

ILLINOIS POLLUTION CONTROL BOARD
November 4, 2010

UNITED CITY OF YORKVILLE, a municipal)
corporation,)
)
Complainant,)
)
v.) PCB 08-96
) (Citizen's Enforcement – Land, Water,
HAMMAN FARMS,) Air)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

This citizen's enforcement action was brought by United City of Yorkville (Yorkville) against Hamman Farms (Hamman). The case, which concerns Hamman's farmland in Kendall County, is before the Board today on three motions. First, Hamman filed its third motion to dismiss in this proceeding, seeking dismissal of three of the four counts in Yorkville's amended complaint: count I ("Open Dumping Violations"); count II ("Landscape Waste Violations"); and count III ("Air Pollution Violations"). Second, Yorkville filed a motion to strike Hamman's motion to dismiss. Third, Hamman filed a motion to strike Yorkville's answer to Hamman's affirmative defenses to count IV ("Water Pollution Violations").

For the reasons below, the Board grants Yorkville's motion to strike Hamman's motion to dismiss counts I through III. The Board also denies Hamman's motion to strike Yorkville's answer to Hamman's affirmative defenses to count IV. Finally, as Hamman has already filed its answer and affirmative defenses to count IV, Hamman may file an answer and any affirmative defenses to counts I, II, and III by January 3, 2011.

In this opinion, the Board will provide the procedural history of the case before summarizing the parties' arguments and ruling on the motions.

PROCEDURAL HISTORY

Prior to today's decision, the Board had issued three orders in this case, first on October 16, 2008, then on April 2, 2009, and finally on June 18, 2009. The case has not been to hearing. To better understand this case's somewhat complex procedural history, the Board organizes this section of the opinion around the three previously-issued orders, recounting the filings leading up to, and the rulings of, each order. The Board lastly describes the filings made after its June 18, 2009 order and at issue today.

October 16, 2008 Order

On June 4, 2008, Yorkville filed a four-count complaint against Hamman, alleging violations of Sections 9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), and 21(q) of the Environmental Protection Act (415 ILCS 5/9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(q) (2008)). On July 8, 2008, Hamman filed a motion to strike or dismiss counts II through IV of the complaint, as well as Yorkville's requests for attorney fees and costs. The Board ruled on that contested motion in an October 16, 2008 order. Among other things, the Board dismissed without prejudice count III as insufficiently pled, but denied Hamman's motion to dismiss counts II and IV. In addition, the Board granted Hamman's motion to strike with prejudice both paragraph 49 of count II (alleging violations by the Illinois Environmental Protection Agency (Agency)) and Yorkville's requests for attorney fees and costs.

The Board accepted for hearing Yorkville's complaint as modified by the Board's October 16, 2008 order. The Board stated that Yorkville could seek leave to re-allege count III. Further, because the time period under the Board's procedural rules for filing an answer had been stayed by the filing of Hamman's motion to dismiss, the Board specified that Hamman had 60 days from receipt of the Board's order to file any answer.

April 2, 2009 Order

On November 14, 2008, Hamman filed a motion for reconsideration of the Board's October 16, 2008 order denying Hamman's motion to dismiss count IV. On November 17, 2008, Hamman filed a motion to dismiss as duplicative counts I and II of Yorkville's complaint based on a circuit court action that had been filed on September 17, 2008.

On April 2, 2009, the Board denied Hamman's contested motions to reconsider and dismiss. In addition, the Board denied Yorkville's December 1, 2008 contested motion for leave to file an amended complaint with a modified count III, finding that Yorkville's proposed amendment would not cure all of the deficiencies identified in the Board's October 16, 2008 order. The Board granted Yorkville leave to file an amended complaint by May 4, 2009, to remedy count III. Because the time period under the October 16, 2008 order for filing an answer had been stayed by the filing of Hamman's second motion to dismiss, the Board made any answer from Hamman due by July 6, 2009.

June 18, 2009 Order

On May 6, 2009, the hearing officer granted Yorkville's May 1, 2009 request to extend the deadline for filing an amended complaint from May 4 to May 7, 2009. On May 7, 2009, Yorkville filed the amended complaint, remedying the deficiencies of count III, which the Board accepted for hearing in an order of June 18, 2009. Because the amended complaint was filed three days after the Board's original deadline of May 4, 2009, the Board made any answer from Hamman due by July 9 rather than July 6, 2009.

