

ILLINOIS POLLUTION CONTROL BOARD
February 7, 2002

JOHN M. GIERTYCH,)
)
 Complainant,)
)
 v.) PCB 00-133
) (Citizens Enforcement - Noise)
 4T's MANAGEMENT, L.L.C.,)
)
 Respondent.)

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

On December 28, 2002, 4T's Management, L.L.C. (4T's) filed a motion for summary judgment accompanied by a memorandum in support thereof. On January 3, 2002, the complainant, John M. Giertych (Giertych), filed a response objecting to the motion for summary judgment. The response, entitled 'motion to object to the motion for summary judgment,' was improperly filed, but was effectively served on the respondent and accepted by the Board on January 28, 2002. This matter involves a complaint filed on February 2, 2000, alleging that noise generated by the respondent's facility in Manteno, Kankakee County, has resulted in noise pollution violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq.* (2000)) and Board regulations.

For the reasons articulated below, the Board denies 4T's motion for summary judgment and directs the case to hearing.

BACKGROUND

Giertych resides at 1125 Ash Court in Manteno. Comp. at 1.¹ 4T's facility is located directly south of complainant's residence at 1125 Sycamore, Manteno. The complaint alleges that the noise pollution emanates from refrigeration units, idling and revving of truck motors, truck parking and braking, dropping off and picking up of trailers and other crashing and banging sounds. Comp. at 3. Giertych alleges that the noise pollution continues 24 hours per day every day of the week, and was noted immediately upon the opening of respondent's facility. *Id.* Giertych alleges that the noise generated by the respondent's facility has resulted in noise pollution in violation of Sections 23 and 24 of the Act (415 ILCS 5/23 and 24 (2000)) and Sections 900.102 and 901.102(a) and (b) of the Board's regulations. 35 Ill Adm. Code 900.102, 900.102(a)(b).

¹ The complaint will be referred to as "Comp. at ___." 4T's motion for summary judgment will be referred to as "Mot. at ___." 4T's memorandum in support of its motion will be referred to as Mem. at ___." The Giertych deposition will be referred to as Dep. at ___." Giertych's response will be referred to as Resp. at ___."

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998); People v. City of Waukegan, PCB 01-104, slip op. at 2 (Aug. 23, 2001). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370; Waukegan, PCB 01-104, slip op. at 2.

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, *citing* Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, the party opposing a motion for summary judgment may not rest solely on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994); Waukegan, PCB 01-104, slip op. at 2.

The Board’s procedural rules provide that “if the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.” 35 Ill. Adm. Code 101.516.

RESPONDENT’S ARGUMENTS

In addition to the motion for summary judgment and accompanying memorandum, 4T’s submitted affidavits, one with an attached noise survey, and the complainant’s deposition in support of its position. 4T’s asserts that the complainant lives in a mobile home park in the middle of an industrial park and that the property on which he lives is zoned for industrial use. Mot. at 1. The respondent argues that the evidence mandates that the Board should grant summary judgment for the respondent on all allegations in the complaint.

Specifically, 4T’s contends that (1) the sound measurements at the facility establish that no measurable noise emanates from the facility, let alone sound in excess of the numeric standards; (2) the only measurable sound at the facility is truck traffic going to and from the facility, and that such sound is exempted from the Board’s numeric standards; and (3) the ambient sound in the surrounding industrial park exceeds the noise levels measured at the respondent’s property. Mot. at 2.

4T’s next asserts that the evidence supports a finding in favor of the respondent on each of the factors that must be considered in determining if the complained of sound constitutes an unreasonable interference. Mot. at 3. 4T’s argues that the character and degree of injury claimed by Giertych is neither substantial nor frequent, that the facility provides an economic and social value to the community, that there is overwhelming evidence that the facility is suitable for its location and was intended to have priority in the area, that no technically or

economically feasible method of reducing the ambient truck traffic sound exists, and that 4T's has taken substantial and effective actions to reduce sound from its facility. Mot. at 3.

