ILLINOIS POLLUTION CONTROL BOARD
May 16, 2013

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 13-43
	)	(Enforcement - Air)
BLICK'S CONSTRUCTION CO., INC.,	)	
an Illinois corporation, and RON BRICKER,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by J.D. O'Leary):

The People of the State of Illinois (People) filed a four-count complaint (Comp.) against Blick's Construction Co., Inc. (BCC) and Ron Bricker (Bricker) (collectively, respondents). The complaint concerns alleged asbestos abatement violations in connection with a building demolition and renovation project located at 1201 Broadway in Quincy, Adams County. This matter is before the Board today on the motion of BCC to dismiss count II of the complaint as inadequately pled (Mot.). For the reasons below, the Board grants BCC's motion, but dismisses count II without prejudice.

In this order, the Board first describes the procedural history of the case, and then the complaint, the dismissal motion, and the People's response to the motion. After providing the applicable legal framework, the Board sets forth the reasons for granting BCC's motion and dismissing count II without prejudice.

PROCEDURAL HISTORY

On February 8, 2013, the People filed the four-count complaint. On February 21, 2013, the Board accepted the complaint for hearing. BCC, on March 4, 2013, filed a motion for leave to file *instanter* the motion to dismiss count II of the complaint. On the same day, BCC also filed an answer to counts I, III and IV of the complaint. On March 7, 2013, the People filed a response to the motion to dismiss. Bricker filed an answer to the complaint on April 11, 2013.

BCC's motion for leave to file, to which the People did not respond, is denied as unnecessary. The Board's procedural rules provide that motions to dismiss, among others, must be filed within 30 days after "the service of the challenged document . . . ." 35 Ill. Adm. Code 101.506. The record shows that the People's complaint was served on BCC on February 11, 2013, 21 days before March 4, 2013, when BCC filed the motion for leave to file, attaching the motion to dismiss. BCC therefore timely filed its motion to dismiss without need of the Board's leave.

FILINGS

In this section, the Board first summarizes the complaint and the provisions allegedly violated under count II. Then, the Board describes BCC's motion and the People's response.

People's Complaint

Asbestos Removal

The complaint, in count I, sets forth factual allegations that are incorporated by reference into all counts. Comp. at 6, 9, 12. The complaint alleges that BCC "controlled or supervised renovation and waste disposal operations," and that Bricker "performed, controlled, or supervised renovation activities" at a former commercial bank building (facility) located at 1201 Broadway in Quincy. *Id*. at 2. According to the complaint, the facility's owner (First Bankers Trust Company, N.A.) employed Mass Construction (Mass) as a general contractor, to supervise and control demolition operations at the facility, and Mass, in turn, hired BCC as a subcontractor to "perform, control, and supervise demolition operations at the facility." *Id.* at 2-3. The People assert that before May 5, 2011, BCC employed Triple A Asbestos Services (Triple A) to remove asbestos-containing material (ACM), including Regulated Asbestos-Containing Material (RACM), from the facility. *Id.* at 3.

On May 5, 2011, the complaint continues, the Illinois Environmental Protection Agency (Agency) received a "Notification of Demolition and Renovation" for the facility. Comp. at 3. According to the complaint, the notice stated that beginning on May 10, 2011, Triple A would remove 385 square feet of RACM located in restrooms, stairways, and a janitor's closet, and that, upon completion of this activity, BCC would begin demolition on May 16 and conclude demolition on July 8, 2011. *Id.*

The complaint alleges that prior to June 7, 2011, Bricker or someone acting under his supervision and control disturbed or removed more than 160 square feet or 35 cubic feet of spray-on asbestos-containing ceiling material and thermal insulation. Comp. at 3. The complaint adds that on at least two occasions before June 7, 2011, BCC's president observed Bricker remove items from the facility, including ceiling tiles, in preparation for demolition. *Id.* According to the People, Triple A informed the Agency that on June 7, 2011, Triple A observed dry, friable, cut and broken asbestos-containing waste material at "numerous locations within the facility" resulting from the removal of "various building components." *Id.*