Pending Filings

On June 30, 2009, Hamman filed an answer, including affirmative defenses, to count IV. On the same date, Hamman filed a motion to dismiss counts I through III (HMot. Dism.), with a supporting brief (HMot. Dism. Br.), all of which Yorkville moved to strike on July 14, 2009 (YMot. Str.). On July 28, 2009, Hamman filed a response to Yorkville's motion to strike (HResp.). On August 11, 2009, Yorkville filed a motion for leave to reply, attaching the reply. Yorkville's unopposed motion for leave is granted and the reply is accepted (YReply).

On August 28, 2009, Yorkville filed an answer to Hamman's affirmative defenses to count IV (YAns.). On September 2, 2009, Hamman filed a motion to strike Yorkville's answer (HMot. Str.) and on September 16, 2009, Yorkville filed a response to Hamman's motion to strike (YResp.).

PARTIES' ARGUMENTS

Yorkville's Motion to Strike Hamman's Motion to Dismiss Counts I-III

Hamman's Third Motion to Dismiss

In its third motion to dismiss, Hamman seeks dismissal of counts I through III of the amended complaint. In the motion, for purposes of counts I and II, Hamman argues that the allegations of the amended complaint cannot establish a "composting operation," "open dumping," "waste-storage, waste-treatment, or waste-disposal," or a "permitting" violation. HMot. Dism. at 1-3; HMot. Dism. Br. at 2-11. As to count III, according to Hamman, the allegations of the amended complaint still do not cure the informational deficiencies with respect to air pollution and, alternatively, a two-year statute of limitations applies. HMot. Dism. at 3-4; HMot. Dism. Br. at 11-13.¹

Yorkville's Motion to Strike the Motion to Dismiss

Yorkville moves to strike Hamman's motion to dismiss counts I through III. Yorkville states that as required by the Board's order of April 2, 2009, Yorkville amended "only Count III of Yorkville's four-count complaint; the remaining counts remained unchanged." YMot. Str. at 3. According to Yorkville, as to counts I and II, Hamman's motion to dismiss includes new arguments that "should have been included in Hamman's prior motions to dismiss." *Id.* Hamman should therefore be "estopped from making new arguments." *Id.* Yorkville also maintains that Hamman's motion is "an attempt to relitigate issues that have been decided previously against Hamman so as to prolong litigation and delay hearing." *Id.* Yorkville asks that the motion to dismiss be stricken "[i]n the interest of judicial economy." *Id.* at 3-4.

¹ Hamman correctly notes that the caption of the amended complaint incorrectly includes the Agency as a respondent. HMot. Dism. Br. at 1. This mistake, which Yorkville has not since repeated, is considered mere scrivener's error.

In addition, Yorkville notes that on June 18, 2009, the Board observed that Hamman filed no motion responsive to the amended complaint within the permitted 30 days after service of the amended complaint. YMot. Str. at 3. As Hamman was served with the amended complaint on May 7, 2009, any motion to dismiss was due thirty days later. *Id.* at 4, citing 35 Ill. Adm. Code 101.506, 103.212(b). Yorkville maintains that Hamman’s latest motion to dismiss was accordingly “time-barred as of the date of its filing on June 30, 2009,” adding that Hamman “failed to allege any material prejudice, upon which the Board could permit the untimely filing of a motion to dismiss.” *Id.* Yorkville therefore asks the Board to strike the third dismissal motion. Should the Board deny Yorkville’s motion to strike, Yorkville asks for 14 days to respond to Hamman’s motion to dismiss. *Id.*

Hamman’s Response to the Motion to Strike

Hamman asserts that the Board’s April 2, 2009 order gave Hamman until July 6, 2009, to file both an answer and a motion to dismiss. HResp. at 3, n.1. According to Hamman, it “answered” the amended complaint with (1) the answer and affirmative defenses to count IV and (2) the motion to dismiss counts I through III. HResp. at 3. Next, Hamman argues that a “motion” is not a “pleading” and “a Motion to Strike may only be employed to strike a pleading, not a motion” and, therefore, Yorkville’s motion to strike the motion to dismiss is “a procedural nullity.” *Id.* at 3, 7-8 (emphasis in original).

