

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB NO. 12-35
)	(Enforcement-Water)
SIX M. CORPORATION INC., an Illinois)	
corporation, WILLIAM MAXWELL, and)	
MARILYN MAXWELL,)	
)	
Respondents,)	
)	
and)	
)	
JAMES McILVAINE,)	
)	
Necessary Party-Respondent.)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 1, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a RESPONSE TO MOTION TO DISMISS, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

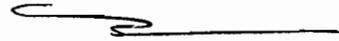
MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
Thomas Davis, Chief
Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that I did on November 1, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and RESPONSE TO MOTION TO DISMISS upon the persons listed on the Service List.



Thomas Davis, Chief
Environmental Bureau
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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Hearing Officer
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**PCB No. 12-35
(Enforcement – Water)**

RESPONSE TO MOTION TO DISMISS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the Motion to Dismiss William Maxwell and Marilyn Maxwell, and states as follows:

Introduction

This enforcement action pertains to two releases from an underground storage tank system and the ongoing failure to remediate these releases. The People’s Complaint was filed on August 25, 2011 and alleges that the first release was reported on May 13, 1996 and the second release was reported on March 8, 2006. Violations of Sections 12(a) and 57.6(a) of the Act are alleged against an Illinois corporation registered as “Six M. Corporation Inc.”¹, William Maxwell

¹ The Respondents’s Motion to Dismiss mostly refers to the corporate entity as “Six-M Corporation, Inc.” with the hyphen, but also in the exact manner (without the hyphen) it is registered with the Illinois Secretary of State.

and Marilyn Maxwell. "At all times relevant to this Complaint, the Respondents have owned and operated a gasoline service station ("facility") doing business as 'Walker's Service Station' and located at 430 West Clinton Avenue, Farmer City, De Witt County, Illinois." Comp. at Count I, ¶s 4, 5 & 6. The well-pleaded allegations are directly premised upon the ownership and operation of the gasoline service station by each of the Respondents. The applicability provision at Section 57.1(a) of the Act provides: "An owner or operator of an underground storage tank who meets the definition of this Title shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program." The People allege that the releases from the UST system polluted the groundwater and that the corporation and the individuals are subject to the Leaking Underground Storage Tank Program as an "owner or operator" of USTs because of their failure to comply with all applicable statutory and regulatory reporting and response requirements.

Suggestion of Death as to Marilyn Maxwell

Marilyn Maxwell is deceased. Complainant consents to the dismissal of Marilyn Maxwell and accepts the suggestion of death as a properly submitted affirmative matter barring judgment. Complainant opposes the requested dismissal of William Maxwell for the reasons stated below.

Legal Posture of Motion to Dismiss William Maxwell

The Motion to Dismiss is filed pursuant to Section 2-619(a)(9) of the Civil Practice Law, 735 ILCS 5/2-619(a)(9): "That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." Section 2-619(a) also provides that "If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." The dismissal request is also filed pursuant to Section 101.500 of the Board's

Procedural Rules, and submitted with an affidavit and other documentary exhibits attached.

The Motion to Dismiss does not cite Section 101.506 as authority to seek dismissal, although Section 101.506 governs the dismissal of a complaint. Section 101.506 also requires that such a motion “must be filed within 30 days after the service of the challenged document.” Section 101.500(c) provides: “Motions may be filed at any time unless otherwise specifically provided.” Service of the Complaint was made on August 26, 2011 according to the certified mail receipts filed with the Board. The Motion to Dismiss filed on October 25, 2011 is untimely because it was not filed within 30 days of service as required by Section 101.506.

The affidavit submitted by the Respondents conveys the direct knowledge of Tom Maxwell, the son of Marilyn Maxwell and William Maxwell, and an operator of the business known as “Walker Tire Service”² in Farmer City. In fact, Tom Maxwell states that he has “managed operations” at the facility since the retirement of William Maxwell some time prior to May 13, 1996, that he has directed “all aspects of the environmental response of Six-M Corporation” to the LUST releases, and that “William Maxwell, being retired, has not managed or directly overseen any aspect of any environmental issues at the service station.” Respondent’s Exh. 1. The affidavit complies with Supreme Court Rule 191 and is admissible pursuant to the Illinois Code of Evidence. However, the substance of this affidavit does not effectively raise any “affirmative matter” under Section 2-619(a)(9) to defeat the claims against William Maxwell or to bar the imposition of judgment.

The five documentary exhibits are tendered without any regard or contention for

² The Respondents and the regulatory agencies appear to refer to the business or facility as both “Walker’s Tire Service” and “Walker Tire Service” in the motion and its exhibits.

admissibility, without any affidavit regarding the foundation for such documents, and are not even mentioned in the Tom Maxwell affidavit. Exhibit A is a printout of the Fire Marshal's website and purports to identify as the owner of the facility. Exhibit B consists of the first page of an October 28, 1996 letter from the Fire Marshal regarding reimbursement eligibility; however, the document is incomplete as the signature page is missing. Exhibit C is a printout of the Illinois EPA's website and purports to identify "owner/operator" as "Walker Tire". Exhibit D is a notification for underground storage tanks made to the Fire Marshal by William Maxwell on April 18, 1986; this document certified that the USTs were currently in use and that William Maxwell was then the owner of the USTs. Exhibit D also identified the location and name of the facility as "Walker's Service". Lastly, Exhibit E is a notification for underground storage tanks made to the Fire Marshal on behalf of "Six M Corp." on March 11, 1992.

