ILLINOIS POLLUTION CONTROL BOARD
August 19, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-51
	)	(Enforcement - Air)
DRAW DRAPE CLEANERS, INC., an Illinois corporation, AMERICAN DRAPERY CLEANERS & FLAMEPROOFERS, INC., an Illinois corporation, and RICHARD ZELL, an Illinois resident,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J.P. Novak):

This matter is before the Board on a second motion for partial summary judgment filed by the People of the State of Illinois (People) on July 2, 2004, against American Drapery Cleaners & Flameproofers, Inc. (ADCFI) and Richard Zell (Zell) (collectively, respondents). The People seek partial summary judgment on four of eight counts in the amended complaint filed December 30, 2003, which alleges air pollution, operating, and permit violations of the Environmental Protection Act (Act) and the Board's air rules. Respondents run a drycleaning facility in Chicago, Cook County.

On August 2, 2004, respondents filed a response in opposition to the motion asserting that specified mitigating circumstances dictate a finding in their favor. On August 10, 2004, the People filed a reply, accompanied by a motion for leave to file, which is granted by the Board.

The People seek summary judgment against respondents ADCFI and Zell on four counts: count IV, construction of an emissions source without a permit; count V, operation of an emissions source without a permit; count VII, installation of a non-solvent recovery dryer and lack of a cartridge filter; and count VIII, failure to perform an initial flow rate test. A year ago, the People sought and obtained partial summary judgment on these counts in the original complaint against the remaining respondent, Draw Drape Cleaners, Inc. (Draw Drape).

For the reasons discussed below, the Board grants the People's Second Motion for Partial Summary Judgment on the complaint by finding that the respondents violated the Act and the Board's rules as alleged in counts IV, V, VII, and VIII. The parties are directed to proceed expeditiously to a hearing on the remedy and penalty for these four counts and on all issues regarding the remaining contested counts in the amended complaint. Respondents may present at hearing any mitigating evidence and arguments as they relate to the Board's consideration of factors in Sections 33(c) and 42(h) of the Act.

The Board will first outline the procedural background of this case and then summarize the standard of decision governing motions for summary judgment. Next, the Board will address the issue of ADCFI's and Zell's liability for violations alleged in the Amended Complaint. The Board then addresses each of the four counts on which the People seek summary judgment before reaching its conclusion on the People's motion.

PROCEDURAL BACKGROUND

Respondents operate a petroleum solvent dry cleaning operation located at 2235-2239 West Roscoe Street, Chicago, Cook County. On October 15, 2002, the People filed an eight-count complaint against Draw Drape. The People alleged that Draw Drape violated various provisions of the Act, the Board's air pollution regulations, and Draw Drape's Federally Enforceable State Operating Permit (FESOP). The People further alleged that Draw Drape violated these provisions by emitting volatile organic material through uncontrolled operation of its equipment.

On December 17, 2002, Draw Drape filed an answer to the complaint and raised five affirmative defenses (First Answer). On January 16, 2003, the People filed a motion to strike or dismiss Draw Drape's affirmative defenses (First Motion to Strike). On February 20, 2003, the Board issued an order striking all five of Draw Drape's affirmative defenses.

On June 27, 2003, the People filed a motion for partial summary judgment (First Motion) on four of eight counts. Draw Drape filed its response (First Response) to that motion on July 18, 2003, asserting that various mitigating circumstances required a finding in its favor. On July 31, 2003, the People filed a reply. On August 21, 2003, the Board granted the complainant's motion for partial summary judgment, finding that Draw Drape had violated the Act and the Board's regulations as alleged in counts IV, V, VII, and VIII. In the same order, the Board directed the parties to proceed to hearing on the remaining counts and on remedy and penalty issues.

