

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)
ILLINOIS,)
)
Complainant,)
)
vs.)
)
J. B. TIMMERMANN FARMS, LTD.,)
an Illinois corporation,)
)
Respondent.)

PCB No. 07-70
(Enforcement - Water)

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STATE OF ILLINOIS
Pollution Control Board

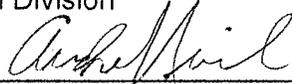
NOTICE OF FILING

To: James Richard Myers
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, copies of which are 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: 
ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

Attorney I.D. #6285057
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: December 29, 2008

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COMPLAINANT'S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

The PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney

General of the State of Illinois, hereby replies in support of its Motion to Strike Respondent's Affirmative Defenses. In support of this Reply, the Complainant states as follows:

I. INTRODUCTION

On October 15, 2008, the Respondent raised the following Affirmative Defenses in its Answer to Complainant's Complaint:

- 1) **Act of God** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Rainfall is an act of God, not within the control of the Respondent.
- 2) **Third-Party Intervention** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Several other landowners in the area of Respondent have waste and water retention systems which failed at the same time as Respondent's.
- 3) **Mitigation** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Respondent has acted with all due attentiveness and speed to rectify the situation and to prevent further overflows of its lagoon at its significant cost and expense.

The Respondent's Affirmative Defenses are both factually and legally insufficient and, therefore, should be stricken.

II. ARGUMENT

A. Respondent's Affirmative Defenses are Factually Insufficient

The Respondent does not plead sufficient facts to support its Affirmative Defenses. Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

In *Int'l Ins. Co.*, an insurer sued its insured for rescission of a policy and restitution for money paid. *Int'l Ins. Co.*, 609 N.E.2d at 844-845. The defendant included ten affirmative defenses in its answer. While the appellate court later allowed nine of the ten defenses to stand, it held that facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action. *Id.* at 853. The court did, however, dismiss the defendant's affirmative defense of "unclean hands." It reasoned that the defendant merely alleged plaintiff's conduct was unconscionable and tainted with bad faith. *Id.* at 856. It found this affirmative defense to be totally conclusory in nature and did not include any specific facts to support its conclusion. *Id.*

In this case, the Respondent admits that its Affirmative Defenses are lacking in detail. (See Resp't[s] Resp. to Mot. to Strike, ¶ 2, attached as Exhibit A). It argues, however, that these are issues for discovery. The law in Illinois is clear; facts included in pleadings must be specific.

As in the affirmative defense of unclean hands in *Int'l Ins. Co.*, the Respondent's Affirmative Defenses do not include sufficient facts. Furthermore, the Respondent does not need

discovery to provide the necessary details. For example, rather than concluding there was an Act of God, e.g., heavy rainfall, Affirmative Defense #1 could easily be supported with information such as; when it rained, how long it rained or how much rainfall was received. Rather than concluding that the neighbors also experienced system overflows, Affirmative Defense #2 could easily be supported with more specific facts to show how many neighbors were affected and where they are located in relation to the Respondent's property. Rather than concluding that the Respondent has made repairs to its property, Affirmative Defense #3 could easily be supported with information that shows what work was done, or where and when it was done. This is information that is available only to the Respondent. Therefore, Respondent's Affirmative Defenses are totally conclusory in nature and devoid of specific facts to support their conclusions.

B. Respondent's Affirmative Defenses are Legally Insufficient

Respondent's Affirmative Defenses are legally insufficient. A proper affirmative defense admits the legal sufficiency of a cause of action but then asserts new matter which is capable of defeating a plaintiff's right to recover. *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 651 N.E.2d 121, 125-126 (1995). See also *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 668 N.E.2d 1144 (1st Dist. 1996) (affirmative defenses must offer facts which are capable of negating the alleged cause of action).

In this case, the Respondent argues that its Affirmative Defenses are legally relevant. (See Resp't[s] Resp. to Mot. to Strike, ¶ 2, attached as Exhibit A). Relevancy is an evidentiary standard used at trial. *In re Stephen K*, 373 Ill. App. 3d 7, 867 N.E.2d 81, 101 (1st Dist. 2007). Respondent's Affirmative Defenses will be evaluated on whether they are capable of defeating

Complainant's claims, not on whether they are admissible at trial. Respondent's Affirmative Defenses do not meet this standard for the following reasons:

First, in Illinois, the "Act of God" defense is not a defense against water pollution claims brought under Section 12 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/12 (2006). See *Perkinson v. Illinois Pollution Control Board*, 187 Ill. App. 3d 689, 543 N.E.2d 901, 904 (3rd Dist. 1989), citing *Freeman Coal Mining Corp. v. Illinois Pollution Control Board* (5th Dist. 1974). The *Freeman* Court ruled it was no defense that the discharges were accidental or unintentional or that they were the result of an "Act of God" beyond the Defendant's control. The fact that there was an unusually heavy rainfall does not provide new facts capable of defeating this cause of action.

Second, Section 12(a) of the Act provides that no person shall cause or allow water pollution "either alone or in combination with matter from other sources." 415 ILCS 5/12(a) (2006). It does not matter whether the Respondent's neighbors contributed to the discharge. The legal issue is whether the Respondent caused or allowed the discharge. Asserting there was discharge from the Respondent's neighbors does not offer new information that is capable of defeating the Complaint.

Finally, Section 33(a) of the Act, states: "It shall not be a defense to findings of violations of the provisions of the Act or Board regulations....that the person has come into compliance subsequent to the violation." 415 ILCS 5/33(a) (2006). The fact that the Respondent claims it has worked to rectify the situation is not a defense to liability. In its Response, Respondent correctly notes that a number of factors may be considered by the Court when making a penalty determination, however, Complainant's Motion only attacks the sufficiency of Respondent's

Affirmative Defenses, it does not raise the issue of penalty.

Therefore, Respondent's Affirmative Defenses are legally insufficient.

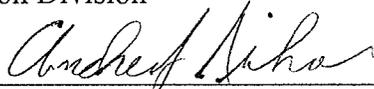
III. CONCLUSION

The Respondent's Affirmative Defenses are both factually and legally insufficient. Therefore, they should be stricken pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2007).

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking the Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN Attorney General
of the State of Illinois

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

BY: 

ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/557-9457

Dated: *December 29, 2008*

CERTIFICATE OF SERVICE

I hereby certify that I did on December 29, 2008, send by U.S. mail, first class with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING, COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

To: James Richard Myers
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

and the original and ten copies of the Notice of Filing by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy of the Notice of Filing was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794



Andrew J. Nicholas
Assistant Attorney General

This filing is submitted on recycled paper.