Agency Inspection and Sample Testing

The complaint alleges that an Agency asbestos inspector inspected the facility on June 8, 2011. Comp. at 3. The People assert that during the inspection, the inspector observed the following: (1) "[m]ost of the ceiling on the second floor of the facility" had been removed, and approximately 1,253 square feet of "dry, friable, cut and broken" RACM was deposited in the "basement area" through openings cut into the facility's first and second floors; (2) metal building components had been removed and deposited outside the building; (3) an "undetermined quantity of asbestos-containing thermal insulation" had been disturbed or

removed; and (4) there was no evidence of a water source or water-spraying devices within the facility for use in wetting the ceiling material and thermal insulation to control the emission of asbestos. *Id.* The complaint claims that the removal of the ceiling material and RACM deposition, as well as removal of the asbestos-containing insulation, occurred "on a date or dates prior to June 7, 2011." *Id.* at 3-4. The complaint further alleges that the Agency collected and had tested four samples of dry, friable, "suspect" material located within the facility, and two samples from ceiling tiles located outside the facility. *Id.* at 4. According to the complaint, the tests revealed that spray-on ceiling material located within and deposited outside the facility contained "chrysolite asbestos equal to or greater than 1%." *Id.*

Based on these allegations, the complaint sets forth four counts against respondents, as follows.

Count I - Air Pollution

Count I alleges that respondents violated Sections 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2010)) and Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141) by causing, threatening, or allowing the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution in Illinois. Comp. at 1-5.

Count II - Asbestos Abatement Notification and Payment

Count II alleges that respondents violated Sections 9.1(d)(1) and 9.13(b) of the Act (415 ILCS 5/9.1(d)(1), 9.13(b) (2010)), and Sections 61.145(b)(1) and (b)(3) of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos (40 C.F.R. §§ 61.145(b)(1), (b)(3)), by failing to do the following:

- Notify the Agency of "asbestos removal activities" at the facility "prior to commencing such activities";

- Provide the Agency with "a notification of demolition and renovation informing the [Agency] of asbestos removal activities to be performed on a date prior to that stated within a notification of demolition and renovation signed on May 3, 2011, and received by the [Agency] on May 5, 2011"; and

- Submit the requisite asbestos fee to the Agency "with a notification of demolition and renovation prior to commencing asbestos removal activities." Comp. at 6-8.[1]

[1] Although the Board generally does not have jurisdiction over federal Clean Air Act regulations, Section 9(d)(1) of the Act, as set forth below, provides that "[n]o person shall . . . violate any provision of Sections 111, 112, 165, or 173 of the Clean Air Act . . . or federal regulations adopted pursuant thereto." 415 ILCS 5/9(d)(1) (2010).

Count III - Asbestos Abatement Work Practice

In count III, the People allege that respondents violated Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2010)) and Sections 61.145(c)(1) and (c)(6) of the asbestos NESHAP (40 C.F.R. §§ 61.145(c)(1), (c)(6)) by not removing all RACM, including Category I non-friable ACM that would break up, dislodge, or be similarly disturbed, prior to commencing salvaging activities. Comp. at 9-11.

Count IV - Asbestos Waste Handling

In count IV of the complaint, the People allege that respondents violated Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2010)) and Sections 61.150(a) and (b) of the asbestos NESHAP (40 C.F.R. §§ 61.150(a), (b)) by: (1) not adequately wetting, and keeping wet, all RACM and regulated asbestos-containing waste material during handling and loading for transport to a disposal site, or processing asbestos-containing waste material into nonfriable forms; (2) not using an alternative emission control and waste treatment method approved by the United States Environmental Protection Agency's Administrator during renovation activities; and (3) not transporting all regulated asbestos-containing waste material generated during asbestos removal activities to a proper waste disposal site as soon as practical. Comp. at 12-14.

Relief Requested

For each of the four counts of the complaint, the People ask that the Board (1) find the respondents violated the Act and the regulations as alleged; (2) enter an order permanently restraining respondents from further violations of the Act, Board regulations, and asbestos NESHAP; (3) impose civil penalties of $50,000 for each violation and $10,000 for each day during which the violation continued; and (4) award the People their costs and reasonable attorney fees. Comp. at 5, 8-9, 11, 15.

