

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 27 2003

STATE OF ILLINOIS  
*Pollution Control Board*

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
                   Complainant, )  
 )  
                   v. )  
 )  
 SKOKIE VALLEY ASPHALT, CO., an Illinois )  
 corporation, EDWIN L FREDERICK, JR., )  
 individually and as owner and President of Skokie )  
 Valley Asphalt Co., Inc., and RICHARD J. )  
 FREDERICK, individually and as owner and Vice )  
 President of Skokie Valley Asphalt Co., Inc. )  
 )  
                   Respondents. )

PCB 96-98

Enforcement

**RESPONDENT'S MOTION FOR RECONSIDERATION OF THE  
BOARD'S ORDER OF JUNE 5, 2003**

The Respondents, SKOKIE VALLEY ASPHALT, CO., an Illinois corporation, EDWIN L FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc., by and through their attorney, David S. O'Neill, herein moves the Board for reconsideration of its Order of June 5, 2003. In support of its position, the Respondents states as follows:

**PROCEDURAL HISTORY**

1. On July 26, 2002, the People of the State of Illinois filed a second amended complaint against the named Respondents in the above-captioned complaint.
2. On December 20, 2002, the Respondents properly filed a response to the Complainant's seconded amended complaint entitled "Respondent's Answer and Affirmative Defense to Complainant's Second Amended Complaint" to clearly indicate that the Respondent was

filing an answer and one, single affirmative defense with the affirmative defense based on a theory of laches and equitable estoppel.

3. By a hearing officer order dated February 19, 2003, the hearing officer established a new discovery schedule for this matter that stated in relevant part that all written discovery in this matter was to be completed within ninety days after the Board ruling on the motion for summary judgment.
4. On April 18, 2003, the Complainant filed a Motion to Dismiss the Respondent[s'] Affirmative Defense.
5. On April 23, 2003, the Respondents filed the "Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc."
6. On April 30, 2003, the Respondents filed a Response to Complainant's Motion to Strike or Dismiss Respondent's Motion to Dismiss.
7. On May 7, 2003, the Complainant filed a Motion for Leave to File a Reply and its Reply to Respondent[s'] Response to Complainant's Motion to Strike or Dismiss Respondents' Motion to Dismiss.
8. On May 7, 2003, the Complainant filed a Motion to Strike Respondents' Motion to Dismiss Edwin L. Frederick and Richard J. Frederick, or, in the Alternative Complainant's Response to and Request to Deny Respondents' Motion to Dismiss Edwin L. Frederick and Richard J. Frederick.
9. On June 5, 2003, the Board issued an Order in which the Board stated that it struck the first and second affirmative defenses, but allowed the third affirmative defense to stand. The Board also denied the Respondents' motion to dismiss Edwin L. Frederick, Jr. and Richard J. Frederick from the complaint.

#### **ITEMS FOR RECONSIDERATION**

- A. **The Board mistakenly struck arguments in favor of the Respondents' sole**

**affirmative defense and has failed to affirm the Respondents' sole affirmative defense based on laches and equitable estoppel.**

1. In the "Conclusion" of its order of June 5, 2003, the Board states that the "first two affirmative defenses are stricken but the third affirmative defense remains". (Order at 7.)
2. In the Response of December 20, 2002, the Respondents clearly state that they are offering one, singular affirmative defense. This intention is stated in the title of the filing which is entitled "Respondent's Answer and Affirmative Defense to Complainant's Second Amended Complaint" (Response at 1) and not "Respondent's Answer and Affirmative Defenses to Complainant's Second Amended Complaint". There is nothing in the title of the filing to allow the Board to conclude that more than one affirmative defense is being raised.
3. The Respondents' intent to file one, sole affirmative defense is reiterated in the subtitle to the Affirmative Defense section of the Response that is clearly titled "Affirmative Defense" (Response at 7) and not "Affirmative Defenses". There is nothing in the subtitle of the affirmative defense section of the Response to allow the Board to conclude that more than one affirmative defense is being raised.
4. The Respondents' intent to file one, sole affirmative defense is again reiterated in the opening sentence to the Affirmative Defense section of the Response that clearly states "As an affirmative defense to the Complainant's Second Amended Complaint..." (Response at 7) and not "As affirmative defenses to the Complainant's Second Amended Complaint..."
5. The argument for the affirmative defenses is expressed in three paragraphs. The first two paragraphs of the affirmative defense clearly state the requisite elements of the defense of laches – lack of diligence and resultant prejudice. (Response at 7).
6. The third paragraph clearly states the affirmative defense that is supported by the allegations of the first two paragraphs – laches which is an affirmative defense under the doctrine of equitable estoppel. (Response at 7).
7. In its order, the Board states that the "first two affirmative defenses are stricken but the third affirmative defense remains". In light of the fact that only one affirmative defense

