ILLINOIS POLLUTION CONTROL BOARD
May 2, 1996

DAVID AND SUSI SHELTON,	)	
	)	
Complainants,	)	
	)	PCB 96-53
v.	)	(Citizens' Enforcement - Noise)
	)	
STEVEN AND NANCY CROWN,	)	
	)	
Respondents.	)	
	)	

ORDER OF THE BOARD (by G.T. Girard):

This matter is before the Board on a motion to dismiss filed by the respondents on April 2, 1996. On April 3, 1996, complainants filed a response to the motion to dismiss and on April 17, 1996, a motion for leave to file an affidavit in support of the motion to dismiss. Also on April 17, 1996, the respondents filed a motion for leave to file a reply and a reply. The Board grants complainants' motion for leave to file an affidavit and respondents' motion for leave to file a reply.

Respondents argue that because the complainants no longer live in Illinois or occupy the home next to the air conditioner unit in question, complainants cannot establish that the sound being emitted from the air conditioning unit in question "unreasonably interferes" with the enjoyment of life. (Mot. at 1-2.) Thus, respondents maintain that the "controversy is moot".

In their response, complainants argue that the Motion to Dismiss is untimely pursuant to Section 103.104(a) of the Board's procedural rules which requires that "all motions by respondents to dismiss…the complaint…shall be filed within 14 days after receipt of the complaint." Furthermore, the complainants characterize the motion as analogous to a Section 5/2-615 motion under the Civil Practice Act (735ILCS 5/2-615), and argue that the motion should only be granted if the complainants have failed to state a cause of action upon which relief can be granted when viewing all facts in the light most favorable to complainants. They contend that they have alleged all the necessary elements for a cause of action for violation under Section 900.102 of the Board's noise regulations. (Response at 3 and 4.) Finally, the complainants state their intention to demonstrate that the air conditioning unit in question continues to have an adverse effect on them. Complainants also state that they intend to argue that the residential exemption for air conditioners found at 35 Ill. Adm. Code 901.102 should not apply in this case. Therefore, complainants argue that this matter should proceed to hearing.

In their reply, the respondents argue that the motion to dismiss should be decided by the Board because the facts underlying it were only confirmed 15 days prior to the motion

being made. (Reply at 2.) Concerning the proper standard of review for this particular motion, the respondents characterize their motion as similar to a Section 5/2-619 motion under the Civil Practice Act, and argue that it is not whether the complaint fails to state a claim upon which relief may be granted, but rather whether "the claim is barred by other affirmative matter avoiding the legal effect of or defeating the claim."

The Board will not deny the motion to dismiss as untimely. Respondents are correct that this type of motion can be made at a time when they believe the facts warrant it. As for the motion, the Board's procedural rules do not address the standard to be applied to a motion to dismiss. However, Section 101.100(b) of the Board's procedural rules allows that in the absence of a specific rule to govern a particular situation, the parties may argue that the Code of Civil Procedure applies. The parties have done so in this case. Accordingly, we will apply the principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss (735 ILCS 5/2-615 and 5/2-619) as done in Robert Miehle v. Chicago Bridge and Iron Company, PCB 93-150 (Nov. 4, 1993) and Gordon Krautsack v. Bhogilal Patel, Subhash Patel, and Electronic Interconnect, Inc., PCB 95-143 (June 15, 1995) citing the Miehle case.

It is axiomatic that the trial court must take all well-pleaded allegations in the complaint as true. (Import Sales v. Continental Bearings, (1st Dist. 1991) 217 Ill.App.3d 893, 577 N.E.2d 1205, 160 Ill. Dec. 634, 639). Additionally, a complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a plaintiff to relief (Callaizakis v. Astor Development Co., (1st Dist. 1972) 4 Ill.App.3d 163, 280 N.E.2d 512.) In this case, complainants have alleged violations for which facts can be proven which would entitle them to relief. Although the complainants no longer reside next to the air conditioner, complainants may still be able to prove that an unreasonable interference occurred. We note that the fact that complainants no longer reside in proximity to the air conditioner may be relevant concerning the penalty and/or remedy in the event a violation is found by the Board.

The motion to dismiss is denied. The hearing officer is ordered to set this matter for hearing as expeditiously as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board