

ILLINOIS POLLUTION CONTROL BOARD
June 15, 2023

PAUL CHRISTIAN PRATAPAS,)
)
 Complainant,)
)
 v.) PCB 23-81
) (Citizen's Enforcement - Water)
 SILO BEND AND THE TOWNES BY SILO)
 BEND BY M/I HOMES,)
)
 Respondents.)

ORDER OF THE BOARD (by M. Gibson):

On December 19, 2022, Paul Christian Pratapas (Mr. Pratapas) filed a citizen's complaint (Comp.) against Silo Bend and the Townes by Silo Bend by M/I Homes (M/I). The complaint concerns M/I's residential construction located at 16646 South Sun Meadow Drive, Lockport, Will County. On January 12, 2023, 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. (Mot.)

The Board first addresses the proper name of the respondent. Next, the Board 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.

NAMED RESPONDENT

As filed, Mr. Pratapas named "Silo Bend and the Townes By Silo Bend by M/I Homes" as the respondent in this complaint. The proper name for respondent is "M/I Homes." The Board corrects the caption in this order and directs the Clerk to correct the respondent's name in the docket of this case.

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 2-5.

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 December 18, 2022, at 1:48 PM. Comp. at 2. However, the complaint lacks any details describing the extent, duration or strength of the alleged violation and only cites general violations and conclusions, such as toxic concrete washout making contact with soil and dirty mixed with snow on the site. *Id.*

Additionally, 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 respondent violated its permit;
2. Assess a civil penalty of \$50,000 and an additional civil penalty of \$10,000 per day for each violation;
3. Investigate fraudulent SWPPP inspection reports and contractor certifications;
4. Void the permit for the site until the builder "ceases to pollute the surrounding groundwater and surface water;"
5. Order SWPPP plans for concrete washout areas with standards from the Illinois Urban Manual. Comp. at 3.

The Board has broad statutory authority to grant relief; however, some of the requests from Mr. Pratapas in this complaint are beyond that authority. Specifically, the Board cannot investigate fraudulent SWPPP inspection reports and contractor certifications. *See* 35 Ill. Adm. Code 101.106(b). Therefore, the Board strikes the third request for relief listed above. The Board will allow Mr. Pratapas 30 days to amend his complaint as to the specificity of the violations and his request for relief. If the board does not receive an amended complaint curing this deficiency, it may dismiss the case and close the docket.

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.*

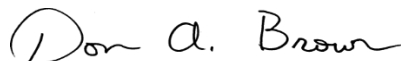
In this case, M/I argues that the complaint should be dismissed because the Silo Bend development project has a General Permit to Discharge Storm Water Associated with Construction Activities, NPDES Permit No: ILR10ZAAU, dated March 25, 2021. The NPDES Permit states that “[t]he following non-storm water 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 directs the Clerk to correct the name of the respondent in the docket.
2. 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 July 17, 2023. If the board does not receive an amended complaint curing this deficiency, it may dismiss the case and close the docket.
3. The Board strikes one of Mr. Pratapas’ requests for relief.
4. 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 June 15, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board