Provisions Allegedly Violated Under Count II

Section 9.1(d)(1) of the Act provides as follows:

(d) No person shall:

(1) violate any provisions of Sections 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto . . . . 415 ILCS 5/9.1(d)(1) (2010).

Section 9.13(b) of the Act provides in relevant part:

> (b) If demolition or renovation of a site has commenced without proper filing of the 10-day Notice, the fee is double the amount otherwise due. . . . 415 ILCS 5/9.13(b) (2010).[2]

The asbestos NESHAP regulations (40 C.F.R. 61) were adopted pursuant to Section 112 of the Clean Air Act (42 U.S.C. § 7412), as referenced in Section 9.1(d)(1) of the Act. Section 61.145(b) of the asbestos NESHAP provides in relevant part:

> (b) Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall:
>
> (1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.
>
> * * *
>
> (3) Postmark or deliver the notice as follows:
>
> (i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a)(1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins. 40 C.F.R. § 61.145(b)(1), (b)(3).

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Section 61.141 of the asbestos NESHAP, in turn, defines "owner or operator of a demolition or renovation activity" as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both." 40 C.F.R. § 61.141.[3]

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[2] Section 9.13(a) of the Act reads as follows: "For any site for which the owner or operator must file an original 10-day notice of intent to renovate or demolish pursuant to 40 CFR 61.145(b) (part of the federal asbestos National Emission Standard for Hazardous Air Pollutants or NESHAP), the owner or operator shall pay to the Agency with the filing of each 10-day Notice a fee of $150." 415 ILCS 5/9.13(a) (2010).

[3] "Demolition" means "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility." 40 C.F.R. § 61.141. "Renovation" means "altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions." *Id*.

BCC's Motion to Dismiss Count II

BCC argues that count II of the complaint should be dismissed because it does not allege a date when BCC initiated "asbestos stripping or removal work" or "asbestos demolition" for which 10-day notification is required, and does not allege that BCC undertook any activity proscribed by the asbestos NESHAP. Mot. at 2. Rather, BCC continues, the People allege only that BCC "'caused or allowed'" an "unrelated, independent third party" to engage in such activities on "some unspecified date." *Id.*

BCC maintains that the Agency received a notice of demolition and renovation on May 5, 2011, informing the Agency about the commencement of asbestos removal "to be undertaken by" Triple A, which BCC engaged to "perform all regulated asbestos activities" at the facility. Mot. at 2. According to BCC, the complaint alleges no facts establishing that BCC initiated any regulated asbestos activity earlier than 10 days after the Agency received the notification of demolition and renovation. *Id.* at 2-3.

Moreover, BCC continues, the People's claim that BCC also violated the requirement to pay the asbestos fee before commencing asbestos removal "is dependent upon" the alleged 10-day notification violation. Mot. at 3. Because the complaint does not properly allege any facts that could be interpreted to demonstrate a violation of the 10-day notification requirement, BCC adds, the complaint also fails to state a claim for violation of the fee requirement. *Id.*

People's Response to Motion

The People argue that count II alleges all the elements of a violation of Sections 9.1(d)(1) and 9.13(b) of the Act and Sections 61.145 (b)(1) and (b)(3) of the asbestos NESHAP. Resp. at 1-4. In support, the People recite the following allegations of the complaint:

a. Respondents are owners or operators of a renovation activity;

b. Spray-on asbestos containing material and thermal insulation exceeding 160 square feet or 35 cubic feet, a "jurisdictional amount" of asbestos, was disturbed or removed under Bricker's "supervision and control";

c. On at least two occasions before June 7, 2011, BCC's president observed Bricker removing items from the facility, including ceiling tiles, in preparation for demolition of the facility;

d. Triple A informed the Agency that on June 7, 2011, it had discovered dry, friable, cut and broken regulated asbestos-containing waste material at numerous locations within the facility resulting from the removal of various building components;

e. By not notifying the Agency of asbestos removal activities at the facility before commencing such activities, respondents violated Section 9.1(d)(1) of the Act, and Section 61.145(b)(1) and (b)(3) of the asbestos NESHAP; and

f. By not submitting the prescribed fee to the Agency with a notice of demolition and renovation before commencing asbestos removal activities, respondents violated Section 9.13(b) of the Act. Resp. at 3, citing Comp. at ¶¶ 6, 13, 14, 15, 26, 28, 30.

