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JUN 03, 2011

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SCOTT MAYER,)
)
Complainant,)
)
vs.)
)
LINCOLN PRAIRIE WATER COMPANY,)
KORTE & LUITJOHAN CONTRACTORS, INC.,)
and MILANO & GRUNLOH ENGINEERS, LLC,)
)
Respondents.)

PCB No. 2011-022

ORIGINAL

ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES

NOW COMES the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., by its attorneys, Heyl, Royster, Voelker & Allen, and for its Answer to Count II of the Complaint, states as follows:

COUNT I
(Lincoln Prairie Water Company)

This Respondent makes no answer to Count I of the Complaint because no allegations are made or relief is prayed for against it in said Count.

COUNT II
(Korte & Luitjohan Contractors, Inc.)

1. This Count II of Complaint is brought pursuant to the terms and provisions of Section 31(d)(1) of the Illinois Environmental Protection Act (415 ILCS 5/31).

ANSWER: This Respondent admits that Complainant asserts the statute cited and that the statute exists, but denies that Complainant has any cause of action under said statute.

2. Complainant is the owner of real estate whose legal description is as follows:

The Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) and the West Half (W 1/2) of the West Half (W 1/2) of the West Half (W 1/2) of Southeast Quarter (SE 1/4), all in Section Thirty-four (34), Township Twelve (12) North, Range Five (5) East of the Third Principal Meridian, Shelby County, Illinois.

ANSWER: This Respondent admits the allegations of Paragraph 2.

3. The aforesaid real estate contains approximately 50 acres upon which the Complainant grows crops.

ANSWER: This Respondent admits the allegations of Paragraph 3.

4. On April 15, 2005, Respondent, Korte & Luitjohan Contractors, Inc., began trenching across the south side of the above described real estate, lying adjacent to, and parallel with and north of an existing road with said trench running approximately three-eighths (3/8) mile ("Easement").

ANSWER: This Respondent admits the allegations of Paragraph 4.

5. In the course of said trenching, Respondent, Korte & Luitjohan Contractors, Inc., shredded into various sized pieces, a telephone cable running the length of said trench, leaving pieces of wire, aluminum and plastic cable coating in the field.

ANSWER: This Respondent denies the allegations of Paragraph 5.

6. The pieces of wire, aluminum and plastic coating were initially dumped alongside the trench and thereafter, bulldozed into the open trench.

ANSWER: This Respondent denies the allegations of Paragraph 6.

7. In the Spring of 2005 and after the aforesaid trenching was completed, Complainant planted the entire 50 acres in corn.

ANSWER: This Respondent admits the allegations of Paragraph 7.

8. In the Fall of 2005, Complainant harvested the corn and tilled the soil.

ANSWER: This Respondent admits the allegations of Paragraph 8.

9. While tilling the soil in the Fall of 2005, Complainant noticed the pieces of wire, aluminum and plastic coating in the "Easement".

ANSWER: This Respondent denies the allegations of Paragraph 9.

10. During the Spring of 2006, Complainant left fallow, the "Easement" and planted the remainder of the real estate in alfalfa.

ANSWER: This Respondent denies the allegations of Paragraph 10.

11. After bailing a portion of the 2006 alfalfa crop from the real estate, Complainant observed a wire protruding from one of the bails.

ANSWER: This Respondent denies the allegations of Paragraph 11.

12. After bailing a portion of the 2006 alfalfa crop, Complainant quarantined approximately 200 bales of alfalfa valued at \$18,000.00.

ANSWER: This Respondent denies the allegations of Paragraph 12.

13. After bailing a portion of the 2006 alfalfa crop, Complainant ceased bailing the 60 feet directly north of the "Easement" due to the wire contamination to his alfalfa.

ANSWER: This Respondent denies the allegations of Paragraph 13.

14. In the Spring of 2010, Complainant had anhydrous applied to the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 14 and, therefore, denies the same.

15. After the aforesaid application, Complainant observed pieces of wire, aluminum and plastic cable coating in the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 15 and, therefore, denies the same.

16. On April 11, 2010, Complainant tilled the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 16 and, therefore, denies the same.

17. On April 11, 2010 and after the tilling, Complainant observed pieces of wire, aluminum and plastic cable coating in the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 17 and, therefore, denies the same.

18. On June 25, 2010 and after the aforesaid "Easement" had been rained on, Complainant observed approximately 170 pieces of wire, aluminum and plastic cable coating.

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 18 and, therefore, denies the same.

