

ILLINOIS POLLUTION CONTROL BOARD

June 17, 2004

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 04-81
)	(Enforcement - Water)
EMMETT UTILITIES, INC. an Illinois)	
corporation, and RUSSELL D. THORELL,)	
individually and as president of EMMETT)	
UTILITIES, INC.,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

On November 10, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Emmett Utilities, Inc. and Russell D. Thorell (respondents). On May 6, 2004, the Board denied motions for summary judgment filed by the People, and reserved ruling on Russell Thorell’s (Thorell) motion to dismiss the complaint against him until the People had an opportunity to respond. On May 18, 2004, the People filed their response to the motion to dismiss.

For the reasons stated below, the Board denies Thorell’s motion to dismiss the complaint against him.

BACKGROUND

In the complaint, the People allege that the respondents violated Sections 12(a) and (f) and 18(a)(2) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and (f) and 18(a)(2) (2002)) and 35 Ill. Adm. Code 601.101 and 607.103(c). The People allege that the respondents violated these provisions by: (1) failing to protect the safety of a public water supply; (2) failing to provide continuous operation and maintenance of a public water supply; (3) allowing discharges of untreated effluent, raw sewage, and overflows into an unnamed tributary to the LaMoine River; (4) causing offensive conditions, including unnatural color, odor, sludge, and turbidity in the receiving stream; and (5) violating the conditions of National Pollutant Discharge Elimination System permit number IL0071030. The complaint concerns the respondents’ public water supply and wastewater treatment facilities at Stratford West townhouse subdivision near Macomb, McDonough County.

MOTION TO DISMISS

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. at 1-2. Thorell argues that the appellate court has rejected or at least severely limited the doctrine. Mot. 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. at 2.

PEOPLE'S RESPONSE TO THORELL'S MOTION TO DISMISS

The People argue that when ruling on a motion to dismiss, the Board must take all well-pleaded fact as true, and draw all inferences from them in favor of the non-movant. Resp. at 1. The People contend that the legal precedent for personal liability is provided in People v. C.J.R. Processing, Inc., 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3rd Dist. 1995), and that personal involvement and active participation by Thorell in the acts and omissions resulting in the violations are alleged pursuant to C.J.R. Resp. at 2, citing C.J.R. Processing, 269 Ill. App. 3d 1013, 647 N.E.2d 1035 (3rd Dist. 1995). The People argue that the applicable law is clear that an individual acting in a corporate capacity may be individually liable either as a responsible corporate officer, as a direct participant under general legal principles or specific statutes. Resp. at 2.

The People assert that the responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing. Resp. at 4. The People argue that three elements must be satisfied to prove corporate officer liability: (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions that constituted the violations; and (3) that the individual's actions or inactions facilitated the violations. Resp. at 5, citing United States v. Park, 421 U.S. 658, 95 S.Ct. 1903 (1975).

The People contend that Thorell plainly had a position that allowed him to influence the utility's policies, that he often dealt directly with regulatory and enforcement matters establishing his nexus between his position and environmental compliance, and that his acts in controlling all expenditures by Emmett Utilities and his omissions regarding equipment maintenance allowed the problem to occur. Resp. at 5. The People assert that Emmett Utilities has no subordinate or intermediate officer principally responsible for compliance and that Thorell was directly involved in all of the various corporate activities. Resp. at 6. Thus, the People contend, Thorell had the responsibility and the authority to prevent the regulatory violations in the first instance and to correct the violations once they were brought to his attention. *Id.*

The People contend that the complaint sufficiently pled that the Agency contacted Thorell and directed the respondents to replace the well pump and to restore service, and that Thorell stated the respondents would not replace the well pump until a pending rate increase might be granted by the Illinois Commerce Commission. Resp. at 9. Further, the People assert that if it can prove that Thorell refused to replace or repair the well pump then he should be held responsible because as a responsible corporate officer, Thorell controlled the source of pollution and did not take precautions to prevent the pollution. *Id.*

Finally, the People assert that it has not made any attempts to pierce the corporate veil as was unsuccessfully tried in the previous circuit court action, but that the case before the Board is premised on an entirely different set of facts, and that personal liability is distinct from the derivative liability resulting from piercing the corporate veil. Resp. at 10.

DISCUSSION

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. See People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

Initially, the Board disagrees with Thorell's argument that the court in Tang rejected or at least severely limited the "responsible corporate officer" doctrine set forth in C.J.R. Processing. Rather, the Tang Court accepted the doctrine, and discussed the pleading requirements necessary to state a claim for personal liability against a corporate officer under the Act. Tang, 805 N.E.2d at 253. The court found that a plaintiff must do more than allege that the corporate officer held a management position or had general corporate authority. *Id.* Specifically, the Court found that a plaintiff must allege facts establishing that the officer had personal involvement or active participation in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation. *Id.* In addressing the facts before it, the Court found that conclusory allegations that an officer caused or allowed actions to occur in violation of the act, without explanation, is not sufficient. Tang, 805 N.E.2d at 254.

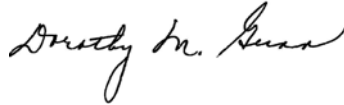
In paragraph 4 of the instant complaint, the People allege that Thorell has owned Emmett Utilities, served as its corporate president and is individually liable for the violations alleged herein as a responsible corporate officer because of his direct and personal involvement in the acts and omissions causing or resulting in violations. Comp. at 2. Standing alone, this conclusory allegation would not be sufficient to establish Thorell's personal liability.

However, in paragraph 12 of the complaint, the People allege that when contacted by the Agency and told to replace a well pump and restore service, Thorell stated that the respondents would not do so until a pending rate increase might be granted by the Illinois Commerce Commission. Comp. at 4. This allegation, if accepted as true, shows that Thorell had knowledge of the alleged violations and creates the inference that Thorell was personally involved in the acts at the basis of the People's complaint. As the Board must draw all inferences in favor of the non-movant when deciding a motion to dismiss, the allegation is sufficient to state a claim against Thorell for personal liability against a corporate officer under the Act. Although paragraph 12 is only incorporated in counts I and II of the complaint, the allegation of direct personal involvement adequately provides a basis for a claim against Thorell in Counts III through V as well.

When taking the People's well-pled allegations as true and drawing all inferences from them in favor of the People, the Board finds that there is a set of facts that could be proven entitling the People to relief on the complaint. Accordingly, Thorell's motion is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 17, 2004, by a vote of 5-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board