

ILLINOIS POLLUTION CONTROL BOARD

October 4, 2001

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 02-2
)	(IEPA No. 292-01-AC)
NORDEAN and SUSAN SIMON d/b/a)	(Administrative Citation)
BERMAN'S AUTO PARTS,)	
)	
Respondents.)	

ORDER OF THE BOARD (by E.Z. Kezelis):

On August 17, 2001, Nordean and Susan Simon d/b/a Berman's Auto Parts (Simons) filed a motion to stay this administrative citation action. In their motion, the Simons allege that in light of their recently filed bankruptcy petition, they are entitled to have this proceeding stayed pursuant to the automatic stay provisions of Section 362 of the Federal Bankruptcy Code (Bankruptcy Code) (11 U.S.C. § 362 (2001)). The Illinois Environmental Protection Agency (Agency) filed a response opposing the motion on September 6, 2001. On September 18, 2001, the Simons filed a motion seeking leave of the Board to reply to the Agency's response. On September 24, 2001, the Agency filed a surreply, a motion for leave to file a surreply, and a motion to strike affirmative defenses. The motions for leave to file a reply and surreply are granted. The motion to strike affirmative defenses is not addressed in this order as time for the Simons to respond has not yet lapsed.

BACKGROUND

On July 16, 2001, the Agency filed this administrative citation. The Agency alleges that the Simons violated Section 21(p)(1) of the Environmental Protection Act (Act) (415 ILCS 5/21(p)(1) (2000)) by causing or allowing open dumping of waste in a manner that results in litter. The violations alleged in the administrative citation arose from an Agency inspection of the Simons' property on May 17, 2001. Pursuant to Section 42(b)(4-5) of the Act, the Agency seeks a penalty of \$1,500 for the alleged violation. 415 ILCS 5/42(b)(4-5) (2000).

On August 17, 2001, the Simons filed a petition for review of the administrative citation pursuant to Section 31.1 of the Act (415 ILCS 5/31.1 (2000)). The Simons' motion to stay this proceeding was also filed on August 17, 2001. The basis for the Simons' motion to stay is the alleged applicability of the automatic stay provision resulting from their Chapter 13 bankruptcy action, which was filed on May 18, 2001.

PROCEDURAL MATTERS

Untimeliness of Agency Response

Before addressing the substance of the motion for stay, it is necessary to address several procedural matters. First, the Simons argue that the Agency's September 6, 2001 response was untimely. The Simons argue that Section 101.500(d) of the Board's procedural rules (35 Ill. Adm. Code 101.500(d)) requires that responses to motions be filed within seven days after service of the motion. Section 101.500(d) in fact provides 14 days, not seven, within which to respond. *See* 35 Ill. Adm. Code 101.500(d).

Section 101.500(d) of the Board's procedural rules provides, in pertinent part:

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 or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

In its surreply, the Agency argues that its response was timely. The Agency states that it received the motion to stay proceedings on August 20, 2001. Accordingly, the due date for its response was September 4, 2001 (Monday, September 3, 2001 was Labor Day and thus, a legal holiday). The Agency certified that its response was mailed on September 4, 2001. The Board finds that under the mailbox rule of Section 101.300(b)(2), the Agency's response was, in fact, timely. *See* 35 Ill. Adm. Code 101.300(b)(2)

Failure of Motion to Stay to Satisfy Procedural Requirements

The second procedural issue that the Board addresses involves the failure of the Simons to comply with the Board's procedural rules for filing motions to stay proceedings. *See* 35 Ill. Adm. Code 101.514. Specifically, Section 101.514 requires that all motions to stay Board proceedings be accompanied by a status report detailing the status of the proceeding for which a stay is sought. *Id.*

The Simons did not provide a status report. Normally, the Board would be justified in rejecting the motion for failure of the proponent to comply with Board procedures. However, in this limited instance, the Board finds that the issues raised in the motion for stay are of such interest to the community of litigants who practice before the Board as to necessitate consideration at this time. Accordingly, the Board will address the motion to stay proceedings on its merits.