Standards of Review

Before responding the substantive arguments that are premised upon these documents, it is necessary to address the applicable standards of review. The Board must consider all well-pleaded facts in the complaint as true when deciding a motion to dismiss for certain defects or defenses. A Section 2-619 motion admits the legal sufficiency of the cause of action and seeks dismissal by virtue of an affirmative defense or defect entitling movant to judgment. A motion for involuntary dismissal specifically brought pursuant to Section 2-619(a)(9) raises an "affirmative matter avoiding the legal effect of or defeating the claim." A Section 2-619(a)(9) motion is properly used to raise affirmative matters that negate the claim, not to challenge the essential allegations of the cause of action. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 115 (1993). However, the "affirmative matter" must be something more than

evidence offered to refute a material fact alleged in the complaint. *Barber-Colman co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (5th Dist. 1992). An “affirmative matter” to support involuntary dismissal of cause of action is something in nature of a defense that completely negates cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from complaint. Statutory immunity is an affirmative matter that can be raised in a motion for involuntary dismissal, and collateral estoppel, statutes of limitation and the doctrine of merger are other examples. It is well-settled that an alleged affirmative matter must completely negate the cause of action.

The Motion to Dismiss is brought specifically pursuant to Section 2-619(a)(9) but improperly seeks to rebut well-pleaded factual allegations that William Maxwell owned and operated the subject facility. Moreover, the exhibits are improper in the context of Section 2-619(a)(9). A party may not submit evidentiary material in support of a motion to dismiss, on the grounds that the claim is barred by other affirmative matter avoiding the legal effect of or defeating the claim, for the purpose of contradicting well-pleaded facts in the complaint. *Green v. Trinity Intern. University*, 344 Ill. App. 3d 1079, 1086 (2nd Dist. 2003). In ruling on a motion to dismiss on the ground that the underlying claim is barred by an affirmative matter, a trial court may not consider arguments and matters unsupported by affidavit. *Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.*, 261 Ill. App. 3d 338, 343 (2nd Dist. 1994).

Argument in Opposition to Dismissal under §2-619(a)(9)

At all times relevant to this Complaint, the Respondents have owned and operated a gasoline service station doing business as “Walker’s Service Station” in Farmer City. According to the allegations, the relevant time period began on April 18, 1986 when William Maxwell

submitted a notification or registration to the Fire Marshal certifying that he was the owner of the USTs. The first release was reported on May 13, 1996 and the second release was reported on March 8, 2006. Lastly, the two LUST releases have not been sufficiently remediated in accordance with applicable regulations and approved plans. Therefore, the relevant time period as alleged in the Complaint is twenty five years and counting.

The affidavit of Tom Maxwell is not improper in any sense but it fails to present any “affirmative matter” for purposes of Section 2-619(a)(9) regarding William Maxwell. Rather, it merely contends that William Maxwell was retired from the business by May of 1996 and thus no longer operating the facility at the time of the first release. Retirement is not an affirmative matter barring judgment.

The exhibits are improper and cannot be utilized for the purposes of the present motion. The Board may not consider arguments and matters unsupported by affidavit. For instance, the motion argues that Exhibit D “indicates that William Maxwell was signing the notification on behalf of Walker’s Service, not in an individual capacity.” Motion at p. 3. This argument and Exhibit D are improper and unsupported by the affidavit.

The *implicit* argument of the dismissal request is that the corporation is the successor in interest to the individual owners and operators. However, the Respondents did not *explicitly* make this type of argument and did not provide relevant documentary evidence (e.g. title and corporate records) with a proper foundation for admissibility and consideration, within a properly pleaded motion pursuant to statutory provisions other than Section 2-619(a)(9).

The Motion to Dismiss contends that “the identity of the party responsible for

undertaking any corrective action is not subject to factual dispute” and (in reliance upon the improper exhibits) concludes that the Fire Marshal “has formally determined that Walker Service Station is the owner or operator of the subject tanks.” Motion at p. 3. This too does not qualify as an “affirmative matter” defeating the cause of action per Section 2-619(a)(9).

The Motion to Dismiss then completely abandons Section 2-619(a)(9) by arguing that the Complainant failed to state a cause of action against William Maxwell as a responsible corporate officer due to the lack of any allegations of “personal involvement and active participation in the acts resulting in liability.” Motion at pp. 3 & 4; quoting *People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277, 289 (1st Dist. 2004). The Complainant did not plead any allegation that William Maxwell is a corporate officer³ and as such is somehow personally liable for the violations.

Conclusion

The Board is presented with a dismissal motion grounded on Section 2-619(a)(9) seeking involuntary dismissal of William Maxwell due to an affirmative matter defeating the claims of violation. The matter asserted by the affidavit pertains to the retirement of William Maxwell and simply does not qualify as an “affirmative matter” under Section 2-619(a)(9). The extraneous matters presented by the exhibits are improperly tendered and there is no attempt to satisfy the evidentiary and procedural requirements for foundation and admissibility. The Board should not consider these exhibits for any purpose. The substance of the improper exhibits apparently relates to “the identity of the party responsible for undertaking any corrective action [which] is not subject to factual dispute” according to the argument presented by the Respondents. This

³ The Complaint does identify William Maxwell as the registered agent for Six M. Count I at ¶ 4.

argument is not properly presented in this Section 2-619(a)(9) motion.

The Motion to Dismiss suggests that "it is difficult to imagine how a person could be individually liable for failure to perform a plan." Motion at p. 4. Yet, this is what the People allege in regard to William Maxwell.

WHEREFORE, the Complainant respectfully requests that the Motion to Dismiss the claims against William Maxwell be DENIED.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
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