Additionally, according to Hamman, when Yorkville filed the amended complaint, the original complaint was thereby abandoned and withdrawn. HResp. at 4. Hamman argues that it was accordingly “incumbent” upon Hamman to “preserve its objections to the deficiencies” of the amended complaint, “now the only operative complaint,” by filing another motion to dismiss “in order to avoid waiving its right to challenge the defects therein.” *Id.* Hamman states that where a respondent responds to a complaint “by simply filing an answer, it waives any defect in the pleading.” *Id.*

Hamman also maintains that no recognized theories of estoppel apply against it, despite Yorkville’s unsupported claim to the contrary. HResp. at 5-7 (discussing collateral estoppel, judicial estoppel, promissory estoppel, equitable estoppel). Because Yorkville’s amendment of the complaint, Hamman continues, “acted to extinguish the prior complaint, effectively removing it from the record,” Hamman has “every right to raise any and all arguments in its response to the only operative complaint,” including “new arguments” and “previously asserted arguments.” *Id.* at 5, 7. Finally, Hamman suggests that Yorkville filed the motion to strike “for the improper purpose of obtaining an exceptionally long extension of time in which to respond to the Motion to Dismiss.” *Id.* at 8.

Yorkville’s Reply to the Response to the Motion to Strike

Yorkville replies that the Board did not grant Hamman additional time beyond the thirty-day period to file a motion to dismiss. YReply at 1. The Board’s April 2, 2009 order, continues Yorkville, stated that Hamman could file an answer on or before July 6, 2009, but “granted no additional time for Hamman Farms to file any motion to dismiss or other motion challenging the sufficiency of the complaint.” *Id.* Yorkville notes that the Board’s June 18, 2009 order

“specifically references the thirty-day time limit for filing a motion to dismiss and finds that Hamman Farms failed to file any motion responsive to the amended complaint.” *Id.* Yorkville states that the Board’s procedural rules grant respondents sixty days to file an answer to a complaint, but only thirty days to file motions to dismiss. *Id.* at 1-2. According to Yorkville, any motion challenging Yorkville’s complaint pursuant to 35 Ill. Adm. Code 101.506 or 103.212(b) should have been filed by June 8, 2009. *Id.* at 2.

Yorkville further argues that Hamman filed the latest motion to dismiss “solely to protract litigation by making new arguments that could have and should have been raised in its first motion to dismiss.” YReply at 2. Yorkville states that if Hamman were actually seeking to “preserve its former objections for the record, its arguments should have been identical to the ones that were contained in its original motion.” *Id.* Instead, Yorkville continues, Hamman “attempts to have Counts I and II of Yorkville’s Amended Complaint dismissed on completely new grounds,” even though “Counts I and II of the Amended Complaint are identical to Counts I and II of Yorkville’s original complaint.” *Id.* Yorkville maintains that having failed to make these new arguments “in its original two motions to dismiss,” Hamman is now “merely trying to have a second bite at the apple after its first two attempts failed.” *Id.* Yorkville concludes that the Board should find these new arguments waived and strike the motion. *Id.* at 2-3.

Hamman’s Motion to Strike Yorkville’s Answer to Hamman’s Affirmative Defenses to Count IV

Hamman’s Motion to Strike

Hamman moves to strike Yorkville’s answer to Hamman’s affirmative defenses to count IV. Hamman notes that Yorkville’s answer moves to strike both affirmative defenses, yet the request was not made by proper motion or within the 30-day period for filing motions to strike pleadings. HMot. Str. at 1-2. Hamman also asserts that the only ground given by Yorkville in support of striking the affirmative defenses is that each calls for a legal conclusion, which Hamman argues is “patently frivolous.” *Id.* at 2.

