ILLINOIS POLLUTION CONTROL BOARD
May 2, 2013

SCOTT MAYER,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 11-22
	)	(Citizens Enforcement Land)
LINCOLN PRAIRIE WATER COMPANY, KORTE & LUITJOHAN CONTRACTORS, INC., and MILANO & GRUNLOH ENGINEERS, LLC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by C. K. Zalewski):

On November 15, 2010, Scott Mayer (Mayer) filed a citizen's enforcement complaint (Comp.) against Lincoln Prairie Water Company (Water Company), Korte & Luitjohan Contractors, Inc. (Contractors), and Milano & Grunloh Engineers, LLC (Engineers) (collectively, respondents). Complainant seeks to recover from respondents over $647,000 in costs to remediate the land pollution respondents allegedly caused on his farmland, a 50-acre site in Shelby County.

On April 7, 2011, the Board accepted the complaint for hearing, finding it was neither duplicative nor frivolous on the whole, although the Board struck some portions of the relief requested as beyond the Board's authority to grant. On January 28, 2013, Mayer filed a motion to amend the complaint (Mot. Am.) and a first amended complaint (Am. Comp.). On February 29, 2013, Contractors filed a response in opposition to the motion for leave (Resp.). The other respondents did not file responses to the motion. For the reason stated below, the Board denies Mayer's motion and directs that this action proceed to hearing.

The Board first sets forth the procedural history of this case. Next, the Board summarizes the motion as well as the response of Contractors. Finally, the Board details the relevant statutory provisions and case law before setting forth the reasons for denying the motion.

THE ORIGINAL COMPLAINT

The November 15, 2010 complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) by respondents at a 50-acre site in Shelby County on which Mayer grows row crops. Comp. at 1-2.

Mayer alleges that in April 2005 he gave the Water Company an easement for installation, operation, and maintenance of underground water lines, and that during trenching

respondents shredded an underlying telephone line. Comp. at 2. Mayer alleges that the pieces of telephone line were then open dumped by bulldozing them into an open trench resulting in contamination consisting of "pieces of wire, aluminum and plastic cable coating in the field." *Id.* Mayer seeks to recover $647,000 in costs to remediate the property, along with his litigation costs and attorney fees from respondents. Comp. at 6, 11, and 16.

MOTION AND AMENDED COMPLAINT

Mayer's original complaint seeks $647,000 in remediation cost to remove and replace the soil contaminated as a result of the installation, operation, and maintenance of underground water lines. Comp. at 16. After the completion of discovery, Mayer filed the motion to amend the complaint adding $7,100 to his request for relief for the replacement cost of a water line that would allegedly be damaged during removal and replacement of the contaminated soil. Am. Comp. at 6, 10, 17. He also added three new counts to the amended complaint seeking damages of $18,000 for crop losses, and $1,081.50 per year since 2007 for losses due to fallow field areas. Am. Comp. at 22, 27, 32.

Specifically, Mayer seeks to amend the original complaint by adding:

1) "replacement cost of $7,100.00 for the water line which will be damaged during the removal and replacement of the contaminated soil" to Paragraph 28 of Count I, Paragraph 27 of Count II, and Paragraph 28 of Count III of the original complaint; Am. Comp. at 6, 11, and 16.

2) "and, $7,100.00 for replacement cost of the damaged water line" to Paragraph 29-B of Count I, Paragraph 28-B of Count II, and Paragraph 29-B of Count III of the original complaint; Am. Comp. at 6, 11, and 16.

3) Counts IV, V, and VI asking that the Water Company (Count IV), Contractors (Count V), and Engineers (Count VI) be found in violation of the Act and directing respondents to pay Mayer "$18,000.00 for the lost hay crop and $1,081.50 for the 2007 crop year and each year thereafter during which the portion of the field has remained fallow." Am. Comp. at 22, 27, 32.

