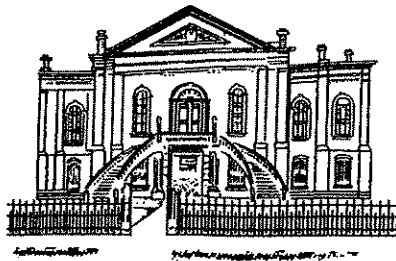


LOUIS E. COSTA
CLERK
(618) 242-3120



STATE OF ILLINOIS
APPELLATE COURT
FIFTH DISTRICT
14TH & MAIN STREETS
P.O. Box 867
MT. VERNON, IL 62864-0018

February 26, 2009


Paul Racette, Assistant Attorney General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

RE: *People v. The Pollution Control Board, et al.*
Gen. No.: 5-07-0504 (PCB No.: 07-16)

Dear Counsel:

Enclosed please find a copy of a decision in this cause which was filed in this court on February 26, 2009.

Sincerely,


Louis E. Costa, Clerk

LEC/hla
Enc.

cc: Daniel P. Bubar/David L. Rieser
Timothy J. Fox - Special Assistant Attorney General to IPCB
Dorothy Gunn, Clerk - IPCB

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

NO. 5-07-0504

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
FEB 26 2009
LOUIS E. COSTA
CLERK APPELLATE COURT, 5th DIST.

THE PEOPLE OF THE STATE OF ILLINOIS,)	Petition for Review of Orders
)	of the Pollution Control Board.
Petitioner,)	
)	
v.)	PCB No. 07-16
)	
THE POLLUTION CONTROL BOARD)	
and CSX TRANSPORTATION, INC.,)	
)	
Respondents.)	

RULE 23 ORDER

This is a direct administrative review of a decision of the Illinois Pollution Control Board (the Board) which ruled that CSX Transportation, Inc. (CSX), had violated certain sections of the Illinois Environmental Protection Act (the Act) (415 ILCS 5/1 *et seq.* (West 2006)) but declined to impose a civil monetary penalty. The People of the State of Illinois (the State), which had brought the enforcement action before the Board at the request of the Illinois Environmental Protection Agency (the Agency), appeals, arguing that the Board erred when it failed to hold an evidentiary hearing on the question of whether to impose a civil penalty on CSX. For reasons that follow, we affirm.

On September 12, 2006, the State filed its complaint before the Board and alleged that CSX had violated sections 12(a), 12(d), and 21 of the Act (415 ILCS 5/12(a), 12(d), 21 (West 2006)), when CSX accidentally spilled 400 to 500 gallons of diesel fuel onto the ground at its Rose Lake railroad yard in St. Clair County and then failed to clean up the site in a thorough and timely manner. The complaint prayed for a hearing on the issues, a finding that CSX had violated the Act, an order that CSX cease and desist from any further violations of

the Act, and a civil monetary penalty of not more than the statutory maximum. On November 15, 2006, CSX answered the complaint and raised several affirmative defenses, all of which were denied by the State.

On February 26, 2007, CSX filed a motion for a summary judgment, alleging that there were no disputed questions of material fact and that CSX was entitled to a judgment in its favor as a matter of law. On March 29, 2007, the State filed its own cross-motion for a summary judgment, in which it agreed that "the material facts proving violations and liability in this case are not in dispute" but alleged that it was entitled to a judgment as a matter of law on these issues. The State's motion further asserted, "[T]he only material issues of genuine facts are those which determine the penalty under Section 42(h), such as [CSX's] due diligence to comply with the Act including its response and lack thereof to [the Agency's] requests for information[] and [CSX's] failure to self[-]disclose its violations of the Act." The State's motion asked that the Board enter a summary judgment in favor of the State "and schedule a hearing to determine a penalty under Section [sic] 33 and 42 of the Act."

Both parties filed responses and replies to the others' pleadings. In its response to the State's motion for a summary judgment, CSX urged the Board to "deny the [State's] request for a hearing to determine a civil penalty since [CSX] did not violate any provisions of the [Act]." CSX also argued that even if the Board found that CSX had violated the Act, a civil penalty was not appropriate because the site had been completely remediated prior to the filing of the complaint.

On July 12, 2007, the Board entered its opinion and order. The Board found that there were no disputed questions of material fact and that the matter was appropriate for a summary judgment. The Board found that CSX had violated sections 12(a), 12(d) and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (West 2006)), and the Board ordered it to cease

and desist from future violations. The Board found that "a civil penalty was not warranted." Specifically with respect to the imposition of a penalty, the Board stated that it had considered the factors set forth in sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c), 42(h) (West 2006)) and that it recognized that subsequent compliance with the Act or remediation is not a bar to the imposition of a penalty and that a penalty may be imposed to deter future violations of the Act. The Board stated, "However, in this case a review of the record and the factors in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) ([West] 2006)) convinces the Board that a civil penalty is not appropriate in this case." The Board discussed in detail several of the section 33(c) and 42(h) factors as applied to the facts of this case. The Board concluded, "Based on CSX's prompt action after an accidental spill to clean up the site of the spill, the Board finds that no civil penalty is necessary to deter future violations of the Act."