In short, the People assert, count II alleges that BCC was an owner or operator of a renovation activity with a legal duty to comply with the notification and fee requirements, but the renovation activity "occurred without proper notice or fee payment." Resp. at 3. The People argue that count II is "well pled" and "reasonably informs" BCC of the nature of the "claims and defenses it is called upon to meet." *Id.* at 4.

DISCUSSION

Below, the Board first sets out the legal standards that apply to complaints and motions to dismiss. The Board then analyzes and rules upon the motion.

Legal Framework

Requirements for Complaints

Under Section 31(c) of the Act, the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31(c) (2010); 35 Ill. Adm. Code 103.212(c). Section 31(c) states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2010). Even though "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law" (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board's procedural rules "provide for specificity in pleadings" (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)), and "the charges must be sufficiently clear and specific to allow preparation of a defense" (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

Motion to Dismiss

The Board has often looked to Illinois civil practice law for guidance when considering motions to dismiss. *See, e.g.*, United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 14 (Oct. 16, 2008); People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See*, *e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550,

557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), citing A, C & S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part[,]'" A, C & S quoting People *ex rel*. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001). The appellate court has explained: "It is impossible to formulate a simple methodology to make this determination, and therefore a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Gonzalez v. Thorek Hospital & Medical Center, 143 Ill. 2d 28, 34, 570 N.E.2d 309 (1991).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. *See* Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4, citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's failure to allege facts necessary to recover "may not be cured by liberal construction or argument." Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43, quoting People *ex rel*. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

"Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." Grist Mill Confections, PCB 97-174, slip op. at 4, citing Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E.2d 1167, 1170 (1st Dist. 1994); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 ("In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties."). Fact-pleading does not require a complainant to set out its evidence: "'To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People *ex rel*. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981), quoting Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970); United City of Yorkville,

PCB 08-96, slip op. at 15. Moreover, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing College Hills, 91 Ill. 2d at 145.

Board Analysis

Count II of the complaint alleges that BCC violated Sections 61.145(b)(1) and (b)(3) of the asbestos NESHAP (40 C.F.R. §§ 61.145(b)(1), (b)(3)) and therefore Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2010)), as well as Section 9.13(b) of the Act (415 ILCS 5/9.13(b) (2010)). It is a violation of Section 9.1(d)(1) of the Act to violate the asbestos NESHAP (40 C.F.R. 61). Under the asbestos NESHAP, the 10-working day notification requirements (40 C.F.R. §§ 61.145(b)(1), (b)(3)) apply to the "owner or operator of a demolition or renovation activity" (40 C.F.R. § 61.145(a)), who is defined to include, among others, "any person who owns, leases, operates, controls, or supervises the demolition or renovation operation" (40 C.F.R. § 61.141). Section 9.13(a) of the Act requires an owner or operator subject to the asbestos NESHAP notification requirements to pay a $150 fee with the 10-day notification; Section 9.13(b) doubles the fee if demolition or renovation work has commenced without proper filing of the 10-day notification. *See* 415 ILCS 5/9.13(a), (b) (2010).

In ruling upon a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See* Beers, PCB 04-204, slip op. at 2. So, construing count II of the People's complaint, the following must be accepted:

- Before May 5, 2011, Mass hired BCC as a subcontractor to perform, control, and supervise demolition operations at the facility (Comp. at ¶ 10);

- Before May 5, 2011, BCC employed Triple A to remove ACM, including RACM, from the facility prior to demolition (Comp. at ¶ 11);

- On May 5, 2011, the Agency received a notification of demolition and renovation for the facility, signed May 3, 2011, stating that Triple A would remove RACM beginning on May 11, 2011 (Comp. at ¶ 12);

- The notification further provided that after completion of Triple A's RACM removal, BCC would perform demolition, beginning on May 16, 2011, and ending on July 8, 2011 (Comp. at ¶ 12);

- Before June 7, 2011, and in preparation of demolition, Bricker or someone acting under his supervision disturbed or removed ACM, which activities were observed on at least two occasions by BCC's president (Comp. at ¶¶ 13-14).

