

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1998

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB 97-168 |
| |) | (Enforcement - Land) |
| OLD WORLD INDUSTRIES, INC., |) | |
| an Illinois corporation, and |) | |
| SPECIALTY SEALANT TAPES, INC., |) | |
| a dissolved Illinois corporation, |) | |
| |) | |
| Respondents. |) | |

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a motion to dismiss filed by Old World Industries, Inc. (Old World), on June 22, 1998. The Illinois Attorney General's Office, on behalf of the People of the State of Illinois (complainant), filed a response on July 6, 1998. Old World filed its reply on July 20, 1998. For reasons explained below, the Board denies the motion to dismiss and directs the hearing officer to proceed to hearing.

BACKGROUND

Complainant filed this action for the recovery of remediation costs on March 26, 1997.¹ Complainant alleges that a release or a substantial threat of a release of hazardous substances occurred at the Specialty Sealant Tapes, Inc. (Specialty Sealant) site, located at 7800 South Woodlawn, Chicago, County of Cook, Illinois (site). Comp. at 1-2. Complainant asserts that from 1983 through 1987, Specialty Sealant manufactured cements, tapes, and adhesives at the site. Complainant further argues that from May 1987 through May 1989, Mystik Tape Corporation (Mystik Tape), a subsidiary of Old World, leased the site from Specialty Sealant for the purpose of manufacturing industrial sealants and adhesive-backed tape. Comp. at 2. Mystik Tape was voluntarily dissolved in March 1989. Comp. at 2.

Complainant asserts in the complaint that Old World operated the site which was used by Mystik Tape from 1987 to 1989. Comp. at 3. To support this allegation, complainant states that one of the founders of Old World, J. Thomas Hurvis, acted as one of the members of the board of directors, president, and vice president of Mystik Tape. Comp. at 3. Additionally, complainant alleges that Riaz H. Waraich acted as a founder of Old World and

¹ The complaint will be cited to as "Comp. at ____." Old World's memorandum in support of the motion to dismiss will be cited to as "Mot. to Dism. at ____." Complainant's response to the motion to dismiss will be cited to as "Resp. at ____." Old World's reply will be cited to as "Reply at ____."

president and secretary of Mystik Tape. Complainant also alleges that Francis P. McLaughlin acted as the senior vice president of Old World while acting as president, vice president, and secretary of Mystik Tape. Comp. at 3. The complaint further states that McLaughlin, Waraich, and Hurvis had the authority to sign applications for construction and operating permits for Mystik Tape. Waraich and Hurvis signed Mystik Tape's articles of dissolution. Comp. at 4. Mystik Tape's operating permits were withdrawn on Old World's letterhead and signed by McLaughlin. Also, Old World and Mystik Tape used the same corporate address and telephone number. Comp. at 4.

The complaint further alleges that Mystik Tape vacated the site upon withdrawing its operating permits in 1989. In 1990, a private environmental consulting company conducted a Phase I site assessment of the site and found that: (1) large amounts of asbestos remained on the site; (2) several underground storage tanks that previously contained solvents and oils were present on the site; (3) leaking transformers containing poly-chlorinated biphenyls were present on the site; and (4) several areas at the site contained drums of solvents. Comp. at 4. In July 1992, the Illinois Environmental Protection Agency (Agency) took samples at the site and found the same conditions found during the Phase I site assessment, as well as numerous physical hazards at the site. Comp. at 4-5. Additionally, the Agency's investigation concluded that approximately 200 drums remained on the site which contained hazardous materials. Comp. at 5. The drums discovered during the sampling investigation were allegedly labeled "Mystik Tape." Comp. at 5.

On December 23, 1992, the Agency sent a notice to Old World, pursuant to Section 4(q) of the Environmental Protection Act (Act). 415 ILCS 5/4(q) (1992). Comp. at 5-6. On February 18, 1993, the Agency held a conference with Old World, pursuant to Section 4(q) of the Act, to discuss the remediation work requested in the 4(q) notice. Comp. at 6. Upon learning that Old World would not perform the remediation pursuant to the 4(q) notice, the Agency hired a private service to remediate the site. The Agency incurred costs totaling \$223,650 for the remediation of the site. Comp. at 6.

MOTION TO DISMISS

While complainant alleges certain procedural deficiencies in the filing of this motion to dismiss, the Board has the discretion to hear this motion and, accordingly, will do so. Substantively, Old World sets forth two major arguments in support of its motion to dismiss: (1) Old World believes that this matter should be dismissed as untimely pursuant to Section 12.80 of the Illinois Business Corporation Act (805 ILCS 5/12.80 (1996)), and (2) Old World asserts that complainant has failed to allege facts establishing that Old World was an operator of the site.