has been raised, the Board's Order is meaningless.

8. Although not clearly stated, the Board appears to strike paragraphs 1 and 2 of the Respondents' argument for the affirmative defense (Order at 5). These paragraphs contain materials essential to establish the Respondents' affirmative defense based on laches under the doctrine of equitable estoppel.
9. Wherefore, the Respondents respectfully request the Board to reconsider the sections of its Order of June 5, 2003, that apparently strike the arguments in favor of the Respondents' affirmative defense and instead modify its Order to allow the Respondents' sole affirmative defense to stand as argued.

**B. The Respondents' Motion to Dismiss is timely filed because it is not subject to the timing limitations of Section 101.506 the Board's Procedural Rules .**

1. In its order of June 5, 2003, the Board states that "Skokie Valley motion was untimely filed" (Order at 7) and incompletely states that "Section 101.506 of the Board's procedural rules provide that all motions to strike, dismiss or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document" (Order at 7).
2. Section 101.506 states, in its entirety, that "[a]ll motions to strike, dismiss or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged documents, unless the Board determines that material prejudice would result". The section only applies to motions attacking the sufficiency of a pleading and not to any motion pertaining to the pleading.
3. The Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc., filed by the Respondents on April 23, 2003, is not a motion attacking the sufficiency of the pleading filed with the Board. It is, instead, a motion to dismiss two of the named Respondents based on the equitable doctrine of laches.

4. As a result, this motion is not governed by the limitations invoked by Section 101.506 of the Board's Procedural Rules. (Motion at 2..)
5. The Board's mistakenly applied the time limitations of Section 101.506 of the Board's Procedural Rules to this situation.
6. The Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc. was, in fact, properly and timely filed.
7. Even if the Board determines that Section 101.506 applies to the Respondents' motion, in a matter where the full dismissal of two of the named Respondents is at issue, the fact that "material prejudice would result" is obvious.
8. Section 101.506 clearly states that the time limitation does not apply if "material prejudice would result".
9. The resultant material prejudice makes the Board's application of Section 101.506 inappropriate.
10. Wherefore, the Respondents respectfully request the Board to reconsider the sections of its Order of June 5, 2003, that denies the Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc.

**C. The Respondents' Motion to Dismiss the Respondents Edwin L. Frederick, Jr. and Richard J. Frederick should be allowed.**

1. In its Order of June 5, 2003, the Board states that "even if the motion were properly before the Board, the Motion to dismiss would be denied" (Order at 7) because "Skokie Valley has not proved the elements of laches..." (Order at 7).
2. The basic elements of laches are lack of due diligence by a party asserting a claim and prejudice to the opposing party. People v. Royster-Clark Inc., PCB 02-8 at 6 (January 24, 2002) citing Van Milligan v. Board of Fire and Police Commission, 158 ILL.2d at 89,

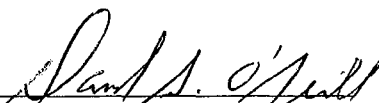
630 N.E. 2d at 833.

