

water supply and wastewater treatment facilities at Stratford West townhouse subdivision near Macomb, McDonough County.

The Board accepted the complaint for hearing on November 20, 2003. On December 30, 2003, Thorell sent a letter to the People acknowledging receipt of the complaint and denying all allegations. Specifically, Thorell states “I have read the allegations in the complaint. They are absurd and simply not true; therefore, I deny all of them. The Company isn’t polluting anything and the water is safe.” The parties then filed the pleadings as noted above.

PRELIMINARY MATTER

The respondents filed a motion to stay proceedings on February 10, 2004. The complainant filed an objection to the motion for a stay on February 20, 2004. On April 26, 2004, the respondents filed a withdrawal of the motion to stay the proceedings. The Board will allow the motion to be withdrawn, will not stay this matter, and will not address the motion to stay or the People’s response.

MOTIONS FOR SUMMARY JUDGMENT

The People filed motions for summary judgment against Emmitt Utilities and Thorell. Both motions allege that no answer or responsive pleadings to the complaint have been filed and that all material allegations are, therefore, admitted under Section 103.204(d). MSJ1 at 2; MSJ2 at 2.¹ In both motions, the People assert that the December 30, 2003 letter cannot serve as an answer.

The People contend that the December 30, 2003 letter cannot be an answer on behalf of Thorell because it does not purport to specifically deny the material allegations of the complaint, and because it fails to address and satisfy the procedural and substantive requirements. MSJ1 at 3. The People assert the letter cannot serve as an answer on behalf of Emmett Utilities because it does not specifically deny the material allegations and because Thorell is not authorized to appear on behalf of the company since he is not an attorney. MSJ2 at 3.

The People ask that a hearing for determination of an appropriate civil penalty be scheduled.

THORELL’S MOTION TO DISMISS

¹ The Board will cite to the People’s motion for summary judgment against Thorell as “MSJ1 at ___”; the People’s motion for summary judgment against Emmett Utilities will be cited as “MSJ2 at ___”; Thorell’s motion to dismiss will be cited as “Mot. to Dismiss at ___”; the People’s motion to strike Thorell’s motion will be cited as “People’s Mot. to Strike Mot. at ___”; the People’s motion to strike Emmett Utilities answer will be cited as “People’s Mot. to Strike Ans. at ___”; Thorell’s response to the People’s motion to strike Thorell’s motion to dismiss will be cited as “Thorell’s Resp. at ___”; and Emmett Utilities’ response to the People’s motion to strike the answer will be cited as “Emmett Utilities Resp. at ___.”

Thorell asserts that he is named as a respondent solely on the grounds that he is a responsible corporate officer and that Illinois does not recognize a responsible corporate officer doctrine. Mot. to Dismiss at 1-2. Thorell argues that the appellate court has rejected or at least severely limited the doctrine. Mot. to Dismiss at 2, citing People v. Tang, 2004 Ill. App. LEXIS 74 (1st Dist. 2004). Thorell argues that the complaint merely alleges in a completely conclusory fashion his involvement in the alleged violations and, as such, does not state a cause of action. Mot. to Dismiss at 2.

**PEOPLE’S MOTION TO STRIKE
THORELL’S MOTION TO DISMISS**

The People assert that a draft complaint was provided Thorell’s counsel who acknowledged receipt of the draft complaint in a reply dated October 13, 2003. People’s Mot. to Strike Mot. at 2. The People assert that its efforts demonstrate not only formal compliance with notification requirements, but also informal communications with counsel, and that both corporate and individual respondents were fully aware of the enforcement proceeding. *Id.*

The People argue that Thorell’s motion to dismiss must be filed within 30 days after the filing of the complaint unless the Board determines that material prejudice would result. People’s Mot. to Strike Mot. at 2. The People contend that Thorell’s motion was untimely and that Thorell failed to seek leave to file. *Id.* The People contend that Thorell has waived his ability to attempt to demonstrate material prejudice and that the Board has no basis in the record to entertain consideration of whether any prejudice might result and if so whether such prejudice might be material. *Id.* The People ask for leave to object to Thorell’s motion to dismiss on substantive grounds if the Board denies the motion strike.

