ILLINOIS POLLUTION CONTROL BOARD
September 28, 1989

LEFTON IRON AND METAL COMPANY, INC., a Missouri Corporation, and LEFTON LAND AND DEVELOPMENT COMPANY, INC., a Missouri Corporation,	)	
Complainants,	)	
v.	)	PCB 87-191 (Enforcement)
MOSS-AMERICAN, INC., a Delaware Corporation, and KERR-MCGEE CHEMICAL CORPORATION, a Delaware Corporation,	)	
Respondents	)	
KERR-MCGEE CHEMICAL CORPORATION, a Delaware Corporation,	)	
Counterclaimant,	)	
v.	)	
LEFTON IRON AND METAL COMPANY, INC., a Missouri Corporation, and LEFTON LAND AND DEVELOPMENT COMPANY, INC., a Missouri Corporation,	)	
Counterrespondent.	)	

ORDER OF THE BOARD (by J. Marlin):

On August 11, Lefton Iron and Metal Company, Inc. and Lefton Land and Development Company, Inc. (hereafter referred to collectively as Lefton) filed, for the second time in this proceeding, a Motion for Summary Judgment. On August 16, 1989, Moss-American Corporation and Kerr-McGee Chemical Corporation (hereafter referred to collectively as the respondents) filed a response to the motion.

On August 29, 1989, the respondents filed a Cross-Motion for Summary Judgment. Also on that date, Kerr-McGee Chemical Corporation (Kerr-McGee) filed a Counterclaimant's Motion for Summary Judgment. On September 13, 1989 the Board granted a motion filed by Lefton which sought an extension of time to respond to the August 29, 1989 motions. Lefton filed its response to the Cross-Motion for Summary Judgment on September 14, 1989.

Lefton filed another motion to extend time for a response on September 19, 1989. The September 19th motion requests an extension to respond to Couterclaimant's Motion for Summary Judgment. Lefton filed its response to that motion on September 22, 1989. The September 19th motion by Lefton is hereby granted.

On September 27, 1989, Kerr-McGee filed a Motion for Leave to File Reply in relation to the Counterclaimant's Motion for Summary Judgment. The Board did not allow the filing of a reply earlier in this proceeding. (See Order of July 13, 1989). Similarly, Kerr-McGee's September 27, 1989 motion is denied.

Illinois courts have defined the proper scope of summary judgment rulings as follows:

> The rules governing summary judgment procedures are well established. Although recognized as a salutary procedure in the administration of justice, it is a remedy which should be granted with caution so that the respondent's right to a trial, wherein the evidentiary portion of his case may be presented, is not usurped in the presence of material conflicting facts and inferences. The function of this procedure is to determine whether triable issues of fact exist in the record, not to try such issues. The right of the moving party to summary judgment must be clear, free from doubt and determinable solely as a question of law. If there is present any fact or facts on which reasonable persons may disagree, or inferences which may be fairly drawn from those facts and may lead to different conclusions, the motion court must stay its hand and permit the resolution of those facts and inferences to be made at trial.
>
> Nolan v. Johns-Manville Asbestos and Magnesium Materials Company, 74 Ill. App. 3d 778, 39 N.E. 2d 1352, 1363-64 (1st Dist. 1979).

> Summary judgment is appropriate where the pleadings, depositions and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

> (Ill. Rev. Stat. 1977, ch. 110, par. 57(3)). In ruling on a motion for summary judgment, the trial court must construe the pleadings, depositions and affidavits most strictly against the moving party and most liberally in favor of the opponent. (Lumbermens Mutual Casualty Co. v. Poths, (1968), 104 Ill. App. 2d 80, 243 N.E.2d 40). Inferences may be drawn from the facts which are not in dispute, and if fair-minded persons could draw different inferences from these facts then a triable issue exists. (McHenry Sand & Gravel, Inc. v. Rueck, (1975), 28 Ill. App. 3d 460, 328 N.E.2d 679). The right of a party to summary judgment must be clear and free from doubt. (Dakovitz v. Arrow Road Construction Co., (1975), 26 Ill. App. 3d 56, 324 N.E.2d 444).
>
> Killeen v. R.W. Dunteman Company, 78 Ill. App. 3d 473, 397 N.E. 2d 436, 438 (1st Dist. 1979).

Lefton's August 11th motion is quite similar to its June 14, 1989 Motion for Summary Judgment which the Board denied by its Order of July 13, 1989. As in the previous motion, Lefton argues that the respondents' August 1, 1988 Response to Lefton's Request for Admissions, the respondents' answers to Lefton's First Set of Interrogatories, and the respondents' Counterclaim indicate that there is no genuine issue as to material facts of the case and that Lefton is entitled to summary judgment in its favor. Additionally, Lefton argues in its August 11th motion that certain statements of the Couterclaim constitute "a judicial admission of every material fact asserted in the Complaint against Kerr-McGee". (Motion, p.6). Lefton also argues that the depositions of Louis Meier and C. George Lynn also support Lefton's request for summary judgment.

The respondents' Response disputes Lefton's contentions that the respondents' Counterclaim amounts to a binding judicial admission. Also, the repondents assert that the depositions do not show that Lefton is entitled to summary judgment. Specifically, the respondents state that Lefton has failed "to establish the necessary causal connection between the alleged activities conducted at the site ... and the alleged conditions existing at the site". (Respondent's Response, p.5-6).

Applying the above-quoted criteria for rulings on summary judgment motions the Board must deny Lefton's motion. As found in its July 13, 1989 Order, the Board is not convinced, beyond doubt, that Lefton is entitled to summary judgment in this matter. The portions of the pleadings cited in Lefton's instant motion are the same as those cited in Lefton's previous motion.