Yorkville’s Response

Yorkville claims that Hamman’s motion to strike the answer was unnecessary and intended to harass, delay, and raise litigation costs. YResp. at 1-2. According to Yorkville, Hamman disregards the critical passages of Yorkville’s answer, in which Yorkville denies each affirmative defense. Yorkville maintains that it complied with the rules governing answers. *Id.*

DISCUSSION

In this section of the opinion, the Board first addresses Yorkville’s motion to strike Hamman’s third motion to dismiss. Next, the Board discusses Hamman’s motion to strike Yorkville’s answer to Hamman’s affirmative defenses to count IV of the amended complaint. Lastly, the Board sets a new deadline for any answer that Hamman may wish to file with respect to counts I through III.

Yorkville's Motion to Strike Hamman's Third Motion to Dismiss

For the following reasons, each of which is detailed below, the Board grants Yorkville's motion to strike Hamman's pending motion to dismiss counts I through III. First, Hamman's filing of its third motion to dismiss failed to comply with the 30-day deadline of the Board's procedural rules for filing motions to dismiss. Second, the Board did not grant Hamman leave to file a motion to dismiss either beyond the 30-day deadline or readdressing counts I and II. Third, Hamman has not shown that it would suffer "material prejudice" if the Board declines to accept this latest motion to dismiss. Finally, it was not procedurally improper for Yorkville to file a motion to strike Hamman's motion to dismiss.

Hamman Did Not Comply with the 30-Day Deadline of the Procedural Rules

The Board's procedural rules address the filing of *motions to dismiss* complaints:

All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed *within 30 days* after the service of the challenged document, unless the Board determines that material prejudice would result. 35 Ill. Adm. Code 101.506 (emphasis added).

Motions made by respondents alleging that a citizen's complaint is duplicative or frivolous² must be filed *no later than 30 days* following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen's enforcement proceedings. Timely filing the motion will, pursuant to Section 103.204(e) of this Subpart, stay the 60 day period for filing an answer to the complaint. 35 Ill. Adm. Code 103.212(b) (emphasis added).

The procedural rules also address the filing of *answers* to complaints:

- d) Except as provided in subsection (e) of this Section, the respondent may file an answer *within 60 days* after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

² "Unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2008); *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.*

- e) If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the *60-day period* to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(d), (e) (emphasis added).

Accordingly, the procedural rules plainly distinguish a *motion to dismiss* a complaint from an *answer* to a complaint. Any motion to dismiss a complaint must be filed within 30 days after service, unless material prejudice would result. Any answer to a complaint, on the other hand, is not due until 60 days after service. Here, Hamman timely filed an answer (to count IV), but Hamman's third motion to dismiss was untimely. It is uncontested that Hamman was served with the amended complaint on May 7, 2009. Hamman did not file the pending motion to dismiss counts I through III until June 30, 2009, which is beyond the 30-day deadline of the procedural rules.

Hamman Did Not Have Leave to File a Motion to Dismiss Either Beyond the 30-Day Deadline or Readdressing Counts I and II

In its October 16, 2008 order, the Board ruled that the 60-day period for Hamman to file an answer to Yorkville's original complaint was automatically stayed by procedural rule due to the timely filing of Hamman's first motion to dismiss: "Hamman's filing of the *motion to strike or dismiss* stayed the 60-day period for filing an *answer* to the complaint, which stay ends today with the Board's ruling on the motion. See 35 Ill. Adm. Code 103.204(e). Hamman therefore has 60 days from receipt of this order to file an *answer* to Yorkville's complaint, as amended by today's rulings." United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 26 (Oct. 16, 2008) (emphasis added). The Board concluded by summarizing its rulings:

The Board grants Hamman's motion to strike from [count II of] Yorkville's complaint the allegation that the Agency violated the Act in issuing the May 1, 2008 determination concerning Hamman's application of landscape waste. In addition, the Board grants Hamman's motion to dismiss Yorkville's air pollution count [count III] as insufficiently pled. The Board also grants Hamman's motion to strike as frivolous Yorkville's requests for attorney fees and costs [made in all four counts]. The Board otherwise denies Hamman's motion to strike or dismiss *and accepts for hearing Yorkville's complaint, as amended by today's decision.*

Any *answer* to the complaint, as amended, must be filed within 60 days after Hamman receives this order. Nothing in today's rulings precludes Yorkville from seeking leave to file an *amended complaint that re-alleges air pollution and cures that count's factual pleading deficiencies.* Any *amended complaint must exclude the provisions of the original complaint stricken with prejudice by this order.* Hamman Farms, PCB 08-96, slip op. at 27-28 (Oct. 16, 2008) (emphasis added).

