ILLINOIS POLLUTION CONTROL BOARD
May 2, 2002

MDI LIMITED PARTNERSHIP #42,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 00-181
	)	(Citizens UST Enforcement)
REGIONAL BOARD OF TRUSTEES FOR	)	
BOONE AND WINNEBAGO COUNTIES	)	
and BOARD OF EDUCATION OF	)	
BELVIDERE DISTRICT 100,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by G.T. Girard):

On December 18, 2001, Board of Education of Belvidere District 100 (District 100) filed a motion for summary judgment and a memorandum in support of motion for summary judgment (Memo). On that same day, Regional Board of Trustees for Boone and Winnebago Counties (Regional Board of Trustees) also filed a motion for summary judgement (T.Mot.SJ) and joined in the motion filed by District 100. On January 16, 2002, MDI Limited Partnership #42 (MDI) filed a response to the motion for summary judgment (R.Mot.SJ) and a motion to strike (Mot.Strike) an affidavit attached to District 100's motion. On February 1, 2002, District 100 filed a response to the motion to strike (R.Mot.Strike) and a request for leave to file a reply. By hearing officer order, District 100 was granted leave to file a reply, and the reply was filed on March 22, 2002.

For the reasons enunciated more fully below, the Board grants the motion to strike and denies the motions for summary judgment.

BACKGROUND

On May 4, 2000, MDI filed a three-count complaint alleging that respondents violated Sections 21(a), (d)(2), and (e) of the Act (415 ILCS 5/21(a), (d)(2), and (e) (2000)). The allegations pertain to the remediation of contamination from two leaking underground storage tanks. The tanks were discovered by MDI as MDI developed a site formally used as a school building.

On July 13, 2000, the Board denied a motion to dismiss the complaint filed by the Regional Board of Trustees and set the matter for hearing. On July 16, 2001, District 100 filed a motion for leave to file a third-party compliant against the City of Belvidere which was later withdrawn.

MOTION TO STRIKE

Before proceeding to the substance of the motion for summary judgment, the Board will first address the motion to strike the affidavit. The following discussion will summarize the arguments in the motion and the response and then explain the Board's reasons for striking the affidavit.

MDI argues that the affidavit does not meet the requirements of Supreme Court Rule 191. Although the Board has not adopted Supreme Court Rule 191, MDI argues that the Board may look to that rule for guidance. Mot.Strike at 1, citing 35 Ill. Adm. Code 101.100(b). Supreme Court Rule 191 provides in part that the affidavit:

> shall be made on personnel knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. 145 Ill. 2d R. 191.; S. Ct. Rule 191.

MDI asserts that the affidavit does not meet the requirements of Supreme Court Rule 191 in three ways. First, the affidavit is not based on the personal knowledge of the affiant. Mot.Strike at 2. Second, the affidavit consists of "unsubstantiated conclusory" statements regarding the disposition of the tanks. *Id*. Third, even if the affiant were a sworn witness, he could not testify about matters set forth in the affidavit because the testimony would be based on hearsay. *Id*. For these reasons MDI argues the affidavit should be stricken.

District 100 maintains that the affidavit is admissible to support the motion for summary judgment under Supreme Court Rule 191. R.Mot.Strike at 1. District 100 argues that the affiant based the affidavit on personnel knowledge obtained in an investigation of District 100's records and interviewing witnesses. R.Mot.Strike at 2. The statement of facts was based on the research performed, and the knowledge gained, by the affiant according to District 100. *Id*. District 100 also asserts that the affidavit does not contain hearsay. R.Mot.Strike at 3. Finally, District 100 argues that because MDI has not presented a contrary affidavit, the affidavit must be taken as true. R.Mot.Strike at 2.

The Board's procedural rules do not provide detail on the parameters of an affidavit. The Board may then look to the Supreme Court Rules for guidance and the Board does so here. The Board has examined the affidavit and Supreme Court Rule 191. Based on the Board's examination, the Board finds that it is appropriate to strike the affidavit. The affidavit specifically states that the affiant has "come to the conclusion from this review" that the tanks were taken out of service in the mid-60s, drained of fuel, filled with an inert material "which I believe was water" and District 100 did not use the fuel tanks after the mid-60s. Memo at Exh. N. Clearly these are conclusions and not facts. Furthermore, it is not clear that the

affiant could testify to these facts. Therefore, the Board will strike the affidavit.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). 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." *Id*. 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." *Id*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest 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 (2d Dist. 1994).