RESPONSE

On February 19, 2013, Contractors filed an objection to Mayer's Motion for Leave to File an Amended Complaint. Resp. at 1. Contractors argue that Mayer's motion is "untimely because the Complainant knew or should have known about this alleged need [for replacement of the water line] well before he filed the original Petition." *Id.* at 4. Further, Contractors argue that Mayer's request, "comes after the parties have completed the discovery process, including the expert/opinion witness component of the discovery process." *Id.*

In support of its argument that Mayer unnecessarily delayed broaching replacement of the water line, Contractors also state that Mayer sought supplemental interrogatories from Contractors on February 6, 2012, to which Contractors objected. Resp. at 4. Mayer did not

address Contractors' objection to those interrogatories until September 17, 2012. *Id*. Contractors claim that there are no written disclosures by Mayer reflecting anything about the alleged need for or the replacement cost of the subject water line. *Id*. Specifically, there was no disclosure made by Mayer from any expert/opinion witness that addresses the issue of the water line in any way. *Id.*

Moreover, Contractors claim that allowing Mayer's motion would, "significantly prejudice Respondents and would eviscerate the significance of the requirement that [Mayer] place the Respondents on notice of [Mayer's] allegations in the Petition." Resp. at 6. Contractors cite Freedberg v. Ohio National, 2012 Ill. App. 110938, 975 N.E.2d 1189 (2012) to support their argument. In Freedburg, the Appellate court states that "ordinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure." Resp. at 7, citing Freedberg v. Ohio National, 2012 Ill. App. 110938, 975 N.E.2d at 1201 (2012). The Freedburg Court also indicated that:

> [i]n determining whether to allow an amendment to the pleadings, the trial court considers the following factors: (1) whether the proposed amendment would cure a defect in the pleadings; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleading. Resp. at 7, citing Freedberg, 975 N.E.2d at 1202.

Contractors assert that factors 2, 3, and 4 weigh in favor of denying the motion, opining that, "[a]ny factual basis supporting the alleged claim for removal and replacement of the water line has been known to this Complainant well before this Petition was filed." Resp. at 7. Contractors argue that before receiving Mayer's motion for leave, no party in this case was aware that Mayer intended to add three new counts involving new allegations and new requests for additional damages against all respondents. *Id.*

Contractors claim that the new allegations in Counts IV, V, and VI of the amended complaint have not been subject to discovery. Resp. at 8. Contractors also assert that the economic damages sought in the new counts were the subject of an Order issued by the Circuit Court of Shelby County. *Id*. Therefore, allowing Mayer to introduce them to the case, according to Contractors, will be prejudicial to the respondents. Resp. at 8-9.

Contractors also claim the pursuit of damages due to fallow farm ground and loss of crops is inappropriate in this case because the "Moorman Doctrine" bars recovery for fallow land and crop loss in this case. Contractors state that "[t]ort law affords the proper remedy for losses arising from personal injuries or damage to one's property, whereas, contract law and the Uniform Commercial Code provide the proper remedy for economic losses stemming from diminished commercial expectations without related injuries to persons or property." Resp. at 9, citing Moorman Manufacturing v. National Tank, 91 Ill.2d 69, 82, 435 N.E.2d 443, 449 (1982).

Finally, Contractors state that the Board should deny Mayer's requests for the award of attorney's fees and costs because the Board has already ruled on that issue in its April 7, 2011

Order denying respondents' Motions to Dismiss. That order struck Mayer's request for fees and costs set out in the original complaint. Resp. at 10. Therefore, Contractors assert the Board and/or Hearing Officer should deny Mayer's Motion for Leave Amending the Complaint. *Id.*

Water Company and Engineers

The Water Company and Engineers have not filed a response to Mayer's motion to amend. The Board's procedural rules provide that, "within 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…in its disposition of the motion." 35 Ill. Adm. Code 101.500(d); People v. Envt'l Health and Safety Svcs., Inc., PCB 05-51, slip op. at 13 (Jul. 23, 2009). The Board finds that by failing to respond to Mayer's motion to amend complaint, Water Company and Engineers have waived any objection to the Motion to Amend Complaint. *Id*. The Board notes however, that while the Water Company and Engineers have waived any objection to the granting of the motion, the Board is not bound by that waiver to grant the motion.

DISCUSSION

The Board's procedural rules contemplate the amendment of complaints (*see, e.g.* 35 Ill. Adm. Code 101.403 and 103.206), but do not specifically provide standards for decisions of such motions. The Board's procedural rules do, however, provide that "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.100(b). The Board looks to Section 2-616 of the Code of Civil Procedure for guidance. 735 ILCS 5/2-616 (2010). Section 2-616 provides:

> At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim. 735 ILCS 5/2-616(a) (2010).

A review of Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) and the case law interpreting that section indicates that while the provisions of Section 2-616(a) of the Code are discretionary, amendments of pleading should be liberally allowed. Savage v. Mui Pho, 312 Ill. App. 3d 553, 556-57 (5th Dist. 2000). Further, the courts have stated that Section 2-616(a) is to be "liberally construed so that cases are resolved on their merits." *Id.* Additionally, the Board's practice is to liberally allow amendments to complaints and petitions filed with the Board. *See generally* People v. The Highlands, L.L.C. and Murphy's Farm, Inc., PCB 00-104 (May 6, 2004) and People v. 4832 Vincennes, LP and Batteast Construction Co., PCB 04-7 (Nov. 6, 2003).

