ILLINOIS POLLUTION CONTROL BOARD
March 17, 2005

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. COMMUNITY LANDFILL COMPANY, INC, Respondent.	)	PCB 97-193 (Enforcement - Land) (consolidated)
PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. EDWARD PRUIM and ROBERT PRUIM, Respondents.	)	PCB 04-207 (Enforcement – Land)

ORDER OF THE BOARD (by G.T. Girard):

On May 21, 2004, complainant filed a nineteen-count complaint against the respondents alleging numerous violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq.* (2002)) and the Board's regulations. The Board docketed that case as PCB 4-207. The allegations in the complaint revolve around the respondents' management, operation, and ownership of Community Landfill Company (CLC) and the Morris Community Landfill in Morris, Grundy County. Comp. at 1. CLC is a respondent in a related case before the Board, People v. Community Landfill Company, Inc., PCB 97-193. On February 17, 2005, the Board granted a motion to consolidate the two cases.

Pursuant to hearing officer order, on January 4, 2005, Edward and Robert Pruim (Pruims) filed an answer to the complaint and two affirmative defenses in the PCB 04-207 proceeding (Ans.). On February 4, 2004, the complainant filed a motion to strike the Pruims' second affirmative defenses (Mot.). On March 4, 2005, the Pruims responded to the motion to strike (Resp.). For the reasons discussed below the Board grants the motion to strike the second affirmative defense.

ARGUMENTS

The Pruims allege two affirmative defenses. The first affirmative defense is that the complaint is barred as untimely and prejudicial to the respondent. Ans. at 73. The second affirmative defense asserts that the complaint is barred because the complainant has failed to state a claim for personal liability under the Act. Ans. at 74.

The complainant argues that the second affirmative defense should be struck because the defense attacks the sufficiency of the complaint. Mot. at 4. The complainant maintains that the defense is merely a restatement of the motion to dismiss filed by the Pruims and denied by the Board. *Id*. The complainant asserts that raising the same issue as an affirmative defense is improper and legally insufficient. *Id*.

The complainant next argues that the defense "cannot defend" because if the defense cannot defeat liability. Mot. at 5-6. Complainant notes that if the allegations in the complaint are accepted as true and the complaint is sufficient to state a cause of action, the Pruims' statement that the "complaint fails to allege sufficient facts" does not excuse liability. Mot. at 6.

The Pruims assert that the complainant misses the mark and that the defense of failure to state a cause of action assumes, for the purposes of the defense, that the allegations are true but legally insufficient. Resp. at 2. The Pruims argue that the defense of failure to state a cause of action may be raised at any time by any motion. *Id*. The Pruims rely on Stratman v. Brent, 291 Ill. App. 3d 123, 39; 683 N.E.2d 951, 955 (2nd Dist. 1997) and Section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (d) (2002)) to support the argument. Resp. at 2.

DISCUSSION

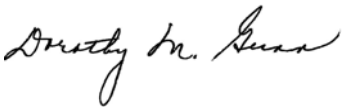
The Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

The Board is not persuaded by the arguments of Pruims. The Board has reviewed Stratman v. Brent, 291 Ill. App. 3d 123, 39; 683 N.E.2d 951, 955 (2nd Dist. 1997) and Section 2-619 (d) of the Code (735 ILCS 5/2-619 (d) 2002)), cited by the Pruims. The Board finds that neither supports the Pruims alleged second affirmative defense. Rather Section 2-619 (d) of the Code (735 ILCS 5/2-619 (d) 2002)) sets forth the ability to raise either by motion or answer the issue of the sufficiency of the complaint and Stratman merely recites the standards for reviewing a motion filed in the court pursuant to Section 2-619 (d) (735 ILCS 5/2-619 (d) (2002)).

The Board finds that the second affirmative defense should be stricken. The Pruims second affirmative defense attacks the sufficiency of the claims and therefore is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order March 17, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board