Illinois Business Corporation Act

The Illinois Business Corporation Act states that "[t]he dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the

date of such dissolution.” See 805 ILCS 5/12.80 (1996). Pursuant to this corporate survival statute, Old World asserts that this matter should have been filed within five years of dissolution of Mystic Tape, that is by March 31, 1994, rather than nearly three years later. While both parties argue different substantive theories regarding the applicability of the Illinois Business Corporation Act to the instant matter, the Board does not need to reach these applicability arguments because it finds that the Illinois Business Corporation Act is simply not relevant to this case.

The respondent in this matter is Old World, not the dissolved corporation, Mystic Tape. The Illinois Business Corporation Act protects the dissolved corporation from suit after five years of the date of its dissolution; it does not protect a viable parent corporation. Therefore, whether Mystic Tape enjoys freedom from pursuit of claims brought pursuant to the Act five years after its dissolution is not a question before the Board in this matter. Rather, the question is whether Old World, still presumably a viable corporation doing business in Illinois, can be held accountable for certain violations of the Act. On that question, the Board will proceed.

Failure to Allege Sufficient Facts

Old World asserts that complainant has failed to allege facts which sufficiently establish that Old World, as the operator of the site, is liable for any of the remediation costs at issue. Mot. to Dism. at 7. Though the complaint was filed pursuant to Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (1996)), Old World argues that Section 22.2(f) is comparable to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), since Section 22.2(f) and CERCLA similarly define and impose liability for response costs on an “owner or operator.”

In support of its argument that complainant has not alleged facts sufficient to show that complainant was the operator of the site, Old World relies on a United States Supreme Court opinion which recently addressed parent corporation liability in a CERCLA case. Old World argues that in United States v. Bestfoods, et al., 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), the United States Supreme Court held that a parent corporation may be liable for the costs of responding to a release of hazardous substances that resulted from its subsidiary’s actions in two ways. First, a corporation may be charged with derivative CERCLA liability for its subsidiary’s actions only when the corporate veil may be pierced, and second, the parent corporation can be held liable as an operator for its own actions in operating a facility owned by its subsidiary.

Old World points out that because the Bestfoods Court found the actual control exercised by the parent over the subsidiary was insufficient to impose liability on the parent corporation, the Board should do the same in this case. Mot. to Dism. at 9-10. Old World states that complainant has not alleged facts to show that the Board should pierce the corporate veil in order to impose liability on Old World. Also, Old World asserts that there are no facts to show that Old World managed or directed operations that relate to pollution as required by the Bestfoods Court. Mot. to Dism. at 10-11.

Complainant argues that it has alleged sufficient facts in its complaint to state a cause of action against Old World as the operator of the site. Complainant believes that the facts and circumstances of the Bestfoods case support complainant's allegations that Old World was the operator of the site and shows that the parties should be able to further explore the nature of Old World's involvement at the site through discovery. Resp. at 4.

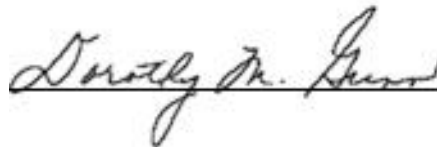
The Board finds that the complaint is sufficient to proceed to hearing since the complaint sufficiently alleges the ultimate facts necessary to state a claim under either of the theories set forth in Bestfoods (and therefore Section 22.2(f) of the Act). The complaint alleges that Old World was an operator of its subsidiary's facility; under Bestfoods and Section 22.2(f) of the Act, a parent that operates a subsidiary's facility is an "operator," and is liable for the costs of remedial action that the State has incurred as a result from a release of hazardous substances at the site. Additionally, the complaint alleges that Old World was an "owner" of its subsidiary's facility at the time that hazardous substances were released. See Comp. at 10-11. According to the holding in Bestfoods, complainant can sustain that claim if it is able to show that the corporate veil between Old World and Mystic can be pierced, and complainant has alleged at least some of the facts relevant to that inquiry. See LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2nd Dist. 1993) (denies a motion to dismiss a complaint which "does allege every ultimate fact which must be proved in order for petitioners to be entitled to judgment and certainly informs the respondents of what they must defend against"). See also People v. Michel Grain Company, Inc., et al. (December 5, 1996), PCB 96-143, slip op. at 2.

CONCLUSION

For reasons stated above, the Board denies Old World's motion to dismiss. The parties are directed to enter into discovery, if they have not already done so, and proceed to hearing.

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 17th day of September 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board