19. On June 25, 2010, Complainant removed the approximately 170 pieces of wire, aluminum and plastic cable coating from the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 19 and, therefore, denies the same.

20. After June 25, 2010, Complainant tilled the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 20 and, therefore, denies the same.

21. After June 25, 2010 and after the tilling, Complainant observed pieces of wire, aluminum and plastic cable coating in the "Easement".

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 20 and, therefore, denies the same.

22. After June 25, 2010 and after the aforesaid "Easement" had been rained on,

Complainant observed approximately 200 pieces of wire, aluminum and plastic cable coating.

ANSWER: This Respondent is without information sufficient to form a belief as to the truthfulness of the allegations of Paragraph 22 and, therefore, denies the same.

23. Section 21 of the Illinois Environmental Protection Act, provides the following prohibitions:

§ 21. Prohibited Acts. No Person shall:

(a) Cause or allow the open dumping of any waste.

(p) In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(7) deposition of:

(I) general construction or demolition debris as defined in Section 3.160(a) of this Act; * * *.

(415 ILCS 5/21).

ANSWER: This Respondent admits the existence of the statute but denies that it applies to the facts of this case and that the Complainant has a cause of action under said statute.

24. Section 5/3.160 of the Illinois Environmental Protection Act in pertinent part, provides the following definition:

§ 3.160. Construction or demolition debris.

(a) "General construction or demolition debris" means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings' plaster; drywall; plumbing fixtures' non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals

incidental to any of those materials.

(415 ILCS 5/3.160).

ANSWER: This Respondent admits the existence of the statute but denies that it applies to the facts of this case and that the Complainant has a cause of action under said statute.

25. The Respondent is a "person" as that term is defined under Section 5/3.315 of the Illinois Environmental Protection Act, as follows:

§ 3.315. Person.

"Person" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, stage agency, or any other legal entity, or their legal representative, agent or assigns.

(415 ILCS 5/3.315).

ANSWER: This Respondent admits the allegations of Paragraph 25.

26. By dumping demolition debris onto the real estate owned by the Complainant, Respondent has violated Section 21 of the Illinois Environmental Protection Act.

(415 ILCS 5/21).

ANSWER: Respondent objects to these allegations as they call for a legal conclusion. Without waiving said objection, Respondent denies the allegations of Paragraph 26.

27. The Complainant has been damaged in that the cost to remove and replace the contaminated soil is in excess of \$647,000.00.

ANSWER: This Respondent denies the allegations of Paragraph 27.

28. The Complainant has incurred attorney fees and costs as a result of prosecuting this matter.

ANSWER: This Respondent makes no answer to the allegations of Paragraph 28 for the reason that the Illinois Pollution Control Board has already stricken the Complainant's request for costs and attorney's fees in its Order of April 7, 2011.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., prays that the Board enter an Order finding the following:

(a.) That the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., has not violated the Act as alleged;

(b.) That the Complainant's prayer to be paid any sum of money for any reason whatsoever be denied;

(c.) That any and all issues raised by the Complainant be denied and that all issues be resolved in favor of the Respondent.

AFFIRMATIVE DEFENSES

NOW COMES the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., by HEYL, ROYSTER, VOELKER & ALLEN, its attorneys, and for its Affirmative Defenses in the captioned matter, states as follows:

FIRST AFFIRMATIVE DEFENSE – Excess Damages

For its First Affirmative Defense, Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., states as follows:

1. The Respondent incorporates by reference the claims being made by the Complainant in his Complaint against this Respondent and all Respondents.

2. The Respondent likewise incorporates its above Answer to the claims being made against this Respondent in this case.

3. The Complainant's claim is for property damage to commercial farmland.

4. The Complainant claims damages in excess of \$600,000.
5. The property in question amounts to less than five acres of farmland in question.
6. The property is used for a business purpose.
7. Illinois law does not permit recovery of an amount in excess of the value of the property in cases of property damage.

8. The Complainant has admitted in this case that the fair market value of his property is \$5,500 per acre.

9. Therefore, the Complainant cannot recover more than \$5,500 per acre for property damage in any event.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., prays that any Order that may be entered on behalf of the Complainant be limited to an amount not to exceed the value of the property which is the subject matter of Complainant's Complaint.

SECOND AFFIRMATIVE DEFENSE – Failure to Mitigate

For its Second Affirmative Defense, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., states as follows:

1. The Respondent incorporates by reference the claims being made by the Complainant in his Complaint against this Respondent and all Respondents.