The People filed an Amended Complaint for Civil Penalties (Amended Complaint) on December 30, 2003. The Amended Complaint adds as respondents ADCFI and Zell. The People filed an Amended Notice of Filing for the Amended Complaint on January 20, 2004. On March 2, 2004, respondents filed an Answer to the Amended Complaint (Second Answer). In their Second Answer, respondents raised five affirmative defenses. Except for non-substantive corrections, the five affirmative defenses raised in the Second Answer are virtually identical to those raised in the First Answer. On April 15, 2004, the People filed its Second Motion to Strike or Dismiss the Respondents' Affirmative Defenses (Second Motion to Strike), and the Board granted that motion on May 20, 2004.

On July 2, 2004,the People filed their Second Motion for Partial Summary Judgment (Second Motion). On August 2, 2004, respondents filed their response to the Second Motion (Second Response). Except for minor changes that do not alter the substance of the respondents' arguments, the Second Response is virtually identical to the First Response. The People filed a reply on August 10, 2004 (Second Reply). Noting the virtual identity between the respondents'

First Response and Second Response, the People incorporated by reference the argument in its reply to the First Response into its reply to the Second Response. Second Reply at 3.

STANDARD OF DECISION

Summary judgment is appropriate "when '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 that the moving party is entitled to judgment as a matter of law.'" Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998), citing 735 ILCS 5/2-1005(c) (1996). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.*, citing Kolakowski v. Voris, 83 Ill. 2d 388, 398, 47 Ill. Dec. 392, 415 N.E.2d 397 (1980).

"Summary judgment 'is a drastic means of disposing of litigation,' and therefore it should be granted only when the movant's right to the relief 'is clear and free from doubt.'" *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, the party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994) (citations omitted).

LIABILITY OF ADCFI AND ZELL

First, the People claim that, because Draw Drape and ADCFI "are essentially the same entity," Second Motion at 7, ADCFI is also subject to a motion for partial summary judgment on the same terms as Draw Drape. Second Motion at 6-7. In support of this claim, the People note that both Draw Drape and ADCFI are wholly owned by the same two parties, one of which is Zell, and use the same facilities. Second Motion, citing Exhibits 4, 5. The People argue that, although the two companies serve different customers, they both "constructed and operated the same non-permitted emissions source, used the same non-solvent recovery dryer without a cartridge filter, and used Dryer #2 without performing an initial flow rate test." Second Motion at 7.

Respondents have not rebutted the People's argument regarding ADCFI's liability for violations of the Act and regulations. *See* Second Response at 3-5. The Board thus finds that ADCFI is essentially the same entity as Draw Drape and is subject to a motion for partial summary judgment on the same terms as Draw Drape.

Second, the People claim that, because of his relationship to Draw Drape, Zell is subject to a motion for partial summary judgment on the same terms as Draw Drape. Second Motion at 4. The People argue that "[a] corporate officer can be held liable for his company's environmental violations if he was personally involved in or actively participated in a violation of the Act, or if he had the ability or the authority to control the acts or omissions that gave rise to the violation." Second Motion at 4-5, citing People v. C.J.R. Processing, Inc., *et al.*, 269 Ill. App. 3d 1013, 1018, 647 N.E.2d 1035 (3rd Dist 1985). The People further argue that any other outcome "would not serve the Act's express purpose of imposing responsibility upon those who cause harm to the environment." Second Motion at 5, citing C.J.R. at 1016.

In support of this claim, the People note that respondents identify Zell as the Vice President of Draw Drape and one of only two persons having knowledge of the operations at, and the volatile organic material ("VOM") emissions from, the drycleaning facility. Second Motion at 5, citing Exhibit 4. The People further note that Zell operates and manages both Draw Drape and ADCFI and is responsible for the day-to-day operation of both companies. Second Motion at 5-6, citing Exhibit 5. Also, the People stress that Zell "is the only person who had dealings with or conferred with or corresponded or met with government regulators . . . in all matters related to the Complaint . . . ." *Id*.

Respondents have not rebutted the People's argument regarding the extent of Zell's control over Draw Drape or his liability for violations of the Act and regulations. *See* Second Response at 3-5. The Board thus finds that Zell is subject to a motion for partial summary judgment on the same terms as Draw Drape.

