

ILLINOIS POLLUTION CONTROL BOARD
May 3, 2007

VERNON and ELAINE ZOHFELD,)
)
Complainants,)
)
v.) PCB 05-193
) (Citizens Enforcement - Air)
BOB DRAKE, WABASH VALLEY)
SERVICE COMPANY, MICHAEL J.)
PFISTER, NOAH D. HORTON, and STEVE)
KINDER,)
)
Respondents.)

ORDER OF THE BOARD (by A.S. Moore):

On February 13, 2007, respondent Michael J. Pfister (Pfister) filed a motion for summary judgment. Pfister's co-respondents, Bob Drake, Wabash Valley Service Company, Noah D. Horton, and Steve Kinder, have not joined or filed a response to Pfister's motion, nor have any of the four of them filed their own motion for summary judgment.

Today the Board finds that the record in this case is not sufficient for full consideration of Pfister's motion for summary judgment and a determination whether or not to grant it. Under the circumstances of this case, however, the Board construes the motion as an unopposed motion to dismiss and dismisses Pfister with prejudice from this proceeding.

Below, the Board first summarizes the procedural history of this case and the allegations contained in the complaint. The Board next summarizes Pfister's arguments in his motion for summary judgment before construing the motion as an unopposed motion to dismiss, granting the motion as construed, and dismissing Pfister from this proceeding.

PROCEDURAL HISTORY

On May 9, 2005, complainants filed a citizen's complaint (Comp.) alleging that respondents caused or allowed agricultural spray applied to Drake's field to drift to the complainants' adjacent property, causing or tending to cause air pollution in violation of Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2004)) and Section 201.141 of the Board's air quality regulations (35 Ill. Adm. Code 201.141). Comp. at 4.

On February 6, 2007, Pfister filed a motion for summary judgment (Mot.), accompanied by an affidavit of Michael J. Pfister (Aff.). On February 13, 2007, Pfister supplemented that filing with an original copy of the affidavit.

In an order dated March 5, 2007, Board hearing officer Carol Webb noted that “[c]omplainant Vernon Zohfeld is now deceased” and that the complainant’s attorney needed time to consult with his surviving client to determine how or whether the case would proceed. Zohfeld v. Drake, et al., PCB 05-193, slip op. at 1 (Mar. 5, 2007).

In an order dated April 12, 2007, the hearing officer stated that “[c]omplainants do not object to the motion for summary judgment and will not be filing a response.” Zohfeld v. Drake, et al., PCB 05-193, slip op. at 1 (Apr. 12, 2007). The hearing officer further noted that the complainant’s attorney needed to consult with his surviving client to determine how or whether the remainder of the case would proceed. *Id.*

THE COMPLAINT’S ALLEGATIONS

Complainants owned and operated a business in Hamilton County that bred and raised thoroughbred horses. Comp. at 1. The complaint also states that Drake owns a 44-acre tract of agricultural land adjacent to complainants’ residence and horse farm; Wabash Valley is an agricultural cooperative that sells agrichemicals, including chemical pesticides and herbicides, and applies them to agricultural fields; and Pfister, Norton, and Kinder work for Wabash Valley. *Id.* at 2.

The complaint alleges that, on or about May 8, 2000, Wabash Valley, Pfister, Horton, and Kinder sprayed agrichemicals including Butyrac-200, RoundUp Ultra, Bicep II Magnum, Aatrex, and Celatom MP-79 on and around Drake’s property. Comp. at 2-3. Complainants further allege that respondents Wabash Valley, Pfister, Horton, and Kinder performed this spraying “at Drake’s express request and with his knowledge, support, and involvement, and in his presence.” *Id.* at 2. The complainants claim that respondents Wabash Valley, Pfister, Horton, and Kinder sprayed in a manner that ensured the agrichemicals would “drift and cloud onto and across the adjacent property owned and occupied by the Zohfelds.” *Id.* at 3. The complaint describes this movement of agrichemicals away from a designated field as “spray drift” or “over drift.” *Id.* at 2. Complainants claim that their property has been subjected to spray drift on many occasions both before and after the alleged May 8, 2000 incident. *Id.* at 4. They further claim that respondents have caused the complainants’ property to experience spray drift “virtually every spring.” *Id.*

As a result of spray drift on May 8, 2000, complainants allege that Elaine Zohfeld came into contact with agrichemicals “by absorption through the skin, . . . ingestion of blackberries that were covered with the pollutants, and by aspiration.” Comp. at 3. Complainants argue that this contact caused “serious and permanent injuries” to Elaine Zohfeld’s health. *Id.*

Complainants also allege that, on May 8, 2000, the Zohfelds’ horses came into contact with agrichemicals “by absorption through the skin, by ingestion of grass and plants that were overdrifted, and by aspiration.” Comp. at 3. Complainants allege that this contact caused “severe and permanent injuries to all of the horses.” *Id.* Specifically, they allege that two horses died and that the “entire herd has been rendered incapable of performing as racing or breeding stock.” *Id.* As a result of the alleged spray drift, complainants claim that the affairs of their equine breeding business have ended. *Id.*

Complainants further allege that, on May 8, 2000, numerous beneficial plants came into contact with agrichemicals and experienced contamination. Comp. at 3. Complainants state that Elaine Zohfeld and the Zohfelds' horses ingested these plants, resulting in "severe and permanent injuries and damages" to both her and the horses. *Id.*

