Respondents.	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on July 28, 2009, we electronically filed with the Clerk of the Illinois Pollution Control Board, **Respondent Hamman Farms' Response to Yorkville's Motion to Strike Respondent's Motion to Dismiss**, a copy of which is attached hereto and hereby served upon you.

Dated: July 28, 2009

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, a municipal corporation,	)	
Complainant,	)	
v.	)	PCB No. 08-96
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and HAMMAN FARMS,	)	
Respondents.	)	

RESPONDENT HAMMAN FARMS' RESPONSE TO YORKVILLE'S MOTION TO STRIKE RESPONDENT'S MOTION TO DISMISS

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys HINSHAW & CULBERTSON LLP and MUELLER ANDERSON, P.C., and for its Response to Yorkville's Motion to Strike the Respondent's Motion to Dismiss, states as follows:

INTRODUCTION

On April 2, 2009, the Board entered an Order denying Yorkville's motion for leave to file an amended complaint because the proposed amended complaint failed to cure the deficiencies that had been previously identified by the Board. The Board granted leave, however, for Yorkville to try once again to cure the deficiencies by filing another amended complaint. The Board's Order of April 2, 2009 gave Yorkville until May 4, 2009 to file another amended complaint.

On May 1, 2009, counsel for Yorkville contacted counsel for Hamman Farms, indicating that Yorkville faced problems in meeting the deadline set by the Board. As a professional courtesy, attorneys for Hamman Farms agreed not to oppose a late filing of the new amended complaint by Yorkville. Yorkville thereafter filed its new amended complaint on May 7, 2009.

The Board's Order of April 2, 2009, which had set a deadline for the filing of Yorkville's new amended complaint, also set a date certain for Hamman Farms to answer that complaint: July 6, 2009. On June 30, 2009, well in advance of that deadline to answer, Hamman Farms answered the complaint with an Answer and Affirmative Defenses to Count IV, and a Motion to Dismiss Counts I through III. Yorkville was served with Hamman Farms' Answer and Motion to Dismiss, via email on June 30, 2009.

By rule, Yorkville had until July 14, 2009 to file a response to the Motion to Dismiss. 35 Ill.Adm.Code 101.500(d). The rules further provide that "[i]f no response is filed, the party will be deemed to have waived objection to the granting of the motion." (*Id.*) To date, Yorkville still has not filed a brief in response to Hamman Farms' Motion to Dismiss, and should accordingly be deemed to have waived its objection to the motion, pursuant to Section 101.500(d).

On July 14, 2009, Yorkville filed a Motion to Strike the Motion to Dismiss, alleging that Hamman Farms was untimely in responding to the amended complaint,[1] and further asserting that Hamman Farms should be estopped from making "new arguments" in responding to the new complaint. Yorkville's motion seeks, as alternative relief, an additional fourteen (14) days in which to respond to Hamman Farms' Motion to Dismiss, presumably requesting that the fourteen days begin to run on the date when the Board rules on the Motion to Strike. In so doing, Yorkville effectively uses a Motion to Strike to seek a total of 4 to 8 weeks, or more, in which to prepare and file a response to the Motion to Dismiss.

As discussed below, because a Motion to Strike may only be employed to strike a pleading, not a motion, it cannot be used to strike the motion to dismiss, and is in fact a

[1] The Board has the authority to set deadlines, as it did in this case, for the parties to perform certain acts. The fact that the Board ordered Hamman Farms to answer the amended complaint by July 6, 2009, and that Hamman Farms filed its Answer and Motion to Dismiss on June 30, 2009 clearly defeats Yorkville's assertion that the June 30, 2009 filing was untimely.

procedural nullity. It seems clear that Yorkville's real purpose in filing a motion to strike a motion was to have one to two months, or, perhaps more, in which to respond to the Motion to Dismiss. Inasmuch as Yorkville's Motion to Strike a motion is procedurally impermissible, and was filed for an improper purpose, the Board is urged to deny the motion to strike and the relief sought therein. In addition, Hamman Farms requests that the Board find, in accordance with Section 100.500(d), that by failing to file a response to Hamman Farms Motion to Dismiss, Yorkville has waived its objection to the motion.

ARGUMENT

1. Hamman Farms' Motion to Dismiss was Necessary to Preserve its Objection to the Amended Complaint

"Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record" and the prior pleading is in effect then "abandoned and withdrawn." *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp*., 96 Ill.2d 150, 154, 449 N.E.2d 125 (1983). Thus, when Yorkville filed its newest amended complaint in May, all of its previously tendered complaints were "abandoned and withdrawn." *Id*. Hamman Farms was then tasked with responding to the only operative complaint: the latest amended complaint.

It is well settled that where a defendant (or in this case, a respondent) responds to a complaint by simply filing an answer, it waives any defect in the pleading. *See Adcock v. Brakegate, Ltd*., 164 Ill.2d 54, 60, 645 N.E.2d 888, 893, 206 Ill.Dec. 636, 641 (1994). Accordingly, it was incumbent upon Hamman Farms to preserve its objections to the deficiencies of the newest amended complaint – now the only operative complaint – by filing a motion to dismiss in order to avoid waiving its right to challenge the defects therein. Thus, Hamman

Farms had no choice but to move to dismiss the amended complaint, raising all of its arguments in opposition thereto.

2. The Doctrine of Estoppel Does Not Apply

Yorkville offers no authority to support its novel theory that Hamman Farms should be "estopped" from raising any new arguments concerning Counts I through III of the most recent amended complaint. Notably, as discussed above, Yorkville's amendment of its complaint acted to extinguish the prior complaint, effectively removing it from the record. Hamman Farms, therefore, has every right to raise any and all arguments in its response to the only operative complaint.