COUNT IV: Construction without a Permit

Count IV of the Amended Complaint alleges that respondents constructed an emissions source without a permit in violation of Section 9(b) of the Act and Section 201.142 of the Board's air pollution regulations.

Section 9(b) of the Act provides as follows:

No person shall

> (b) Construct, install or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such a permit. 415 ILCS 5/9(b) (2002).

Section 201.142 of the Board's air pollution regulations provides as follows:

> No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency, except as provided in Sections 201.146 or Section 201.170(b) . . . . 35 Ill. Adm. Code 201.142.

In its Second Motion, the People specifically incorporate the "Admitted Facts and Background Law" section and arguments of its First Motion into this Second Motion as though fully set forth herein." Second Motion at 3-4. The People thus argue that respondents have admitted that they installed dryer #2 at their facility without first obtaining a permit from the Illinois Environmental Protection Agency (Agency). First Motion at 7, citing Exhibit B.

In response, respondents argue that they installed Dryer #1 in the 1960s and operated it in compliance with the Act until it was damaged in a 1994 fire. Respondents further argue that the Act "grandfathered in" and did not require a permit for Dryer #1. Respondents further state that, following a 1994 fire that damaged their plant, they obtained a permit to rebuild. To resume operations after the fire, respondents argue that they needed a dryer with at least 100 pounds of capacity to replace Dryer #1. Respondents further argue that, because a dryer of that size was not then available, they purchased and installed Dryer #2. Respondents claim that, because Dryer #1 had been destroyed, and because Dryer #1 and #2 were identical, and because they had obtained a permit to rebuild, they believed that they were operating Dryer #2 in compliance with the Act and that their operating permit covered the replacement dryer #2. Finally, respondents claim that, when a dryer became available in the proper size, they ordered and installed the new recovery dryer. Second Response at 3.

In reply, the People argue that respondents have admitted constructing Dryer #2 without first obtaining a permit from the Agency. The People further argue that respondents cannot rely on a belief that they operated Dryer #2 in compliance with the Act, as "a defendant is presumed to know the law and that ignorance of the law is no excuse." First Reply at 3, citing People v. Acosta, 331 Ill. App. 3d 1, 6, 768 N.E.2d 746, 751 (2nd Dist. 2001), People v. Terneus, 239 Ill. App. 3d 669, 672, 607 N.E.2d 568, 570 (4th Dist. 1992).

As in its August 21, 2003 order, the Board grants summary judgment to the People on count IV of the Amended Complaint. Respondents admit that they failed to obtain the required construction permit for Dryer #2 at their facility. Respondents thereby violated Section 9(b) of the Act and Section 210.142 of the Board's air pollution regulations. Respondents' arguments about good faith or mistaken compliance may be raised at hearing on the issues of remedies and penalties, as they may relate to the Board's consideration of factors under Sections 33(c) or 42(h) of the Act.

COUNT V: Operation without a Permit

Count V of the Amended Complaint alleges that respondents operated an emissions source without a permit in violation of Section 9(b) of the Act and Section 201.143 of the Board's air pollution regulations.

Section 201.143 of the Board's air pollution regulations provides:

> No person shall cause or allow the operation of any new emission source or new air pollution control equipment of a type for which a construction permit is required by Section 201.142 without first obtaining an operating permit from the Agency, except for such testing operations as may be authorized by the construction permit. 35 Ill. Adm. Code 201.142.

The People argue that respondents have admitted that they operated dryer #2 at their facility without first obtaining a permit from the Agency. First Motion at 7, citing Exhibit B.

Thus, the People argue that respondents violated Section 9(b) of the Act and Section 201.143 of the Board's Air Pollution Regulations. First Motion at 7.