**PEOPLE’S MOTION TO STRIKE
EMMETT UTILITIES’ ANSWER**

The People assert that a draft complaint was provided Emmett Utilities’ counsel who acknowledged receipt of the draft complaint in a reply dated October 13, 2003. Mot. to Strike Ans. at 2. The People assert that its efforts demonstrate not only formal compliance with notification requirements, but also informal communications with counsel, and that both corporate and individual respondents were fully aware of the enforcement proceeding. *Id.* The People argue that Board procedural rules require an answer to be filed within 60 days after the filing of the complaint, and that all material allegations will be taken as admitted if no answer is filed. *Id.*

THORELL’S RESPONSE TO THE PEOPLE’S MOTION TO STRIKE

Thorell admits that copies of the complaint were served on him by the People, but asserts that he did not seek counsel at the time and instead prepared a completely inadequate and inartfully drafted response to the complaint and sent it to the Attorney General’s Office. Thorell’s Resp. at 1. Thorell asserts that he was notified by an Administrative Law Judge in a related proceeding that he could not represent the corporation Emmett Utilities, and should also

seek counsel for himself. *Id.* Thorell asserts that once he obtained counsel, that counsel then filed the appropriate responses to the complaint for Thorell and Emmett Utilities. *Id.*

Thorell argues that material prejudice will result if his motion to dismiss is not heard because he has a serious and bona fide defense to the allegations against him. Thorell's Resp. at 2. Thorell asserts that its counsel first became aware that the proceedings had been filed before the Board just in advance of the January 16, 2004 status conference with the Board hearing officer, that the counsel had previously only been provided a draft complaint and informed of the likelihood of the filing of the complaint. *Id.* Thorell contends that its counsel was not favored with an actual copy of the complaint when it was initially filed in November 2003. *Id.*

EMMETT UTILITIES' RESPONSE TO THE PEOPLE'S MOTION TO STRIKE

Emmett Utilities argues that, as set forth more fully in Thorell's response, it attempted to answer the complaint on December 30, 2003, without the benefit of counsel. Emmett Utilities Resp. at 1. Emmett Utilities asserts that in an order dated January 16, 2004, an administrative law judge in a related proceeding ordered Thorell to consult with counsel because he could not represent the corporation Emmett Utilities, and that thereafter counsel was obtained. Emmett Utilities' Resp. at 2. Emmett Utilities asserts that Thorell is over 70 years old, in ill health, that he has limited funds, and his company is broke and losing money. *Id.* Emmett Utilities contends that Thorell's primary income is social security and that he can hardly afford an attorney. *Id.* Emmett Utilities argues that his failure to comply with the rules should be excused. *Id.*

DISCUSSION

The motions for summary judgment are based on the respondents' failure to timely file an answer within 60 days after receiving the complaint. Generally, if the respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondents to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

As noted above, Thorell sent the People a letter denying the allegations of the complaint on December 30, 2003. The respondents assert that this letter constitutes a timely response, even if it was inadequate. The People argue that the letter cannot serve as an answer because it does not purport to specifically deny the material allegations of the complaint, and further cannot serve as an answer on behalf of Emmett Utilities because Thorell is not authorized to appear on behalf of the company since he is not an attorney.

The Board regards Thorell's letter denying the allegations of the complaint as an answer sufficient for the purposes of Section 103.204(d). Although the letter was not timely filed with the Board, it was sent to the People and given to the Board hearing officer within 60 days of the filing of the complaint. Further, the letter does contain a denial of the allegations in the complaint. While not a typical answer, the letter does put the People on notice that the allegations in the complaint are being contested, and was followed by a complete answer by Emmett Utilities and a motion attacking the sufficiency of the pleadings on February 10, 2004,

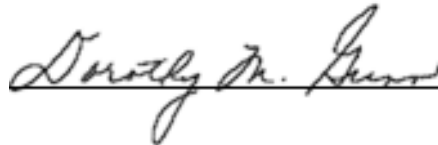
after counsel was obtained. Accordingly, the Board denies the People's motion to strike Emmett Utilities' answer, and the People's motion for summary judgment against both respondents.

The Board next considers the People's motion to strike Thorell's motion to dismiss. Although Thorell's December 30, 2003 letter constitutes an answer, Thorell's motion to dismiss was still untimely filed pursuant to Board rules and cannot be accepted unless material prejudice will result. *See* 35 Ill. Adm. Code 101.506. The People argue that Thorell has waived his ability to attempt to demonstrate material prejudice.

The Board may, of course, look at the record to determine whether or not material prejudice will result if Thorell's motion to strike is not accepted. In so doing, the Board finds that material prejudice will result if Thorell's motion is not heard. The motion is, therefore, accepted and the People's motion to strike is denied. However, the People have requested leave to substantively object to Thorell's motion to dismiss should the Board deny its motion to strike. That request is granted, and the People are hereby given until May 21, 2004, to file a response to Thorell's motion to dismiss.

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 6, 2004, by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board