Counts I, II, and IV, as amended by the Board, were therefore accepted for hearing by the October 16, 2008 order. The order provided that Yorkville could seek leave to re-allege only count III. Hamman Farms, PCB 08-96, slip op. at 22, 28 (Oct. 16, 2008). In that event, and

precisely to avoid confusion and undue burden, the amended complaint would have to carry forward counts I, II, and IV, absent the provisions stricken with prejudice (*i.e.*, the alleged Agency violation and the requests for attorney fees and costs). Yorkville did just that. Hamman's current position, that a third dismissal motion thereby became necessary to avoid waiving old pleading objections to otherwise unaltered counts I and II, is contradicted by the Board's October 16, 2008 rulings.

This procedural posture of the case was reiterated in the Board's next order. In denying Hamman's second motion to dismiss, the Board on April 2, 2009, noted that it "has already accepted for hearing Yorkville's original complaint, as modified by the Board's October 16, 2008 order." Hamman Farms, PCB 08-96, slip op. at 8 (Apr. 2, 2009), citing Hamman Farms, PCB 08-96, slip op. at 26 (Oct. 16, 2008). The April 2, 2009 order continued:

[T]he Board grants Yorkville leave to file an amended complaint *to remedy, pursuant to today's order, the air pollution count* [count III]. Any such amended complaint must be filed no later than May 4, 2009. If an amended complaint is timely filed, the Board will issue an order determining whether to *also* accept for hearing *the modified air pollution count*.

Under the Board's procedural rules, 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 the respondent to have admitted the allegation. See 35 Ill. Adm. Code 103.204(d). Hamman's two motions to dismiss have stayed the *60-day periods for filing an answer*. See 35 Ill. Adm. Code 103.204(e); Hamman Farms, PCB 08-96, slip op. at 28 (Oct. 16, 2008). For administrative economy, the Board now makes any *answer* from Hamman (whether to Yorkville's complaint *as modified by the October 16, 2008 order*, or to any amended complaint *permitted by today's order*) due by July 6, 2008. Hamman Farms, PCB 08-96, slip op. at 8 (Apr. 2, 2009) (emphasis added).

Based on the October 16, 2008 and April 2, 2009 orders, there can be no question that counts I, II, and IV, minus the alleged Agency violation and the attorney fee requests, were accepted for hearing over two years ago, and never abandoned and withdrawn in the sense Hamman urges. Those three counts, so modified, were simply repeated by Yorkville, as the Board instructed, with the filing of the amendments to count III, the only count for which leave was granted to remedy. This was reemphasized in the June 18, 2009 order, in which the Board stated that on October 16, 2008, the Board "accepted for hearing Yorkville's complaint as modified by the Board's order" and on April 2, 2009, the Board "granted Yorkville leave to file an amended complaint . . . to remedy count III." Hamman Farms, PCB 08-96, slip op. at 1 (June 18, 2009).

In fixing a date certain for Hamman's 60-day deadline to file an *answer*, the April 2, 2009 order in no way altered the 30-day timeframe within which Hamman could file a *motion to dismiss*. Yorkville, on May 7, 2009, filed an amended complaint solely to cure the remaining

deficiencies of count III. The deadline for filing a motion to dismiss amended count III expired on June 8, 2009. *See* 35 Ill. Adm. Code 101.300(a), 101.506, 103.212(b). Hamman missed that deadline. On June 18, 2009, the Board accepted the amended count III, noting that no responsive motion had been filed by Hamman within the 30 days provided by rule. Hamman Farms, PCB 08-96, slip op. at 8 (June 18, 2009).

The deadline for filing a motion to dismiss counts I, II, and IV expired long ago. The Board ruled on all timely motions to dismiss those counts in its orders of October 16, 2008 and April 2, 2009. For the pleading of the complaint, all that remained at issue after the Board's April 2, 2009 order was whether to accept any amended count III. Hamman Farms, PCB 08-96, slip op. at 8 (Apr. 2, 2009) ("If an amended complaint is timely filed, the Board will issue an order determining whether to also accept for hearing the modified air pollution count.") . Granting Yorkville leave to amend its air pollution count did not reopen the entire complaint to attack.