Respondents argue that, from the time they installed and began operating dryer #2, they operated it mainly to "fluff" draperies. Respondents contend that the process of fluffing does not emit VOMs into the environment. Respondents further argue that, during the time they operated dryer #2, it has emitted minimal VOMs into the environment. In support of this claim, respondents cite to a verification that Richard Zell of Draw Drapes provided with respondent's answers to the complaint attesting to these facts:

1. Respondent has had a Federally Enforceable State Operating Permit (FESOP) since a permit was required;

2. Respondent has always operated its plant below the emissions allowed under its FESOP permit; and

3. Respondent would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP. Second Response at 3-4.

Respondents argue that Mr. Zell's verified statements constitute evidentiary facts and that complainant has provided no evidentiary facts to controvert them. Respondents further argue that unsworn and unverified statements cannot be considered on a motion for summary judgment. Second Response at 4, citing Rotzoll v. Overheard Door Corp., 289 Ill. App. 3d 410, 681 N.E.2d 156 (4th Dist. 1997) and West v. Deere & Co., 201 Ill. App. 3d 891, 900, 559 N.E.2d 511 (2nd Dist. 1990). Unsubstantiated hearsay statements cannot be considered in ruling on a motion for summary judgment. Second Response at 4, citing Laja v. AT &T, 283 Ill. App. 3d 126, 136, 699 N.E.2d 645 (1st Dist. 1996). Respondents argue that the Board cannot consider the unsworn and unverified statements of complainant's counsel contained in its motion for summary judgment. Second Response at 4.

In their reply, the People again contend that respondents cannot rely on a belief that Dryer #2 was operating in compliance with the Act. First Reply at 3. The People again state that "a defendant is presumed to know the law and that ignorance of the law is no excuse." *Id*. citing People v. Acosta, 331 Ill. App. 3d 1, 6; 768 N.E. 2d 746, 751 (2d Dist. 2001); People v. Terneus, 239 Ill. App. 3d 669, 672 N.E.2d 568, 570 (4th Dist. 1992).

The People further contend that their motion did not contain unsworn and unverified statements, since it cited to respondents' sworn answers to interrogatories. The People assert that Supreme Court Rule 213(h) states "answers to interrogatories may be used in evidence to the same extent as a discovery deposition." First Reply at 1. A discovery deposition, according to Supreme Court Rule 212(a)(4) may be used "for any purpose for which an affidavit may be used." The People, therefore, argue that an answer to an interrogatory may be treated as an affidavit for purposes of a motion for summary judgment. First Reply at 1-2, citing Komater v. Kenton Court Ass'n., 151 Ill. App. 3d 632, 637; 1502 N.E. 2d 1295, 1298 (2d Dist. 1986).

As in its August 21, 2003 order, the Board grants summary judgment to the People on count V of the Amended Complaint. Zell himself has verified the facts on which the People rely as proof of violation. Second Motion, Exh. B at 9 (respondents' response to the first request to admit facts). Again, respondents' arguments about good faith or mistaken compliance may be raised at hearing on the issues of remedies and penalties, as they may relate to the Board's consideration of factors under Sections 33(c) or 42(h) of the Act.

COUNT VII: Failure to Install a Compliant Dryer

Count VII of the amended complaint alleges that respondents did not install a solvent recovery dryer with a cartridge filter as required by Section 60.622 of the Code of Federal Regulations and Section 9.1(d) of the Act.

Section 60.622 of Title 40 of the Code of Federal Regulations provides:

> (a) Each affected petroleum solvent dry cleaning dryer that is installed at a petroleum dry cleaning plant after December 14, 1982, shall be a solvent recovery dryer. The solvent recovery dryer(s) shall be properly installed, operated and maintained.
>
> (b) Each affected petroleum solvent filter that is installed at a petroleum dry cleaning plant after December 14, 982, shall be a cartridge filter. Cartridge filters shall be drained in their sealed housings for at least 8 hours prior to their removal. 40 C.F.R. 60.622.

Section 9.1(d) of the Act provides:

> No person shall:
>
> (1) violate any provision of Sections 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or
>
> (2) construct, install, modify or operate any equipment, building, facility, source or installation which is subject to regulation under Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, except in compliance with the requirements of such Sections and federal regulations adopted pursuant thereto, and no such action shall be undertaken without a permit granted by the Agency or in violation of any conditions imposed by such permit . . . . 415 ILCS 5/9.1(d).

