

ILLINOIS POLLUTION CONTROL BOARD
March 5, 1998

MATTESON WHP PARTNERSHIP, an)	
Illinois general partnership,)	
)	
Complainant,)	
)	
v.)	PCB 97-121
)	(Enforcement - Land)
JAMES W. MARTIN AND EVA W.)	
MARTIN, individually and d/b/a)	
MARTIN'S OF MATTESON,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. McFawn):

Before the Board today is "Respondent's Motion to Strike All References in Complainant's Motion for Summary Judgment to Reports Prepared by Pioneer Environmental, Inc." (Motion to Strike) filed by respondents James and Eva Martin (Martins) on January 14, 1998. By this motion, the Martins seek to strike references to various documents in "Complainant's Motion for Summary Judgment" (Summary Judgment Motion) filed by complainant Matteson WHP Partnership (Matteson) on December 24, 1997. After considering the arguments of the parties, the Board grants the Motion to Strike.

PROCEDURAL HISTORY

This enforcement action was commenced by the filing of a complaint by Matteson on January 17, 1997. The Martins filed an answer (including affirmative defenses) on April 18, 1997. On or about May 2, 1997, Matteson served the Martins with "Complainant's First Request to Admit Facts" (Request to Admit) and "Complainant's First Request to Admit Genuineness of Documents." On May 28, 1997, the Martins filed "Defendants' Response to Complainant's First Request to Admit Facts" (Response) and "Defendants' Response to Complainant's First Request to Admit Genuineness of Documents."

DISCUSSION

Responses to Request to Admit

In its Request to Admit, Matteson referenced a Phase I Environmental Assessment and certain reports and documents prepared by Pioneer Environmental, Inc. (collectively, the Pioneer reports). Many of Matteson's requests for admissions sought admissions by the Martins of findings and conclusions contained in the Pioneer reports. The Martins objected to these requests for admissions, generally using the following language:

Defendants object to this Request in that it calls for the admission of information not within the direct knowledge of Defendants. Defendants further object in that this request calls for an expert opinion. Res. at 2 *et seq.*

Matteson has moved for summary judgment, based in part on statements from the Request to Admit referencing the Pioneer reports, to which the Martins objected in the form set forth above.

Positions of the Parties

The Martins have moved to strike all references to the Pioneer reports in the Summary Judgment Motion, on the grounds that no foundation has been laid to support use of the Pioneer reports in connection with a motion for summary judgment. Matteson argues that because the statements regarding the Pioneer reports were not contradicted, under Illinois Supreme Court precedent they may provide the basis for a grant of summary judgment. It also argues that the reports may provide a basis for the grant of summary judgment because they would be admissible at hearing under 35 Ill. Adm. Code 103.204 or 103.208. Section 103.204(a) provides:

The Hearing Officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.

Section 103.208 provides:

Any writing of record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event. To be admissible the writing or record shall have been made in the regular course of any business, provided it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business", as used in this rule, includes business, profession, occupation, and calling of every kind.

Analysis

Illinois Supreme Court Precedent. At the heart of this dispute is interpretation of the Illinois Supreme Court's recital of the standards for consideration of motions for summary judgment in Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill.2d 240, 249, 633 N.E.2d 627, 630 (1994):

A motion for summary judgment is to be granted if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [735 ILCS 5/2-1005(c).] The pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law.

Matteson focuses its arguments on the phrase “if not contradicted” from the final sentence of the above-quoted passage from Jackson Jordan. It argues that since the assertions in its Request to Admit pertaining to the Pioneer reports were not “contradicted,” they support its motion for summary judgment and should not be stricken.

The Motion to Strike can be resolved by focusing on language earlier in that sentence from Jackson Jordan, referring to the situation “when the movant has supplied facts. . . .” “Supplied” in this context does not mean simply “alleged” or “asserted.” For the purposes of a summary judgment motion, a movant “supplies facts” through the mechanisms set forth earlier by the court: pleadings, depositions, admissions, or affidavits. Where a request to admit is answered with an objection, there has been no admission on file. Thus, the Board concludes that, with regard to factual assertions predicated on the Pioneer reports, Matteson has not “supplied facts,” as that phrase is used in Jackson Jordan, which can support a grant of summary judgment.

Sections 103.204 and 103.208. Although the Pioneer reports might be admissible at hearing under Sections 103.204 or 103.208 (and the Board expresses no opinion at this point on this issue), the Board concludes that neither of these sections permits use of the Pioneer reports, without supporting affidavits, in the context of a summary judgment motion. The rules of 35 Ill. Adm. Code 103.Subpart F (which includes both Sections 103.204 and 103.208) apply only to conduct of hearings; motion practice is governed by separate rules under 35 Ill. Adm. Code 103.Subpart C or, where a matter is not specifically addressed, 35 Ill. Adm. Code 101.Subpart H. Of specific relevance to the matter before us is Section 101.242(a), which provides (emphasis added):

All motions shall clearly state the reasons for and grounds upon which the motion is made and shall contain a concise statement of the relief sought. Facts asserted which are not of record in the

proceeding shall be supported by affidavit. A brief may be included.

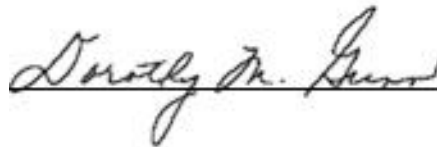
The potential admissibility of a document at hearing does not overcome the requirement of Section 101.242(a) that facts not of record be supported by affidavit. Inasmuch as the facts contained in the Pioneer reports are neither of record nor supported by an affidavit, the Board concludes that they cannot be relied upon in resolving Matteson's Summary Judgment Motion.

CONCLUSION

The Board accordingly grants the Martins' Motion to Strike. All references to the Pioneer reports in Matteson's Summary Judgment Motion are hereby stricken.

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 5th day of March 1998, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board