MOTION FOR SUMMARY JUDGMENT

District 100 puts forth five arguments in support of the motion for summary judgment, and the Regional Board of Trustees incorporates those arguments and put forth one additional argument. District 100 argues first that District 100 should be granted summary judgment because there is no evidence that it owned the property at the time that Section 21 of the Environmental Protection Act (Act) (415 ILCS 5/21 (2000)) became effective "nor at the time the underground storage tanks were closed or at any time thereafter." Memo at 9. Second, District 100 argues that MDI purchased the property "as is" and is therefore barred from seeking cost recovery. Memo at 11. The third argument asserted by District 100 is that MDI purchased the property from the City of Belvidere (City) and the City purchased the property "as is" so MDI cannot seek cost recovery. Memo at 14. Fourth, District 100 argues there is no statutory authority for a private party to enforce Section 21 of the Act (415 ILCS 5/21 (2000)). Memo at 15. Finally, District 100 maintains that there was no legal duty on behalf of MDI to remove the tanks and MDI did so simply to facilitate MDI's own development plans. Memo at 20. The Regional Board of Trustees adopt the arguments of District 100 and further argue that the Regional Board of Trustees duties and authority as titleholder were very limited and Regional Board of Trustees had no authority over the placement, removal or maintenance of fuel tanks. T.Mot.SJ at 3. The following discussion will briefly summarize the arguments of the respondents.

In regards to the first argument District 100 maintains that District 100 is entitled to summary judgment because there is no evidence that District 100 had any ownership of the portion of the property where the tanks were found from 1836 to the present. Memo at 9. Furthermore, District 100 asserts that there is no evidence that District 100 owned the property at the time the tanks were closed and filled with water. Memo at 10. Thirdly, District 100 argues that there is no evidence that District 100 owned the property as defined in the complaint when the Act took effect in 1970. *Id*. Finally, District 100 opines that the evidence

indicates that the Regional Board of Trustees, not District 100, owned the property where the tanks were located. *Id*.

The second and third arguments put forth by District 100 are related in that both arguments rely on the purchase of the property "as is" by MDI. Specifically, District 100 argues that MDI purchased the property from the City "as is" and MDI admitted that MDI "would have no recourse for any environmental or underground storage tank remediation." Memo at 11. Furthermore, the City purchased the property "as is" from the Regional Board of Trustees and MDI "was a third party beneficiary of the contract" for sale to the City. Memo at 14. Based on the purchase of the property "as is" District 100 argues the respondents are entitled to summary judgment.

The fourth argument offered by District 100 is that respondents are entitled to summary judgment as there is "no statutory authorization for a private party to enforce" Section 21 of the Act (415 ILCS 5/21 (2000)). Memo at 15. District 100 asserts that the United States District Court for Northern District of Illinois "has conducted an extensive review of Illinois state law cases, and has expressly determined that 'nothing in any of those case suggest that the Illinois Supreme Court would sanction a private right of action in the absence of state enforcement as envisioned by the Act'." Memo at 15, citing Chrysler Realty Corp. v. Thomas Industries, Inc., 97 F.Supp. 877 (N.D. Ill. 2000). The District Court relied on Fisher v. Lexington Healthcare, Inc., 188 Ill.2d 455, 722 N.E.2d 1115 (1999) as the basis for the decision. District 100 argues that based on these two cases the Board should find that there is no private right for cost recovery exists under Section 21 of the Act (415 ILCS 5/21 (2000)). Memo at 19.

