

ILLINOIS POLLUTION CONTROL BOARD
October 15, 1998

ANTONIO D.H. NAM,)
)
 Complainant,)
)
 v.) PCB 97-234
) (Enforcement - UST, Citizens)
 KIKON SUH,)
)
 Respondent.)

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

This matter is before the Board on a motion for summary judgment (Mot.) and memorandum in support of the motion (Memo.) filed by complainant Antonio D.H. Nam (Nam) on July 16, 1998, against respondent Kikon Suh (Suh). Nam requests that the Board grant summary judgment in his favor as to count II of the complaint¹ against Suh. Suh did not file a response to this motion. For reasons set forth below, the Board denies the motion for summary judgment.

BACKGROUND

On June 24, 1997, Nam filed a two-count complaint (Comp.) in this matter pursuant to 415 ILCS 5/31(b) of the Environmental Protection Act (Act). Nam alleges in count I that Nam is the present owner of the site located at 5101-5117 North Kedzie Avenue, Chicago, Illinois (site), that was previously owned by Suh. Comp. at 1. Nam further asserts that in May, 1996, soil contamination was confirmed in the vicinity of a 1,000 gallon gasoline underground storage tank (UST) found on the site. Nam believes that a release of the gasoline at the site occurred during the time when Suh owned the site since Nam never operated the tanks during his ownership of the site. Comp. at 2. Nam developed and implemented a corrective action plan and, subsequently, the Illinois Environmental Protection Agency (Agency) issued a "No Further Action" letter on December 23, 1996. Nam asserts in count I that Suh violated Section 21(a) of the Act (415 ILCS 5/21(a) (1996)) by causing or allowing open dumping of waste onto the site. Comp. at 3.

In count II, Nam alleges that Suh violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1996)) by conducting a waste-storage, waste-treatment, or waste-disposal operation

¹ The Board notes that Nam's motion for summary judgment requests summary judgment as to count I of the complaint but Nam's memorandum of law in support of the motion requests summary judgment as to count II. Compare Mot. at 3 with Memo. at 1-5. Since the argument set forth in the memorandum supports the granting of summary judgment as to count II, the Board will construe the motion and the accompanying memorandum as a request for summary judgment as to count II only.

in violation of 35 Ill. Adm. Code 732.200. Comp. at 5. Nam states that Suh, as the owner of the site during the time of contamination, violated Section 732.200 by not responding to all confirmed releases of petroleum as required by the applicable statutory and regulatory reporting requirements. Comp. at 5. Therefore, Nam requests that the Board find Suh in violation of the Act and Board regulations, order Suh to remediate the gasoline-contaminated soil, order Suh to reimburse Nam for all costs incurred due to contamination of the site, and grant any further relief the Board deems appropriate. Comp. at 3, 5.

Nam filed a request for admission of facts and genuineness of documents (Request to Admit) on May 29, 1998, to which Suh did not respond. Suh has failed to file an answer or any response to Nam's discovery request, and has not participated in past telephonic status conferences set up by the hearing officer in this matter.

RELEVANT STATUTES

Section 21(d)(2) of the Act states that (415 ILCS 5/21(d)(2) (1996)):

No person shall:

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(2) in violation of any regulations or standards adopted by the Board under this Act . . .

Section 732.200 states that:

Owners and operators of underground storage tanks shall, in response to all confirmed releases of petroleum, comply with all applicable statutory and regulatory reporting and response requirements. 35 Ill. Adm. Code 732.200.

Section 732.103 defines "owner" as:

In the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use of dispensing of regulated substances;

In the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use. 35 Ill. Adm. Code 732.103.

ARGUMENT

Nam requests that summary judgment be granted in his favor as to count II of the complaint (conducting a waste operation in violation of the Act) since there are no remaining genuine issues of material fact to be considered by the Board. Mot. at 1-2. Nam argues that all facts show Suh caused the land pollution at the site by allowing gasoline to contaminate the soil at the site. Memo. at 1. In an affidavit attached to the motion (Affid.), Nam states that he became owner of the site on August 29, 1989, after he bought the site from Suh who owned and operated the site from on or before 1987 until August 22, 1989. Memo. at 1; see also Affid. Nam states that he was never made aware of the existence of the USTs on the site, or of any contamination until he conducted a Phase I site assessment. Memo. at 2. Nam asserts that he never operated the USTs and therefore asserts that the release of gasoline occurred at the site during the operation of the UST while Suh, as the previous owner, operated the site. Memo. at 2; Affid.