4T's notes that Giertych admits that he does not hear the sounds every night and that they do not disturb him everyday. Mem. at 6, citing Dep. at 69. 4T's argues that the owners of the mobile home park where Giertych resides had to obtain a special use permit to allow residences in the area, and promised that the development would not inhibit or have any affect on the industrial character and use of the surrounding area. Mem. at 1. 4T's asserts that Giertych is the only resident complaining about the sound relating to the 4T's facility. Mem. At 6.

COMPLAINANT'S ARGUMENTS

In response to the motion for summary judgment, the complainant contends that, contrary to respondent's assertion, at least 40 people are involved with the instant complaint. Resp. at 1. The complainant reiterates that 50 – 80 refrigerator trailers with their thermal unit running 24 hours per day cause the noise in question. *Id.* Finally, the complainant asserts that he has taken sound readings at various times and days, and that he will prove at hearing that the sounds in question are above the standards set by the Board's regulations. Resp. at 2.

DISCUSSION

The Act and the Board's regulations establish procedures and standards for the control of noise. The Board has numeric sound limits for daytime and nighttime hours. See 35 Ill. Adm. Code 901.102(a) and (b). Section 24 of the Act and Section 900.102 of the Board's regulations constitute a prohibition against nuisance noise. Zivoli v. Prospect Dive and Sport Shop, Ltd. (Mar. 14, 1991), PCB 89-205, slip op. at 8. The Board considers Section 33(c) of the Act to determine if noise rises to the level of a nuisance or an unreasonable interference with the enjoyment of life. See Hoffman v. City of Columbia, Illinois (Oct. 17, 1996), PCB 94-146, slip op. at 2.

Giertych alleged violations of daytime and nighttime numeric limits, as well as the Board's nuisance noise prohibition. The respondent seeks summary judgment on both issues. The Board will first consider the numeric noise standards.

The respondent attached a noise report of its facility to the affidavit of Brian Homans, an acoustical engineer with Shiner & Associates, Inc. According to the report, the respondent's facility does not violate any provisions of Section 901.102. In response to the motion, Giertych asserts that he will provide sound readings at hearing to prove a violation of the Board's numeric regulations. As noted, summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483. A party opposing a motion for summary judgment cannot rest solely on the pleadings, but must present a factual basis that would arguably entitle it to a judgment. See Gauthier, 266 Ill. App. 3d at 219. Although Giertych has not yet presented the results of the noise survey, the Board finds that the existence of a conflicting noise study to be presented at hearing is sufficient to raise a genuine issue of material fact on this point.

The Board next addresses the allegation of a noise nuisance violation. The Board's noise nuisance prohibition is found at Section 900.102 and provides:

No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the [Act], so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

Section 24 of the Act provides that:

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2000).

4T's alleges that insufficient evidence exists to find a noise nuisance violation, and analyzes the Section 33(c) factors in determining that the noise in question is not unreasonable. However, in reviewing the pleadings the Board finds that a genuine issue of material fact exists on this point as well. In his deposition, Giertych states that the vibrations allegedly from the noise emanating from the facility cause his bedside table lamps to turn on at night, and that the lamps must be constantly moved back to the center of the table because of the vibrations. Dep. At 60. An issue also exists concerning the priority of location; the complainant asserts that he moved in before the 4T's facility was built. Dep. at 17. However, 4T's argues that the character of the area was industrial when Giertych moved, and that the priority issue should weigh in favor of 4T's.

The extent of the noise from the facility and the impact that it has on the complainant are still at issue in this matter, and best addressed at hearing. The complainant has stated that 40 of his neighbors are still involved in the complaint. Although not listed parties, the complainant may still call those neighbors to testify about the severity of the noise from the facility, and the testimony would be directly relevant to the question of whether 4t's facility is causing unreasonable interference.

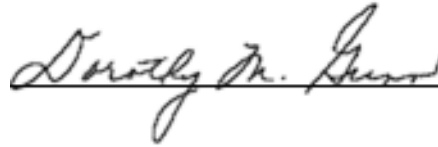
Accordingly, the Board denies summary judgment as genuine issues of material facts exist, and respondent has not proven it is entitled to judgment as a matter of law.

CONCLUSION

The Board accordingly denies respondent's motion for summary judgment and directs the parties to proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 7, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control