Hamman Has Not Shown That It Will Suffer "Material Prejudice"

This is Hamman's third motion to dismiss. Hamman timely filed its first motion to dismiss, which concerned counts II through IV. That motion was granted on count III, but denied on counts II and IV.³ Hamman then sought but was denied reconsideration concerning the denial of its motion to dismiss count IV.

Hamman's second motion to dismiss challenged counts I and II as duplicative. Though it was filed after the 30-day period of the procedural rules, the second dismissal motion was accepted by the Board to avoid material prejudice. Specifically, the second motion was based on a circuit court action that had been filed *after* Hamman's first dismissal motion and *before* the Board's ruling on that first motion. Hamman filed the second dismissal motion within 30 days after receiving a copy of the Board's October 16, 2008 ruling on the first motion to dismiss. On the merits, however, the Board denied Hamman's second motion to dismiss in its entirety.

Hamman filed the third motion to dismiss late and seeks dismissal not only of amended count III, but of unchanged counts I and II, and all without asking for leave. As discussed, Hamman was not required to restate its earlier objections to counts I and II to preserve them. Should the third dismissal motion contain challenges to the pleading of count I or II that Hamman did not present in its previous motions to dismiss, Hamman articulates no reason for failing to have done so. In addition, having twice successfully opposed Yorkville as to the informational sufficiency of count III, Hamman has not justified why it did not move to dismiss this amended count III within the 30-day timeframe of the rules. The Board finds that Hamman has had a fair opportunity to timely move for the dismissal of each of Yorkville's counts.

Should the Board not accept Hamman's third motion to dismiss, Hamman would be barred from now bringing to bear in this proceeding any pleading deficiencies alleged in that

³ As previously noted, the alleged Agency violation (made in count II) and the requests for attorney fees and costs (made in counts I through IV) were stricken with prejudice on Hamman's motion.

motion. Hamman would not be precluded, however, from timely asserting the merits of any other positions espoused in the third dismissal motion, whether through an answer, summary judgment motion, or post-hearing brief, as appropriate. In fact, Hamman never claims that it would suffer “material prejudice” if the Board declines to accept the latest motion to dismiss. 35 Ill. Adm. Code 101.506. In that motion, Hamman raises just two arguments for dismissing amended count III: informational insufficiency and statute of limitations. HMot. Dism. at 3-4; HMot. Dism. Br. at 11-12. The latter can be pled as an affirmative defense in an answer and, as discussed below, the former does not support dismissal of the amended air pollution count.

On April 2, 2009, the Board found that Yorkville’s first proposed amendment to count III “pleads the nature of the alleged interferences with residents, correcting one of the deficiencies found by the Board on October 16, 2008.” Hamman Farms, PCB 08-96, slip op. at 8 (Apr. 2, 2009). However, in denying Yorkville’s motion for leave to file the amended complaint, the Board found that “Yorkville still identifies neither the residents allegedly interfered with nor the locations at which the interferences allegedly took place” and “still includes no allegations on the dates or frequency and duration of the alleged disruptions over the 15-year span.” *Id.* The Board therefore held that “[a]bsent this information, Yorkville’s amendment would not cure all of the deficiencies identified in the Board’s October 16, 2008 order.” *Id.* Yorkville’s second proposed amendment, accepted on June 18, 2009, added over three pages of detailed allegations to count III, curing the remaining defects specifically identified on April 2, 2009. Hamman’s third motion to dismiss does not persuasively argue otherwise. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004) (ruling on motion to dismiss takes all well-pled allegations as true and draws all reasonable inferences from them in favor of non-movant).

Under these circumstances, the Board cannot find that material prejudice would result to Hamman by the Board declining to accept Hamman’s third motion to dismiss.