District 100's final argument is that MDI had no legal duty to remove the tanks but did so to facilitate development at the site. Memo at 20. District 100 argues that within hours of discovering the tanks MDI sought bids for removal without seeking "any environmental opinion" as to whether the tanks had to be removed. District 100 points out that no soil borings were done prior to removal to determine if contamination existed. *Id*. District 100 maintains that there is no evidence that the tanks were removed for environmental reasons. Memo at 21. District 100 also asserts there was no legal duty to remove the tanks because the tanks were taken out of service in the mid 1960s and the Office of State Fire Marshall did not order the removal of the tanks. Memo at 22. District 100 further maintains that the tanks were properly closed under the law as the law existed when the tanks were closed and the inert material placed in the tanks cannot be considered a waste. Memo at 23-24.

The Regional Board of Trustees argue that title of all school buildings and school sites was imposed on Regional Boards of Regional Board of Trustees by statute at Ill. Rev. Stat. 1991, ch. 122, par. 7-28. T.Mot.SJ at 1-2. Furthermore, the duties of the Regional Board of Trustees is limited by statute at Section 6-1 through 6-21 of the School Code (105 ILCS 5/6-1 –5/6-21 (2000)). The Regional Board of Trustees asserts that the Regional Board of Trustees had no authority "over the placement, removal or maintenance of fuel tanks on the District 100 District's school grounds." T.Mot.SJ at 3. The Regional Board of Trustees assert that

Trustees had no power or control of any kind over the property except to the power to dispose of or convey the property after the local school boards made a finding that the property was no longer necessary for the use of the local district. T.Mot.SJ at 4. The Regional Board of Trustees argue that MDI has not cited any authority as to why or how the Regional Board of Trustees could exercise any control over the property in question and therefore the Regional Board of Trustees is entitled to summary judgment. T.Mot.SJ at 4.

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

MDI sets forth three general areas in response to the motions for summary judgment. First, MDI asserts that District 100's motion for summary judgment reflects a "fundamental misunderstanding" of the nature of the complaint. R.Mot.SJ at 1. Second, MDI argues that District 100's recitation of facts contains inaccurate and immaterial information. R.Mot.SJ at 2. Third, MDI maintains that the legal arguments advanced by District 100 are immaterial to a claim for statutory violations of the Act. R.Mot.SJ at 8. The following discussion will summarize each of the general arguments by MDI.

MDI maintains that District 100 appears to interpret the complaint as a claim for private cost recovery under contractual or tort theories and not as a complaint for violation of the Act. R.Mot.SJ at 1-2. As a consequence, MDI argues that many of the facts highlighted by District 100 have no bearing on the statutory based claim. R.Mot.SJ at 2. Therefore, MDI asserts issues of material fact do remain, and the motion for summary judgment should be denied. *Id*.

MDI's second response is that the facts summarized by District 100 are inaccurate and immaterial. More specifically, MDI maintains that MDI conducted an appropriate investigation of the site and the environmental condition of the site. R.Mot.SJ at 2. MDI's consultant Environmental Hazard Control, Inc. performed a Phase I environmental assessment which included inspection of the site, records review, and search of the title. R.Mot.SJ at 3. MDI asserts that the consultant "observed no vent pipe or other signs indicating the presence of underground storage tanks." *Id*.

Also, MDI maintains that, contrary to the assertions of District 100, upon discovery of the tanks MDI "did not immediately contact its contact consultants and order removal of the tanks." R.Mot.SJ at 5. Instead the tanks were not removed until almost three weeks after the discovery and the tank removal contractor encountered petroleum-contaminated waste according to MDI. R.Mot.SJ at 6. MDI further argues that the Office of State Fire Marshal's inspector determined that a release of petroleum contamination had occurred, and the confirmed release indicated a presence of thousands of gallons of petroleum waste in the underground storage tanks. R.Mot.SJ at 7. MDI points out that confirmation samples were collected from the bottom and sidewalls of the excavation and the results indicated that the excavation had successfully collected all the adversely affected soil. *Id*. MDI admits that the soil stockpiled from the excavation indicated "no compounds above the landfill's acceptable criteria" but MDI treated the soil as a special waste anyway. R.Mot.SJ at 7-8.

MDI further argues that the legal arguments advanced by District 100 are "immaterial to MDI's claim for statutory violations of the Act." R.Mot.SJ at 8. First, MDI points out that the Board has consistently upheld the authority to award private cleanup costs as a remedy for violations of the Act. *Id*. Second, MDI asserts that the allegations that District 100 violated the Act are not "dependant upon an obligation to remove the tanks" or on the regulatory status of the tanks. R.Mot.SJ at 11-13. MDI further asserts that MDI's motivation for removing the tanks is also not relevant to the allegations of violation.