Complainants further allege that they have "suffered a loss of enjoyment of their property by being exposed to these agrichemical air pollutants." Comp. at 3. The complaint expresses the fear that complainants' property will experience spray drift whenever Drake sprays his field. *Id.* Complainants claim that, when they are at their home and hear spraying on Drake's field, they move their horses into a barn and close their windows until the spraying ends. *Id.* They claim that this "seriously disrupts their enjoyment of their property." *Id.* Complainants further argue that they have had to relocate their horses' grazing area to reduce the risk of exposure to spray drift. *Id.* Finally, complainants argue that they have not planted new garden plants or trees because of a fear that they will be polluted or made unfit for eating. *Id.*

In the single count of the complaint, complainants allege that respondents violated Section 9(a) of the Act (415 ILCS 5/9(a) (2004)) and Section 201.141 of the Board's air regulations (35 Ill. Adm. Code 201.141) by causing or allowing agrichemicals to drift and cloud from Drake's property onto the adjacent property owned by the Zohfelds, which caused or tended to cause air pollution as that term is defined in Section 3.02 of the Act (415 ILCS 5/3.02 (2004)).

MOTION FOR SUMMARY JUDGMENT

Pfister notes that the complaint alleges that, "[o]n or about May 8, 2000, and at other times," he sprayed agrichemical in a manner that would ensure the occurrence of overdrift events. Mot. at 4-5, citing Comp. at 4 (¶19). Pfister further notes that the complaint asks the Board to assess civil penalties for *each* violation. Mot. at 5 (emphasis in original), citing Comp. at 5.

Pfister argues that the Board "has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, *if brought by the State* on behalf of the public's interest." Mot. at 5 (emphasis in original), citing Union Oil Co. of California d/b/a Unocal v. Barge-Way Oil Co., Inc., PCB 98-169, slip op. at 5 n.1 (Jan. 7, 1999) (citation omitted). Pfister emphasizes the Board's conclusion that, because a private party initiated Unocal, the case did not fall under the exception to the statute of limitations. Mot. at 5, citing Union Oil Co. of California d/b/a Unocal v. Barge-Way Oil Co., Inc., PCB 98-169, slip op. at 5 n.1 (Jan. 7, 1999) (citation omitted). Pfister also emphasizes that, in a later order in the Unocal case, the Board stated that it had already concluded that "the statute of limitations in this case is five years." Mot. at 6, citing Union Oil Co. of California d/b/a Unocal v. Barge-Way Oil Co., Inc., PCB 98-169, slip op. at 2 (Feb. 15, 2001); *see* 735 ILCS 5/13-205 (2004) (five-year limitation).

Pfister states that "[t]he instant case is brought by private individuals, Vernon and Elaine Zohfeld, not by the State of Illinois." Mot. at 6 (¶18). Pfister argues that, as in Unocal, "the statute of limitations applicable to the instant case is five years." Mot. at 6 (¶19). Pfister notes

that the five-year limitation expired May 8, 2005. Mot. at 6 (¶20). Pfister presumes that complainants filed their complaint on May 9, 2005, because the preceding day fell during a weekend. *Id.* Pfister concludes that “any claims that accrued more than five years before Complainants filed their complaint n May 9, 2005 . . . are barred by Section 13-205.” *Id.*, citing 735 ILCS 5/13-205 (2004).

In addition, Pfister claims that he “did not spray agrichemicals or any other substance at or adjacent to Complainants’ property, nor was he present at Respondent Drake’s or Complainants’ property, either in the employ at Wabash Valley Service Company or otherwise, on any date on or after May 8, 2000.” Mot. at 6-7 (¶21). Pfister further claims that he has “no personal knowledge of any agrichemical spraying at any such property on or after May 8, 2000.” Mot., Exh. A (Pfister affidavit). Consequently, Pfister argues that he “is entitled to summary judgment as a matter of law as to Complainants’ claims he violated the Act on or after May 8, 2000.” Mot. at 6 (¶22).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and 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). 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.* 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 299, 240, 489 N.E.2d 867, 871 (1986). “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis which would arguably entitle [it] to a judgment.” Sutter Sanitation, Inc. et al. v. IEPA, PCB 04-187 slip op. at 9 (Sept. 16, 2004); citing Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

BOARD ANALYSIS

Section 101.500(d) of the Board’s procedural rules provides that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

Because the filing of the motion for summary judgment and the death of one of the two complainants both occurred within a short time of one another, the Board faces unusual circumstances in determining whether to grant that motion. The record in this case is not sufficient for a full consideration of the motion for summary judgment and does not provide an adequate basis for the Board to determine that there is no genuine issue of material fact and that Pfister is entitled to judgment as a matter of law. However, the surviving complainant has indicated that she does not object to the motion and does not intend to file a response to it. Furthermore, by operation of the Board’s procedural rules, she and Pfister’s co-respondents are

deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm Code 101.500(d). Based on these unusual circumstances, the Board construes Pfister's motion for summary judgment as an unopposed motion to dismiss. The Board grants Pfister's unopposed motion to dismiss with prejudice without addressing the substance of the arguments in the motion for summary judgment.

CONCLUSION

Under the unusual circumstances of this case, the Board today construes Pfister's motion for summary judgment as an unopposed motion to dismiss and grants the unopposed motion to dismiss with prejudice. Consequently, this order is the last time respondent Pfister's name will appear in the caption of this proceeding.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 3, 2007, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board