4. Because the Movant is asking the Board to apply the equitable doctrine of laches against a government agency and because the Movants are not arguing that the state is not acting in a “governmental capacity” the Movant also needs to establish that “compelling circumstances” exist, to apply the equitable doctrine of laches. People v. State Oil Company, William Anest et.al., PCB 97-103 (May 18, 2000) citing Hickey v. Illinois Central Railroad Co., 35Ill.2d 427, 220 N.E.2d 415 (1966).
5. In the Respondents’ Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc., the Respondents clearly argue the requisite elements of a claim of laches against the state.
6. In its order of June 5, 2003, the Board states that “[c]onsidering the facts in the complaint as true and drawing all inferences from them in favor of the Complainant, Skokie Valley has not shown that the Fredericks reasonably and detrimentally relied on the words or conduct of the State, nor been misled because of the delay in adding the Frederick’s to the complaint, nor has the Skokie Valley provided the Board with any compelling circumstances in this matter.” (Order at 7.)
7. The Board’s ruling in support of its decision to deny the Respondents’ Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc. is not supported by the facts pleaded in this matter.
8. In order to support the Motion to Dismiss, the Movants need not address the truth of the facts in the complaint or the drawing of all inferences from them in favor of the Complainant. Laches is an equitable doctrine and the application of an equitable defense is not dependent on the credibility of the underlying complaint.
9. The assertions by the Complainants that the Fredericks are responsible for the entire Skokie Valley operation, that the Fredericks are identified as officers of Skokie Valley and that only the Fredericks are supplied information for the response to interrogatories on Skokie Valley (Order at 7) have no relevance to an argument that the lack of due

- diligence by a party asserting a claim resulted in prejudice to the opposing party.
10. The Movants simply needs to show that the requisite elements of laches exist even if all inferences from the facts that evidence the elements are drawn in favor of the Complainant.
  11. With respect to the element of lack of due diligence by the Complainant, no inference drawn from the facts that exist in this matter in favor of the Complainant can overcome the fact that the Complainant waited up to seventeen (17) years after the alleged incidents occurred, five (5) years after the Fredericks terminated their employment with corporate entity involved in the matter and three (3) years after the completion of the discovery related to the liabilities of the party to add the additional Respondents to the Complaint. Regardless of the inference drawn in favor of the Complainant these facts show a lack of due diligence by the Complainant especially in light of the fact that the Fredericks were both parties known to the Complainants and their involvement with the alleged violations were also known since the initiation of the litigation and, in fact, since the time of the first alleged violation over seventeen years (17) ago.
  12. With respect to the element of prejudice to the Movants, no inference drawn from the facts that exist in this matter in favor of the Complainant can overcome the facts asserted, as if under oath, in the Movants affidavits, showing that they will indeed be prejudiced. Regardless of any inference drawn, the fact remains that the Movants have been unduly prejudiced by the lack of due diligence by the Complainant and will have difficulty defending themselves in this matter as a direct result of the Plaintiffs lack of due diligence.
  13. As argued in the Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc. compelling circumstances do exist to justify the dismissal of the Movants.
  14. The "compelling circumstances" include the fact that the Movants would be required to defend themselves against charges based on alleged incidents that occurred up to seventeen (17) years ago, five (5) years after the Movants terminated their employment

with the corporate entity named in the Complaint and three (3) years after discovery related to the liability of the parties was completed.

15. The "compelling circumstances" include the fact that a party in the position of the Movants should be able to rely on the representations and actions of the State to conclude that it will not be required to defend itself against allegations raised well after their retirement and after it had justifiably determined that it had completed its responses to discovery requests.
16. The "compelling circumstances" include the fact that the Complainant's motivation for subjecting the Movants to the undue prejudice resulting from the Complainant's lack of due diligence is an attempt to manipulate the Board's Procedural Rules to reopen the discovery that the Respondents have twice thought was completed, to increase the Respondents' cost and effort in countering the Complainant's procedural maneuvering, to limit the Respondents ability to defend themselves in this proceeding and to further delay the hearing and final determination by the Board.
10. Wherefore, the Respondents respectfully request the Board to reconsider the sections of its Order of June 5, 2003, that denies the Respondents' Motion to Dismiss Edwin L. Frederick, Jr., Individually and as Owner and President of Skokie Valley Asphalt Co., Inc. and Richard J. Frederick, Individually and as Owner and Vice President of Skokie Valley Asphalt Co., Inc.

  
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