MDI argues that the legal arguments that the because the tanks were filled with inert material there was no "waste" is immaterial because MDI documented a release of "waste" from the underground storage tanks. R.Mot.SJ at 14. MDI also maintains that use of water in place of petroleum would be contrary to even the earliest regulations on abandonment of tanks. *Id*. And in any event, the material is defined as waste. R.Mot.SJ at 15.

MDI also argues that District 100 need not have been the owner of the property for a violation to be found. R.Mot.SJ at 16. The Act prohibits "any person" from causing or allowing open dumping of waste so according to MDI, District 100 need not have owned the property. *Id*.

Finally, MDI maintains that the arguments put forth by District 100 concerning the contractual obligations or prohibitions are not relevant. R.Mot.SJ at 17. MDI asserts that there is not contract between MDI and District 100, and MDI is not seeking to enforce any rights under the contract with the City. R.Mot.SJ at 18. MDI also asserts that the contractual defenses are not valid defenses against an allegation that the Act (415 ILCS 5/1 *et seq*. (2000)) was violated. R.Mot.SJ at 19.

REPLY

In the reply, District 100 reiterates that District 100 was not the owner or operator of the tanks at the relevant time and that a private party may not enforce Section 21 of the Act (415 ILCS 5/21 (2000)). Reply at 9, 10. In addition District 100 asserts that respondents are entitled to summary judgment because the tanks were properly removed from service prior to 1974 and allowing cost recovery in this case "would be a subversion of the entire statutory scheme." Reply at 1. District 100 also maintains that MDI has failed to distinguish the law that provides that a buyer of property in "as is" condition may not sue the prior owner. Reply at 7. And lastly, District 100 argues that it is proper for the Board to consider whether a party was legally obligated to conduct an activity for which the party seeks recovery. Reply at 11.

DISCUSSION

As discussed above summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). The Board finds that in this case

summary judgment is not appropriate. There are still issues of fact which require that the case proceed to hearing. For example some of the factual issues in dispute include: who had control over the tanks, when the tanks were closed, and were the tanks closed pursuant to the regulations in existence at the time of closure? The Regional Board of Trustees clearly held legal title but their argument is that they had no control over the property. District 100 however argues that District 100 did not own the property or the tanks and is not therefore liable. However, did District 100 operate the tanks and therefore "allow" open dumping as is asserted by MDI? District 100 does assert that the tanks were properly closed under the regulations in place when the tanks were closed. However, if District 100 did not own or operate the tanks, how can they support such an assertion? Clearly the factual issues in this proceeding can be better examined at hearing where examination and cross-examination of the witnesses can occur.

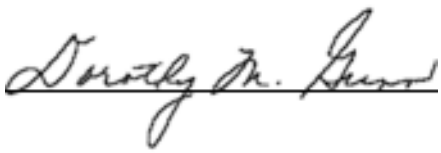
There is one legal argument that the Board will address today. Respondents argue that there is no authority for cost recovery. The respondents are incorrect. The Board has already clearly stated in this case that the Board has the authority to award clean-up costs to a private party. *See* MDI v. Regional Board of Trustees for Boone and Winnebago Counties and Board of Education of Belvidere District 100 PCB 00-181 (July 13, 2000) citing Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994). Furthermore, the Cook County Circuit Court agrees that the Board has the authority to hear these types of cases. *See* Dalise Enterprises, Inc. d/b/a Barge-Way Co. v. PCB, No. 00CH 12113 (Cook County Cir. Ct., Sept. 1, 2000) and Dalise Enterprises, Inc. d/b/a Barge-Way Co. v. PCB, No. 1-00-3391 (1st Dist., Feb. 14, 2002) (dismissed for want of prosecution). The Board finds nothing in the arguments presented which convinces the Board to alter our long-held position.

CONCLUSION

The Board grants the motion to strike the affidavit filed by MDI but denies the motions for summary judgment. This matter shall 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 May 2, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board