Those provisions still do not convince the Board that there is no genuine issue as to any material fact. The use of the depositions by Lefton also do not require a different outcome. A fair minded person could certainly draw more than one inference from the facts presented by the depositions.

Therefore, the Board hereby denies Lefton's motion.

In the August 29, 1989 Cross-Motion for Summary Judgment, the respondents seek summary judgment in their favor "on the issues raised by Lefton's complaint". The respondents contend "that there is no genuine issue as to any material fact existing between the Complainants and Respondents, and ... that Respondents are entitled to judgment in their favor as a matter of law".

However, as stated above in ruling on Lefton's August 11th motion, the Board is not convinced, beyond doubt, that there is no genuine issue of material fact concerning the issues raised by Lefton's complaint. Therefore, the respondent's cross-motion for summary judgment is denied.

The respondents assert that they could not be held liable for violations of 21(a) and 21(e) if the wastes which were deposited on the site were also generated there. The Board is not convinced that such a legal outcome is necessitated even assuming such facts. The "on-site exemption" applies to Section 21(d), not 21(e). Moreover, the on-site exemption to the 21(d) permitting requirement concerns a mixed question of law and fact. In fact, a body of case law has emerged concerning the issue of on-site exemptions. Pielet Bros. Trading v. Pollution Control Board, 110 Ill. App. 3d 752, 755, 442 N.E. 2d 1374, 1373, (5th Dist. 1982). Additionally, although one might be exempt from a permitting requirement with regard to a waste disposal operation, it does not necessarily follow that that person can never be found in violation of Section 21(a) of the Act for causing or allowing the open dumping of any waste.

Nonetheless, in their motion, the respondents assert that Moss-American Corporation has no connection with the subject site. Further, the respondents state that Moss-American, Inc. (as opposed to Moss-American Corporation) was the entity which transferred title of the subject site to Lefton Iron and Metal Company, Inc. in 1973. According to the respondents, Kerr-McGee is the successor-in-interest to Moss-American Inc., not Moss-American Corporation. The motion states that Moss-American, Inc. merged with Kerr-McGee in 1974.

In its Response, Lefton states that it believed Kerr-McGee had utilized the terms "Moss-American Corporation" and "Moss-American, Inc." interchangeably and that the names referred to the same entity. Lefton asserts that its course of action is directed against the predecessor corporation of Kerr-McGee. On this issue the Lefton Response concludes:

> If KERR-McGEE's current motion can be taken as an admission that the predecessor corporation's proper name is MOSS-AMERICAN, INC. rather than MOSS-AMERICAN CORPORATION, then LEFTON accordingly requests leave of the Board, instanter, to amend all of its pleadings to conform to KERR-McGEE's nomenclature which has been articulated for the first time in their Motion for Summary Judgment.
>
> (Lefton Response, p.2).

It appears to the Board that the respondents allow that Moss-American, Inc. is the predecessor-in-interest to Kerr-McGee. Lefton's complaint against Moss-American Corporation is based upon the allegation that Kerr-McGee acquired all the assets of Moss-American Corporation. However, it now appears that Kerr-McGee merged with Moss-American, Inc., not Moss-American Corporation.

As Lefton suggests in its Response, it appears that the filings in this case are the subject of a misnomer. Section 103.121(b) states:

> A misnomer of a party is not a ground for a dismissal, the name of any party may be corrected at any time.

Consequently, Lefton's request to amend its pleadings is granted insofar as the Board will construe the filings of Lefton's, which were filed prior to today's date, as referring to "Moss-American, Inc." wherever "Moss-American Corporation" is mentioned. The Board expects all future pleadings to reference the correct parties of this action. The caption of today's Order reflects the correction.

Additionally, the Board is concerned that this misnomer was not brought to its attention earlier. Lefton's complaint was filed on November 30, 1987. Now, almost two years later, the respondents have informed the Board that Lefton has wrongly named one respondent. It certainly has been clear from the beginning of this proceeding that Lefton's intention was to bring an action against Kerr-McGee and its predecessor-in-interest. Delay in correcting this misnomer has served to create numerous less than precise pleadings and Board orders.

Kerr-McGee's Counterclaimant's Motion for Summary Judgment requests that the Board find that Lefton violated Sections 12(a), 12(d) and 21(a) of the Act. In its response, Lefton asserts that "material issues of fact exist so as to preclude rendition of a summary judgment in favor of Kerr-McGee". Specifically, Lefton states that Kerr-McGee has not shown that Lefton activities have

contributed to water or groundwater pollution. Lefton states that in 1985 it learned for the first time of environmental problems with the site. Lefton further asserts that since that time Kerr-McGee has "been virtually in continuous possession of the property...so that [Kerr-McGee] could conduct an investigation and prepare a work plan to remediate the site".

Again, given the criterion set forth by the courts, the Board must deny Kerr-McGee's motion. The Board is not convinced, beyond doubt, that there is no genuine issue of fact and that Kerr-McGee is entitled to a judgment as a matter of law.

Kerr-McGee's Counterclaimant's Motion for Summary Judgment is hereby denied.

Finally, the Board notes that the parties have presented various legal arguments to support their respective positions. Arguments concerning liability under contract or tort law theories are not necessarily relevant in the Board's determination as to whether an individual has violated the Act or regulations promulgated thereunder. The parties are encouraged to confine their legal arguments to areas of the law which are relevant to enforcement proceedings as set forth by the Act.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of September, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board