Nam asserts that the facts indisputably show Suh is responsible and liable for violating Section 21(d)(2) of the Act by conducting waste-storage, waste-treatment, or waste-disposal in violation of Board regulations, specifically 35 Ill. Adm. Code 732.200. Memo. at 2-3. Nam argues that the site became a waste-disposal site when the gasoline leaked from the tanks into the ground at the site. In support of its argument, Nam relies on the documents and findings of an environmental engineering company which Nam hired to remediate the contaminated property. See Memo., Exh. A. These reports, Nam asserts, show the type and quantity of gasoline waste found at the site. Memo. at 3.

Nam further believes that, pursuant to the definition of “owner” in 35 Ill. Adm. Code 732.103, Suh was the owner of the USTs at the site while the tanks were in operation. Memo. at 3-4. Nam believes that Suh is responsible for the releases of gasoline onto the site due to the fact that Suh owned the site when the releases occurred. Memo. at 4. Nam also asserts that Suh had a statutory responsibility to comply with all regulatory requirements and has failed to do so in violation of 35 Ill. Adm. Code 732.200. Memo. at 4.

ANALYSIS

In order to grant summary judgment, the Board must determine whether the facts indisputably show that Suh improperly conducted waste-storage, waste-treatment, or waste disposal in violation of Section 21(d)(2) of the Act and 35 Ill. Adm. 732.200. A motion for summary judgment is to be granted if only “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.” See 735 ILCS 5/2-1005(c). Summary judgment is appropriate when there are no genuine issues of fact for the trier of fact to consider and the movant is entitled to judgment as a matter of law. Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112; Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 633 N.E.2d 627, 630 (1994).

Initially, the Board must review the facts set forth by the pleadings, admissions, and affidavits in the record. Section 103.162(c) of the Board's procedural rules (35 Ill. Adm. Code 103.162(c)) requires with regard to any admission in the absence of denial that:

[e]ach of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 20 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reason why he cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

Suh has filed neither a response nor an objection to Nam's May 28, 1998 request to admit; Suh has not filed any other responsive pleading in this matter. The Board therefore finds that the facts requested to be admitted are deemed admitted.

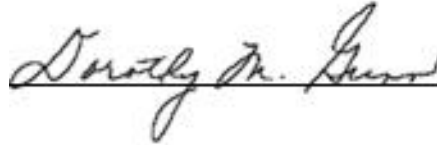
A review of these uncontested facts shows that Suh owned the property from at least 1987 to August 22, 1989, and that the USTs were located on the property while Suh was the owner and operator of the site. Request to Admit at 2. The City of Chicago issued a permit on September 24, 1971, allowing the installation of a 10,000-gallon UST on the property on September 24, 1971. Suh never tested the USTs to determine whether they were leaking gasoline. Request to Admit at 2.

The question now before the Board is whether these facts are sufficient to find a violation as to count II of the complaint which concerns Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1996)) and 35 Ill. Adm. Code 732.200. In support of his motion, Nam asserts that Suh was the owner of the USTs at the site while the tanks were in operation and when the releases occurred; therefore, Nam believes that Suh is responsible for the releases of gasoline onto the site. Yet, the admitted facts and the record do not support grant of summary judgment. At this stage, Nam has failed to show the specific timeframe that Suh owned and/or operated the tanks, nor do the facts show that Suh was the owner and/or operator of the tanks when any release occurred. In failing to show that Suh owned the property when the alleged release occurred, Nam has not proven that Suh failed to comply with all applicable statutory and regulatory reporting and response requirements.

The Board finds that genuine issues of material fact still exist in this matter. Accordingly, the motion for summary judgment is denied, and the parties are directed to proceed to hearing on both counts of the complaint.

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 15th day of October 1998 by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board