MOTION FOR STAY

Simons' Argument

The Simons argue that the automatic stay provisions of 11 U.S.C. § 362 apply to this case and that the proceedings should be stayed. Although the Simons' two-paragraph motion does not specify which portion of Section 362 applies, it appears that only subsection (a)(1) might be relevant to their position. Subsection (a)(1) provides:

- (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of
 - (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. 11 U.S.C. § 362(a)(1) (2001).

Agency Response

In its response, the Agency argues that the Simons are not entitled to a stay because this administrative citation proceeding falls into one of the exceptions to the automatic stay provision. Specifically, the Agency argues that Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. § 362(b)(4) (2001)) allows for an exception to the automatic stay for those proceedings instituted by a unit of government in the enforcement of its police and regulatory power. Specifically, Section 362(b)(4) provides, in pertinent part:

- (b) The filing of a petition under section 301, 302, or 303 of this title or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay - -

* * *

- (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power. 11 U.S.C. § 362(b)(4) (2001).

The Agency claims that this administrative citation is such an exercise of its police power and that the automatic stay is not applicable.

Simons' Reply

The Simons argue that an administrative citation proceeding seeking only imposition of a monetary penalty is not an exercise of the State's police and regulatory power. In support of this argument, the Simons refer the Board to In re Mateer, 205 B.R. 915 (C.D. Ill. 1997) and In re Lenz Oil Service, 65 B.R. 292 (N.D. Ill. 1986). The Simons argue that the Mateer opinion supports a finding that the exception to the automatic stay provision is only applicable when a governmental unit is suing to prevent or stop an environmental violation, as opposed to seeking monetary penalties. Reply at 2, citing Mateer, 205 B.R. 915. The Simons rely upon Lenz Oil in support of their argument that the automatic stay should apply in this case because only a monetary penalty is being sought.

Discussion

Clearly, Section 362(a)(1) of the Bankruptcy Code imposes an automatic stay under certain circumstances. However, Section 362(b)(4) of the Bankruptcy Code allows for an exception to the automatic stay for those proceedings instituted by a unit of government in the enforcement of its police and regulatory power. For the reasons set forth herein, the Board finds that this administrative citation is such an exercise of the Agency's police power, and that a stay is therefore neither appropriate nor required.

First, the Board looks to the definition of "police power" in determining that the prosecution by the Agency of this administrative citation is, in fact, an exercise of the Agency's police power. The definition of "police power" is provided in Greater Chicago Indoor Tennis Clubs, Inc. v. Village of Willowbrook, 30 Ill. App. 3d 134, 332 N.E.2d 199 (2nd Dist. 1975):

The purpose for which the police power may be exercised is for the protection of the lives, health, morals, comfort and quiet of all persons and the protection of property within the State, and a statute or ordinance enacted under such power must be designed to prohibit or regulate those things which tend to injure the public in such matters. Greater Chicago Indoor Tennis Clubs, 30 Ill. App. 3d at 137-38, 332 N.E.2d at 202, citing Lamere v. City of Chicago, 391 Ill. 552, 558-59, 63 N.E.2d 863, 866 (1945).

The instant administrative citation proceeding plainly falls within this definition of "police power." In fact, the appellate court in Miller v. IPCB, 267 Ill. App. 3d 160, 642 N.E.2d 475 (4th Dist. 1994), compared the Board's administrative citation process as follows: "[t]he administrative citation proceeding is to the Act as traffic citations are to the body of criminal law." Miller, 267 Ill. App. 3d at 167, 642 N.E.2d at 482. Just as the issuance and prosecution of traffic citations is clearly an act of the government's police power, so too is the issuance and prosecution of administrative citations.