However, the courts have consistently held that parties do not have an absolute right to amend pleadings under the Code (735 ILCS 5/1-1 *et seq*. (2002)). *See* Zubi v. Acceptance Indemnity Insurance Company, 323 Ill. App. 3d 28, 30-32; 751 N.E.2d 69, 80 (1st Dist. 2001). The Board has denied motions for leave to file an amended complaint where the amended complaint would prejudice the parties, the amended complaint was not timely filed, and the complainant had the opportunity to amend the complaint at an earlier time. People v. Community Landfill, PCB 97-193 slip. op. at 4 (Mar. 18, 2004). The Appellate Court also provides direction on when a motion to amend a complaint should be granted or denied stating, "[o]rdinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure." Resp. at 7, *citing* Freedberg, 975 N.E.2d at 1201. Further, the Freedberg opinion says, "leave to amend a complaint is properly denied in circumstances . . . where the proposed additional counts are based on facts available to the plaintiff when the original complaint was filed." *Id.* at 1203. The Freedburg Court provides four factors to consider when determining whether to deny a motion to amend: "(1) whether the proposed amendment would cure a defect in the pleading; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleadings." *Id*. at 1202.

The first Freedburg factor, whether the amendment cures a defect, is not at issue here. The Board must then consider factors two, three, and four in light of Mayer's motion. To assess the second factor, whether the other parties would sustain prejudice or surprise by virtue of the amendment, the Board looks to the current status of the case. The parties in this case have completed discovery including the expert witness discovery based on the original complaint filed November 15, 2010. Allowing the new allegations in Counts IV, V, and VI, which according to Contractors "introduce novel allegations to the case that lay claim to a factual basis for an economic damages claim," would be prejudicial to respondents given that the amendment was filed after the parties completed discovery in September 2012. Therefore, the Board finds that this Freedburg factor weighs against granting Mayer's motion.

In reviewing the third factor, whether the filing was timely, the Board examines the history of the proceeding. The water lines are at the root of Mayer's original complaint. Discovery served upon respondents in February 2012 included mention of damage to and replacement of water lines. In his Motion to Amend, Mayer simply states, "since filing Complaint, Complainant has learned that the removal of contaminated soil with [sic] result in the destruction of a water line located in the contaminated area[1]." Motion at 1. This brief explanation is insufficient to excuse the two years that have passed in this matter between the filing of the complaint and the filing of Mayer's motion and the eleven months that passed between exhibiting knowledge of the issue in discovery documents and amending the complaint to reflect that knowledge. Therefore, the Board finds that the amended complaint is not timely, and this Freedburg factor weighs against granting Mayer's motion.

[1] The Board reads Complainant's Motion to state "the removal of contaminated soil *will* result in the destruction of a water line."

Finally, the Board finds that the fourth Freedburg factor also weighs against Mayer because the Board has no evidence before it that Mayer was prevented from amending the complaint at an earlier date. Like the plaintiff in Freedberg, Mayer "did not provide any explanation for filing the motion at such a late stage in the proceedings." Freedberg, 975 N.E.2d at 1203. Further, the fact that Mayer raised costs of the water line in discovery served upon respondents in February 2012 suggests that Mayer chose not to amend the complaint at that time to the detriment of respondents. Therefore, the Board finds that Mayer was not prevented from amending the complaint at an earlier time.

The Board finds that the amended complaint would prejudice the respondents, is not timely, and that Mayer had the opportunity to amend the complaint earlier in the case. Because the right to amend is not absolute, and in this case would prejudice the respondents, the Board finds that the amended complaint should not be accepted. Therefore, the Board denies the motion for leave to file an amended complaint and strikes the amended complaint. The Board further directs this matter proceed expeditiously to hearing.

CONCLUSION

After reviewing the arguments, pleadings and facts surrounding the filing of the amended complaint, the Board finds that the amended complaint would prejudice the respondents, is not timely, and that complainant previously had the opportunity to amend the complaint. Therefore, the Board denies the motion for leave to file the amended complaint, strikes the amended complaint, and directs the hearing officer to proceed expeditiously to hearing on the original complaint.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 2, 2013, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board