The People contend that respondents admitted that Dryer #1 is not a solvent recovery dryer and that it lacks a cartridge filter. First Motion at 9, Exh. B at 4-5. The People conclude

on that basis that respondents violated Section 60.622 of the Code of Federal Regulations and Section 9.1(d) of the Act and that summary judgment should be awarded on Count VII.

Respondents argue that a recovery dryer of the proper size with a cartridge filter was not available in 1996 to replace the dryer destroyed by the fire. Respondents further argue that, when a dryer of the proper size became available in May 2002, they immediately ordered and then installed it. Respondents further claim that the dryer's manufacturer accepted their order in May 2002 and delivered the new dryer in September 2002. Finally, respondents argue that they obtained a permit #02030079 and installed and began operating the new dryer in May 2003. Second Response at 4.

In their reply, the People argue that "[t]he unavailability of a proper sized dryer does not excuse Respondent from abiding by the law." First Reply at 3.

As in its August 21, 2003 order, the Board grants summary judgment to the People on count VII of the Amended Complaint. Respondents have admitted that Dryer #2 is not a solvent recovery dryer and that it lacks a cartridge filter. Respondents thus violated Section 60.622 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Respondents may offer evidence and argument relevant to Section 33(c) and 42(h) of the Act on the issue of equipment availability at hearing.

COUNT VIII: Failure to Perform Initial Emissions Test

Count VIII of the amended complaint alleges that respondents did not perform the initial test required by Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Section 60.624 provides:

> Each owner or operator of an affected facility subject to provisions of Section 60.622(a) shall perform an initial test to verify that the flow rate of recovered solvent from the solvent recovery dryer at the termination of the recovery cycle is no greater than 0.05 liters per minute. This test shall be conducted for a duration of no less than 2 weeks during which no less than 50 percent of the dryer loads shall be monitored for their final recovered solvent flow rate. 40 C.F.R. 60.624.

The People argue that respondents admitted that they did not initially test Dryer #2 to verify the flow rate of recovered solvent after installing Dryer #2 in 1996. First Motion at 10-11, citing Exhibit B at 9-10. On that basis, the People argue that respondents violated Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act, and that summary judgment should be awarded.

Respondents note that that they did not perform an emissions test when they began operating Dryer #2 in 1996 because no commercial emissions test was available at that time. Second Response at 4. Respondents further argue that they have had a Federally Enforceable State Operating Permit (FESOP) since a permit was required and that they have always operated below the emissions allowed under that FESOP. Second Response at 4-5. Respondents estimate that that they would have to emit an additional 1,000 gallons per year in order to reach the level

of emissions allowed under the terms of their FESOP. Second Response at 5. Finally, respondents argue that they have verified this fact and that the People have not properly controverted it.

In reply, the People argue that respondents could have performed the required test using simple tolls and procedures over a two-week period. First Reply at 4. The People further argue that respondents' possession of a FESOP does not excuse their failure to perform the test. Id. Finally, the People reiterate that respondents failed by their own admission to perform the test and thereby violated the Act and the Code of Federal Regulation. *Id*.

As in its August 21, 2003 order, the Board grants summary judgment to the People on Count VIII of the Amended Complaint. Respondents admitted that they did not initially test Dryer #2 to verify the flow rate of recovered solvent after the dryer was installed in 1996. Respondents' claim that no commercial emissions test was available at the time does not prevent a finding of liability. Thus, respondents violated Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Respondents may offer evidence and argument relevant to Sections 33(c) and 42(h) of the Act at hearing.

CONCLUSION

The Board grants the People's motion for partial summary judgment on the amended complaint by finding that respondents ADCFI and Zell violated the Act and the Board's rules as outlined in counts IV, V, VII, and VIII. Together with the Board's August 21, 2003 order, the Board has now granted summary judgment on all four of those counts against Draw Drape, ADCFI, and Zell. The parties are directed to proceed expeditiously to hearing on the remaining contested counts and on remedy and penalty issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 19, 2004, by a vote of 4-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board