The Board has previously held that enforcement actions are an exercise of police power for purposes of the Bankruptcy Code's exception to the automatic stay. *See generally* People v. Michel Grain, PCB 96-143 (Aug. 1, 1996); People v. Summit Environmental Services, Inc., PCB 94-202 (Sept. 21, 1995); People v. Fosnock, PCB 94-1 (Sept. 15, 1994); and Citizens of Burbank and People of the State of Illinois v. Clairmont Transfer Co., PCB 84-125 (Dec. 18, 1986). We conclude that the police power exception applies equally to administrative citation proceedings.

In People v. Summit Environmental Services, Inc., PCB 94-202 (Sept. 21, 1995), the Board concluded that a State initiated enforcement action is exempted from the automatic stay as an exercise of the State's police powers. Specifically, the Board found that:

several exceptions to the automatic stay have been created in Section 362(b) of the Bankruptcy Code [11 U.S.C. § 362(b)] . . . includ[ing] the police powers exception created in Section 362(b)(4), which allows the states to protect the public health and the environment and sue a debtor to prevent or stop a violation of the environmental protection laws, or affix damages for violation of such laws. Summit Environmental, slip op. at 2, citing People v. Fosnock, PCB 94-1 (Sept. 15, 1994); Midatlantic v. New Jersey, 474 U.S. 494, 106 S. Ct. 755 (1986); Lenz Oil, 65 B.R. 292 (N.D. Ill. 1986).

The Board concluded in Summit Environmental that it was "appropriate for this action to go forward" because the People were seeking a remedy and penalty for an alleged violation as opposed to attempting to enforce a monetary judgment. Summit Environmental, slip op. at 2.

Similarly, in Lenz Oil, the court concluded that the automatic stay does not prohibit government instituted regulatory actions seeking injunctions and fixing fines and penalties for statutory violations. Lenz Oil, 65 B.R. at 294. Despite the Simons' argument, the Board finds that Lenz Oil makes clear the applicability of the exception to the automatic stay. The Lenz Oil opinion provides as follows:

The distinction between entry and enforcement of a monetary judgment is clear. The first is free of the automatic stay; the second is stayed. Congress allows governmental units to get money judgments in pursuit of their police power, but forces them to wait in line like all other creditors to get the judgment enforced. Lenz Oil, 65 B.R. at 295, citing Illinois v. Electrical Utilities, 41 B.R. 874, 877 (N.D. Ill. 1984) (emphasis added).

The Lenz Oil case makes clear that, even though enforcement and collection of monetary judgments may be stayed during bankruptcy, actions by a governmental unit to obtain a monetary judgment are excepted from the automatic stay.

Likewise, the Board finds that Mateer, also relied upon by the Simons, supports application of the exception to the automatic stay in cases such as the administrative citation proceeding before us. For example, in Mateer, the court referred to the legislative history behind the exception as follows:

paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay. Mateer, 205 B.R. at 920, citing S. Rep. No. 95-989 at 52 (1978) (emphasis added).

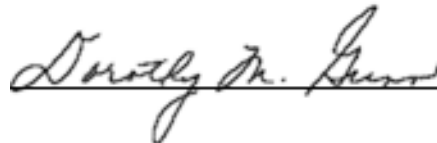
In fact, the court in Mateer concluded that, “numerous cases have found that a State’s enforcement of its environmental laws is an exercise of the State’s police and regulatory power.” Mateer, 205 B.R. at 920, citing City of New York v. Exxon Corp., 932 F.2d 1020 (2nd Cir. 1991). Accordingly, the Board finds that Mateer is persuasive authority for the applicability of the police power exception to the automatic stay.

CONCLUSION

Having reviewed the relevant portions of the Bankruptcy Code and relevant case law, the Board concludes that this administrative citation action is the type of proceeding instituted by a unit of government in the enforcement of its police and regulatory power for which the Bankruptcy Code makes an exception to the automatic stay. Accordingly, the Board finds that a stay of these proceedings is not required by the Bankruptcy Code. The Simons’ motion is, therefore, denied. This case should proceed to hearing as expeditiously as practicable.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 4, 2001, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board