

ILLINOIS POLLUTION CONTROL BOARD
April 6, 2023

PAUL CHRISTIAN PRATAPAS,)
)
 Complainant,)
)
 v.) PCB 23-57
) (Citizens Enforcement - Water)
 CHELSEA MANOR BY M/I HOMES,)
)
 Respondent.)

ORDER OF THE BOARD (by M. Gibson):

On November 15, 2023, Paul Christian Pratapas (Mr. Pratapas) filed a citizen’s complaint (Comp.) against Chelsea Manor by M/I Homes (M/I). The complaint concerns M/I’s residential construction located at Commons Drive in Aurora, DuPage County.¹ On December 16, 2022, M/I filed a motion to dismiss on the grounds that the complaint is frivolous, and a motion to dismiss the complaint by other affirmative matter avoiding the legal effect of or defeating the claim.

The Board first addresses M/I’s motion to dismiss the complaint on the grounds of frivolousness and then the motion to dismiss the complaint on the grounds of other affirmative matter. The Board grants M/I’s motion to dismiss for frivolousness, but gives Mr. Pratapas time to amend his complaint; strikes one of Mr. Pratapas’ requests for relief; and denies M/I’s motion to dismiss the complaint on the grounds of other affirmative matter.

MOTION TO DISMISS: FRIVOLOUS

Under 415 ILCS 5/31(d)(1) (2020), the Board will dismiss complaints that are frivolous. “Frivolous” is defined in the Board’s rules as, “any request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Adm. Code 101.202(b). M/I argues that the complaint is frivolous because it fails to state a cause of action and requests relief that the Board does not have the authority to grant. Mot. at 1-2.

The Board’s procedural rules require complaints to include “dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations.” 35 Ill. Adm. Code 103.204(c)(2). Mr. Pratapas’ complaint alleges that the violation occurred on November 13, 2022, and at the general location of Commons Drive in

¹ The complaint does not cite the specific address of the alleged violation. Rather it states that the violation happened on Commons Drive in Aurora, Illinois because the signage was missing. Comp. at 2.

Aurora, Illinois. Comp. at 3. However, the complaint lacks any details describing the extent, duration or strength of the alleged violation and only cites general violations, such as toxic concrete washout. *Id.* Mr. Pratapas concedes in his response (Resp.) that his complaint lacks specificity and requests that the Board require “respondents [to] furnish complainant with SWPPP book access to determine with greater accuracy the length of violations [and] total of associated fines.” Resp. at 1.

Complaints must request relief that the Board has the ability to grant. 35 Ill. Adm. Code 101.202(b). In his complaint, Mr. Pratapas requests that the Board: 1) find that M/I violated its permit; 2) assess a civil penalty of \$50,000; 3) investigate fraudulent SWPPP inspection reports and contractor certifications; 4) void M/I’s permit for the site until the alleged violations are resolved; 5) state that SWPPP plans for phasing and concrete washout cannot be implemented unless documented otherwise in the Illinois Urban Manual; and 6) guarantee access to the SWPPP book for public review. Comp. at 3. The Board has broad statutory authority to grant relief; however, it does not have the authority to investigate fraudulent SWPPP inspection reports and contractor certifications. *See* 35 Ill. Adm. Code 101.106(b). Therefore, the Board strikes this request for relief and gives Mr. Pratapas 30 days to amend his complaint as to the specificity of the violations.

MOTION TO DISMISS: OTHER AFFIRMATIVE MATTER

A defendant may file a motion to dismiss on the grounds that the plaintiff’s claim is barred by other “affirmative matter avoiding the legal effect of or defeating the claim.” 735 ILCS 5/2-619(a)(9) (2020). Because the allegations of the complaint are taken as true, the “affirmative matter” presented by the defendant must do more than just refute a well-pleaded fact in the complaint. *Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, P39. Illinois courts describe the difference between proper and improper “affirmative matter” motions as the difference between “yes but” and “not true” motions. *Id.* at 40. A “yes but” motion admits that the complaint states a cause of action and that the allegations are true, but argues that a defense exists that defeats the claim. *Id.* In contrast, a “not true” motion only contradicts the allegations and is simply an answer to the complaint. *Id.* A “not true” motion is not a basis for dismissal and is better suited for the trial stage of litigation instead.

In *Smith v. Waukegan Park District*, the plaintiff sued for retaliatory discharge, alleging he was fired because he filed a worker's compensation claim against the defendant, a municipal park district. 231 Ill. 2d 111 (2008). The defendant moved to dismiss, asserting statutory tort immunity as an affirmative matter to defeat the plaintiff’s claim. *Id.* The court recognized that tort immunity could, under the proper circumstances, constitute an “affirmative matter”; however, it held that a question of fact remained because the defendant simply disputed the complaint’s allegation that plaintiff was fired out of retaliation for filing a worker's compensation claim. *Id.* Therefore, the motion to dismiss was improper because the defendant only contradicted a well-pleaded allegation. *Id.*

In this case, M/I argues that the complaint should be dismissed because the Chelsea Manor development project holds a General Permit to Discharge Storm Water Associated with Construction Activities, NPDES Permit No: ILR10ZBGE dated April 1, 2022. The NPDES

Permit states that “[t]he following non-storm water discharges are prohibited by this permit: concrete and wastewater from washout of concrete (unless managed by an appropriate control).” M/I also contends that it has controls in place for concrete washout compliance and provided testimony from Jason Polakow in support of its argument. Similarly to Smith, under the proper circumstances the NPDES permit could allow concrete washout with proper controls, but whether or not M/I complied with the controls is a question of fact that M/I is only refuting. Because M/I’s argument only contradicts the allegations in the complaint, the motion is improper and the Board denies the motion.

ORDER

1. The Board grants M/I’s motion to dismiss for frivolousness in part and directs Mr. Pratapas to amend his complaint for specificity no later than May 8, 2023.
2. The Board grants M/I’s motion to strike Mr. Pratapas’s requests to “investigate into fraudulent SWPPP inspection reports and contractor certifications.”
3. The Board denies M/I’s motion to dismiss for other affirmative matter.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 6, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board