Yorkville's motion cites no authority and fails to identify what form of "estoppel" it thinks should be available to bar Hamman Farms from fully responding to the new complaint, leaving the Board and the respondent to "guess" what it is arguing. Although completely unsupported arguments do not demand a response, Hamman Farms examines below the recognized theories of estoppel, none of which apply under the facts in this case.

a. Collateral Estoppel

If Yorkville seeks to invoke "collateral estoppel," its argument fails because for the doctrine of collateral estoppel to apply, "the issue decided in the prior adjudication must be identical to the issue in the current action, the party against whom estoppel is being asserted must have been a party in the prior action, and the prior adjudication must have resulted in a final judgment on the merits. *Bahr v. Bartlett Fire Protection Dist.*, 383 Ill.App.3d 68, 76, 889 N.E.2d 760, 766-767, 321 Ill.Dec. 495 (Ill.App.Ct. 2008). Here, there was no final judgment on the merits, therefore collateral estoppel is inapplicable.

b. Judicial Estoppel

If Yorkville seeks to invoke "judicial estoppel," its argument similarly fails because for judicial estoppel to apply, Yorkville would have to be able to show that: "(1) the party being estopped [had] taken two positions; (2) the two positions must be inconsistent; (3) the positions must have been taken in separate judicial or quasi-judicial proceedings; (4) the party must have intended for the trier of fact to accept the truth of the facts alleged; and (5) the party must have succeeded in asserting the first position and received some benefit from it." *People v. Carey*, 386 Ill.App.3d 254, 269, 898 N.E.2d 1127, 1141, 325 Ill.Dec. 848, 862 (Ill.App.Ct. 2008). Clearly, again, this theory does not apply inasmuch as, *inter alia*, Hamman Farms has not taken inconsistent positions in separate proceedings, and most notably, it did not receive a benefit from asserting "the first position."

c. Promissory Estoppel

To establish promissory estoppel, one must prove that "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp*., 233 Ill.2d 46, 51, 906 N.E.2d 520, 523-524, 329 Ill.Dec. 322, 325 - 326 (2009). Clearly, Yorkville has not relied to its detriment on promises made by Hamman Farms, thus, promissory estoppel does not bar Hamman Farms' from asserting its defenses or arguments.

d. Equitable Estoppel

Because the other forms of estoppel have been eliminated as inapplicable, only equitable estoppel remains. As the Illinois Supreme Court has explained, however, "[t]o establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the

representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill.2d 302, 313-314, 751 N.E.2d 1150, 115, 256 Ill.Dec. 313, 320 (2001). Inasmuch as this theory is wholly inapplicable to the facts at bar, with not a single element applying, this theory, too, fails to provide the relief sought by Yorkville.

Accordingly, there is no theory of estoppel that would bar Hamman Farms from raising new arguments – or indeed, from re-asserting previously asserted arguments – as it must do to preserve its objections to the new pleading and its rights on appeal. There is, accordingly, no basis for the argument that Hamman Farms should be "estopped" from raising additional arguments concerning the newest amended complaint.

3. A Motion to Strike a Motion is a Procedural Nullity

A motion to strike may be used "to challenge the sufficiency of any pleading filed with the Board." 35 Ill.Adm.Code 101.506. A motion, however, is not a pleading. Rather, a pleading "consists of a party's formal allegations of his claims or defenses," and a motion is "an application to the court for a ruling or an order in a pending case." *In re Marriage of Wolff*, 355 Ill.App.3d 403, 407, 822 N.E.2d 596 290 Ill.Dec. 1011, (Ill.App.Ct. 2005) (collecting cases showing that a motion is not a pleading); *see also KSAC Corp. v. Recycle Free, Inc.*, 364 Ill.App.3d 593, 597, 846 N.E.2d 1021, 1025, 301 Ill.Dec. 418, 422 (Ill.App.Ct. 2006).

Here, the document that Yorkville's motion seeks to strike is, in fact, a motion (to dismiss), not a pleading. Thus, the Motion to Strike is a procedural nullity.

4. Yorkville's Motion to Strike was Filed for an Improper Purpose

As observed above, Yorkville presumably filed its frivolous Motion to Strike for the improper purpose of obtaining an exceptionally long extension of time in which to respond to the Motion to Dismiss. Granting the requested relief for this frivolously filed motion would reward Yorkville's refusal to recognize and act in accordance with the Board's prescribed procedural rules, including the rule concerning motions for extensions of time pursuant to 35 Ill.Adm.Code 101.522.

WHEREFORE, Defendant, HAMMAN FARMS, prays that this Board enter an order finding the Motion to Strike is a procedural nullity, denying the relief requested in the Motion to Strike, and, finding that Yorkville has waived its objection to Hamman Farms' Motion to Dismiss by failing to file a response, and granting such other and further relief as the Board deems appropriate.

Dated: 7/28/09 HAMMAN FARMS

By: /s/ Charles F. Helsten
One of Their Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on July 28, 2009, she caused to be served a copy of the foregoing upon:

Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 **(via electronic filing)**	Thomas G. Gardiner Michelle M. LaGrotta GARDINER KOCH & WEISBERG 53 W. Jackson Blvd., Ste. 950 Chicago, IL 60604 via email to: tgardiner@gkw-law.com mlagrotta@gkw-law.com
Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 w. Randolph Street Chicago, IL 60601 **(via email: hallorab@ipcb.state.il.us)**	

Via electronic filing and/or e-mail delivery.

/s/ Nicola Nelson
Nicola Nelson

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