In its motion to dismiss count II, BCC does not contend that it was not an "owner or operator of a demolition or renovation activity" (40 C.F.R. § 61.141) or that it was not subject to the asbestos NESHAP notification requirements (40 C.F.R. §§ 61.145(b)(1), (b)(3)). On the contrary, BCC acknowledges that the 10-day notification submitted to the Agency "related to the

commencement of regulated asbestos activities to be undertaken by [Triple A], a subcontractor retained by [BCC] to perform all regulated asbestos activities at the subject premises." Mot. at 2.

Instead, BCC suggests that it cannot be held liable for violating the asbestos NESHAP notification requirements based upon the alleged renovation activity of Bricker. The motion implies that the renovation activity referred to in the asbestos NESHAP notification requirements, as applied to BCC, would be that of Triple A, not that of Bricker, an alleged third party "unrelated" to and "independent" of BCC. However, for the violations alleged in count II, the relevance, if any, of the relationship, if any, that existed between BCC and Bricker is not addressed by the motion or the People's response. The Board declines to endeavor resolving these matters on this record.

The only ground for dismissing count II plainly set forth in BCC's motion is that the count fails to specify the date on which *any* asbestos removal activities began. According to BCC, without this information, the complaint fails to allege facts establishing that there were less than 10 working days between delivery of the notification to the Agency and the start of asbestos removal activities. In turn, continues BCC, without factual allegations supporting a violation of the asbestos NESHAP's 10-day notification requirements, the complaint's alleged violations of Sections 9.1(d)(1) and 9.13(b) of the Act are necessarily deficient because violations of those statutory provisions are predicated upon violating the 10-day notification requirements.

The Board agrees with BCC. Count II of the complaint alleges that a notification of demolition and renovation was submitted to the Agency on May 5, 2011, and that asbestos removal activities took place before June 7, 2011. It cannot be reasonably inferred from these allegations that asbestos removal activities began less than 10 working days after the delivery of the notification. Construing the complaint, however liberally, cannot generate the missing facts here. *See* Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43.

Section 9.13(b) of the Act provides, in relevant part, that "[i]f demolition or renovation of a site has commenced without proper filing of the 10-day Notice, the fee is double the amount otherwise due." 415 ILCS 5/9.13(b) (2010). Accordingly, failing to comply with the asbestos NESHAP's 10-day notification requirement is a prerequisite to violating the fee requirement of Section 9.13(b). As the pleading of the former alleged violation is inadequate, so is the pleading of the latter.

The Board finds that count II omits factual detail necessary to reasonably allow BCC to prepare a defense. *See* Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354; Grist Mill Confections, PCB 97-174, slip op. at 4. The Board grants BCC's motion to dismiss count II because the count as pled does not satisfy the requirements of the Act (415 ILCS 5/31(c) (2010)) for the contents of a complaint. The count is dismissed as to BCC and Bricker because the factual infirmity of failing to specify the date on which any asbestos removal activities began is common to both respondents.

In granting BCC's motion, however, the Board does so without prejudice. The Board cannot conclude that there is clearly no set of facts that could be proven that would entitle the People to prevail on their asbestos abatement notification and fee payment claims. *See* Central

Illinois Regional Airport, 207 Ill.2d at 585, 802 N.E.2d at 254 (plaintiff may seek leave to plead over where dismissal is based on matter that may be cured by filing amended complaint); *see also* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303.

CONCLUSION

The Board grants BCC's motion to dismiss count II as insufficiently pled and dismisses count II as to both respondents. However, because the Board cannot conclude that no set of facts could be proven that would entitle the People to prevail on count II, the dismissal of that count is without prejudice. The People are therefore not precluded from seeking leave to file an amended complaint to remedy the pleading deficiencies in count II.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 16, 2013, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board