Yorkville’s Motion to Strike is Not a Procedural Nullity

The procedural rules provide that the Board “may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.” 35 Ill. Adm. Code 101.500(a). Case law from Illinois is replete with instances of the courts entertaining motions to strike filings that may not technically be “pleadings.” *See, e.g., McWilliams v. Dettore*, 387 Ill. App. 3d 833, 841-42, 851-52, 901 N.E.2d 1023, 1030, 1037-38 (1st Dist. 2009) (affirming grant of motion to strike affidavit to post-trial motion); *see also In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 413, 622 N.E.2d 105, 107 (2nd Dist. 1993) (“A motion is an application to the court for a ruling or an order in a pending case. *** A pleading, in contrast, consists of a party’s formal allegations of his claims or defenses.”).

Likewise, the Board has historically entertained, and at times granted, such motions to strike. *See, e.g., MDI Ltd. P’Ship #42 v. Regional Board of Trustees*, PCB 00-181, slip op. at 2-3, 7 (May 2, 2002) (granting motion to strike affidavit to motion for summary judgment); People v. Forty-Eight Insulations, Inc., PCB 74-480, slip op. at 1 (Jan. 6, 1977) (granting motion to strike untimely motion for stay). Reading its plain language, Yorkville’s motion seeks to strike Hamman’s third dismissal motion not on the ground that it is an insufficient pleading, but rather

because it was untimely and overbroad. Contrary to Hamman's claim, Yorkville's motion to strike the third motion to dismiss is not a procedural nullity.

Board Ruling on Yorkville's Motion to Strike

For the reasons described above, the Board grants Yorkville's motion to strike Hamman's latest motion for dismissal. Having so ruled, the Board denies as moot Yorkville's alternative request for time to file a response to Hamman's motion.

Hamman's Motion to Strike Yorkville's Answer

On August 28, 2009, Yorkville filed its "Answer to Affirmative Defenses to Count IV." YAns. at 1. In responding to Hamman's motion to strike Yorkville's answer, Yorkville emphasizes only that it filed a compliant "answer" and in doing so denied both of Hamman's purported affirmative defenses. Taking these representations into account, the Board does not construe Yorkville's answer to Hamman's affirmative defenses to count IV as a motion to strike those affirmative defenses, but rather as mere denials thereof. Accordingly, the Board denies Hamman's motion to strike Yorkville's answer as a late or otherwise improper motion to strike.

Answer

The Board has cautioned that the failure to timely file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation of a complaint may result in the allegation being taken as admitted. *See Hamman Farms*, PCB 08-96, slip op. at 2 (June 18, 2009); *Hamman Farms*, PCB 08-96, slip op. at 8 (Apr. 2, 2009). Hamman had until July 9, 2009, to file an answer to counts I, II, and IV, as modified by the Board, and count III, as modified by Yorkville. Hamman timely filed an answer, but only as to count IV. Hamman has therefore failed to timely file an answer to counts I through III.

Nevertheless, Hamman did move, albeit late, for dismissal of counts I through III. Hamman may have been under the mistaken impression that its 60-day response time for filing an answer to those three counts was thereby stayed. *See* 35 Ill. Adm. Code 103.204(e) (only a *timely-filed* motion for dismissal effectuates the automatic stay). Hamman would plainly suffer material prejudice if it is deemed to have admitted the material allegations of count I, II, or III. The Board grants Hamman leave to file an answer and any affirmative defenses to counts I, II, and III by January 3, 2011, which is the 60th day after the date of this order.

CONCLUSION

The Board grants Yorkville's motion to strike Hamman's third motion to dismiss, including Hamman's supporting brief. Additionally, the Board denies Hamman's motion to strike Yorkville's answer to Hamman's affirmative defenses to count IV of the amended complaint. Hamman may file an answer, including any affirmative defenses, to counts I through III as provided in the order below. The Board again directs that hearing in this matter be pursued expeditiously.

ORDER

1. The Board grants Yorkville's motion to strike Hamman's June 30, 2009 motion to dismiss counts I through III of the amended complaint.
2. The Board denies Hamman's motion to strike Yorkville's August 28, 2009 answer to Hamman's affirmative defenses to count IV of the amended complaint.
3. Hamman may file an answer, including any affirmative defenses, to counts I, II, and III of the amended complaint by January 3, 2011.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board