In its motion for reconsideration, filed July 23, 2007, the State asserted that the Board had erred: "[T]he Board, without the request from either party and without any briefing from either party, proceeded to evaluate a penalty under Section 42(h) of the Act, 415 ILCS 5/42(h) ([West] 2006), and decided that a civil penalty is not warranted." The State argued that the issue of the amount of a penalty was not a part of either motion for a summary judgment and was therefore not properly before the Board. The State pointed out that neither party had briefed the applicability of the section 42(h) factors, and the State pointed out that it had explicitly requested a hearing on the issue of a civil penalty. This motion was denied by the Board on August 9, 2007.

The State brings this direct administrative review action pursuant to section 41(a) of the Act (415 ILCS 5/41(a) (West 2006)) and Supreme Court Rule 335 (155 Ill. 2d R. 335). Before further discussion, we wish to clarify the issue on appeal. In its brief on appeal, the State frames the issue as follows: "The [Board] abused its discretion when it refused to

impose a civil penalty on CSX after failing to hold an evidentiary hearing or to allow input from the parties on the matter." In its prayer for relief in its brief on appeal, the State asks this court to "reverse that part of the [Board's] order that refused to impose a civil penalty on [CSX] and remand this matter with instructions to conduct an evidentiary hearing regarding the penalty issue."

In its brief on appeal, CSX argues that in so framing the issue, the State "attempt[s] to shoehorn several distinct issues with various legal standards" into its statement of the issue: whether the Board abused its discretion in failing to hold a hearing on the penalty issue and whether the Board's failure to impose a penalty was arbitrary and capricious. We agree.

In its reply brief, the State attempts to clarify the issue on appeal by restating it as follows: "[W]here the [Board] failed to hold an evidentiary hearing on the penalty issue or to allow briefing from the parties on the matter, the [Board] abused its discretion in refusing to impose a civil penalty because that decision was *sua sponte*, premature, and based on an incomplete record." We find this to be of little help in clarifying the issue. However, the State repeats its argument: "[T]he State is not asking this Court to impose a civil penalty on CSX. Rather, it is merely asking for a remand to the [Board] with instructions to hold a proper hearing on the penalty issue where the parties can submit evidence—testimonial and otherwise—that is directly relevant to that issue[] and to allow the parties to brief the applicability of the controlling section [*sic*] 33(c) and 42(h) factors."

Keeping in mind that this cause comes to us on appeal from the entry of a summary judgment, we conclude that the State does not intend to argue that it is entitled to a judgment as a matter of law on the issue of the imposition of a civil penalty but that there exist genuine issues of material fact with respect to the question of the imposition of a civil penalty so that the issue is not appropriate for disposition by a summary judgment. The proper framing of the issue on review is important for determining the appropriate standard of review, to which

we now turn.

The purpose of a summary judgment proceeding is not to try a question of fact but simply to determine if one exists. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). A summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue on any material fact and that the movant is entitled to a judgment as a matter of law. *Forsythe*, 224 Ill. 2d at 280. Where there is a dispute regarding a material fact, or where undisputed material facts could lead reasonable observers to divergent inferences, a summary judgment should be denied and the issue decided by the trier of fact. *Forsythe*, 224 Ill. 2d at 280. We conduct *de novo* review of a ruling on a motion for a summary judgment. *Forsythe*, 224 Ill. 2d at 280.

The State argues that there exist genuine issues of material fact on the question of CSX's "lack of diligence in cleaning up the site and its failure to cooperate with the [Agency's] investigation." Specifically, the State argues that CSX denied the State's allegations that CSX did not respond to several of the Agency's letters and notices. The State also argues that there is a dispute regarding whether CSX provided information concerning the cleanup to the Agency in a timely fashion. It argues that these facts are material because a violator's good faith or lack thereof is pertinent to the issue of whether a penalty should be imposed and, if so, the amount of the penalty. See *Modine Manufacturing Co. v. Pollution Control Board*, 193 Ill. App. 3d 643, 649 (1990). The State points to no other facts that it argues are disputed by the parties, nor does the State point to any additional facts that it would introduce on the question of a penalty.

We note that the penalty issue was presented to the Board in CSX's motion for a summary judgment despite the State's request for a hearing on the issue. Accordingly, the Board properly considered whether a summary judgment was appropriate on the question of

whether to impose a penalty. We further find that the Board did not err in finding no genuine issue of material fact with respect to the penalty issue. The Board had before it a complete record of all the facts relating to this case, including the parties' correspondence and the timeliness of CSX's responses to the Agency's letters, notices, and requests. Whether CSX acted diligently and cooperated with the Agency are not "questions of material fact" but conclusions to be drawn by the Board from the undisputed facts. Given the State's inability to point to any genuine issues of material fact on the question of the imposition of a civil penalty sufficient to preclude a summary judgment on that issue, we affirm the order of the Board.

For the foregoing reasons the order of the Illinois Pollution Control Board is hereby affirmed.

Affirmed.

WELCH, J., with WEXSTTEN, P.J., and GOLDENHERSH, J., concurring.