2. The Respondent likewise incorporates its above Answer to the claims being made against this Respondent in this case.

3. The Complainant is capable of and able to grow corn and/or beans on the farmland which is the subject matter of this litigation; that the only alleged limitation on the property claimed by the Complainant is the inability to grow hay or alfalfa on said property.

4. In order to mitigate his damages, therefore, it is incumbent upon the Complainant to grow corn or beans on the property in question.

5. The Complainant has failed to do this, and has allowed the ground to go fallow and has not used it for any purpose.

6. The failure and refusal of the Complainant to use the property which is the subject matter of this litigation in a commercially reasonable manner, namely to grow corn or beans, amounts to a failure to mitigate his damages as required by law.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., prays that the Complainant be barred from that which he prays for by reason of the Complainant's failure to mitigate his damages; namely: growing corn and/or beans (crops he was/is already growing on another part of his property) on the subject land.

THIRD AFFIRMATIVE DEFENSE – Assumption of Risk

For its Third Affirmative Defense, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., states as follows:

1. The Respondent incorporates by reference the claims being made by the Complainant in his Complaint against this Respondent and all Respondents.

2. The Respondent likewise incorporates its above Answer to the claims being made against this Respondent in this case.

3. The alleged damage to this property occurred in the year 2005.

4. At the time of the alleged damage to the property, the Complainant was aware of the alleged presence of small quantities of copper wire in the property in question.

5. At the time of the alleged damage, the Complainant was growing corn on the property in question.

6. Two years thereafter, the Complainant changed the crop on the field in question to grow hay.

7. If the Complainant had not changed his crop, there would have been no adverse consequences to the Complainant by the presence of the telephone wire as alleged in his Complaint on the land in question.

8. The Complainant farms 600 acres of land.

9. Half of the Complainant's land is farmed in corn and beans, and the other is farmed in hay.

10. The Complainant has property where he could grow as much hay as he now grows without any adverse effects on him.

11. In fact, the Complainant could have continued to grow hay elsewhere as he had done in the past had he chosen to do so.

12. When the Complainant, in the face of knowledge of the presence of telephone wire in the ground, and knowledge that it would be a problem in the event that hay were harvested on this property, deliberately chose to farm this ground in hay, Complainant assumed the risk of any economic losses which he may have suffered as a consequence.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., prays that the Complainant be denied all of the relief he seeks and that Respondent recover its costs of suit.

FOURTH AFFIRMATIVE DEFENSE – Statute of Limitations

For its Fourth Affirmative Defense, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., states as follows:

1. The Respondent incorporates by reference the claims being made by the Complainant in his Complaint against this Respondent and all Respondents.

2. The Respondent likewise incorporates its above Answer to the claims being made against this Respondent in this case.

3. To the extent that Respondent's Complaint references any action or omission on the part of this Respondent that occurred more than five years prior to the date that the Complainant filed this Complaint, said claim(s) is/are barred by the statute of limitations.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., prays that the Complainant's Complaint be dismissed, that all relief Complainant prays for be denied, judgment be entered in favor of this Respondent, and that Respondent recover its costs of suit.

COUNT III
(Milano & Grunloh Engineers, LLC)

This Respondent makes no answer to Count III of the Complaint because no allegations are made or relief is prayed for against it in said Count.

KORTE & LUITJOHAN CONTRACTORS, INC.,
Respondent,

BY: 
HEYL, ROYSTER, VOELKER & ALLEN
Keith E. Fruehling
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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing **ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES** was served upon the attorneys of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Box in Urbana, Illinois, on the 2nd day of June, 2011.

Mr. F. James Roytek, III
Law Office of Roytek, Ltd.
921 Broadway Avenue
P.O. Box 746
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STATE OF ILLINOIS
Pollution Control Board

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Kerth E. Fruehling

June 1, 2011

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STATE OF ILLINOIS
Pollution Control Board

IN RE: Our File No. 06405-R7018
Case No. PCB 2011-022
Scott Mayer v. Lincoln Prairie Water Company, Korte & Luitjohan
Contractors, Inc., and Milano & Grunloh Engineers, LLC

Dear Clerk:

ORIGINAL

Per your requirements, enclosed you will find the original and 11 copies of our ANSWER in the above-referenced matter; we ask that you place the original on file. Please acknowledge receipt and filing by stamping the extra copy of the document with a file stamp showing date filed and return it in the enclosed, self-addressed, stamped envelope.

Thank you for your cooperation.

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

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Enclosure: As Indicated

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