

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
CASEYVILLE SPORT CHOICE, LLC,)	
an Illinois Limited Liability Company)	
)	
Complainant,)	
)	
v.)	PCB 2008-030
)	
ERMA I. SEIBER, Administratrix of the)	
Estate of James A. Seiber, Deceased,)	
and ERMA I. SEIBER, in Her Individual)	
Capacity and FAIRMOUNT PARK, INC.,)	
a Delaware Corporation,)	
)	
Respondents.)	

ANSWER INCLUDING AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

NOW COMES the Defendant, FAIRMOUNT PARK, INC. by and through its attorneys, Charles Hamilton and Penni S. Livingston and respectfully ANSWERS the allegations of Count II of the Complaint as follows. Count I is against the Seiber estate and Mrs. Seiber and not against Fairmount Park such that an answer would be inappropriate.

Count II

1. Defendant admits that Caseyville Sport Choice is represented by Belsheim and Bruckert law firm but denies that the address given is their contact information.
2. No information is given other than contact at the Belsheim and Bruckert law firm.
3. Defendant admits it's name and address but denies that it is an alleged polluter.
4. Defendant admits that it had a contract with Mr. Seiber which ended over 15 years ago. That contract was for the hauling and proper disposal of horse manure and other general waste. Defendant DENIES that there was any expectation that Mr. Seiber would dump horse manure and trash on his land rather than at a sanitary landfill. Mr. Seiber was taking the material to the Bi-State

landfill for some time in accordance with his statements documented by Illinois EPA in their records until it was too inconvenient and expensive, according to him. Disposal was expected to be in compliance with all laws as stated in the contract and as stated in a letter to Mr. Seiber in June of 1981 immediately upon receiving notice from Illinois EPA as to allegations of improper disposal by Mr. Seiber. IEPA records make very clear that Mr. Seiber continued his illegal conduct in spite of recommendations from IEPA and the Fairmount Race Track and in spite of being sued in St. Clair County case No. 81-CH-223 and 85-CH-216, both cases resulting in injunctions against Mr. Seiber for the very activity complained about here.

5. The Defendant DENIES that it ever caused or allowed open dumping of waste in violation of Section 21(a) of the Illinois Environmental Protection Act. Mr. Seiber was an independent contractor hired to properly haul and legally dispose of race track waste. He was paid very well for these services such that he was expected to and should have taken the material to a lawfully permitted landfill. Otherwise, according to an IEPA report, Mr. Seiber apparently could have separated the manure to apply to land for beneficial use at agronomic rates and thereupon disposed of the alleged general waste claimed to have been removed by the Plaintiff. Defendant further DENIES and IEPA reports verify that the manure material was not a waste if properly land applied at agronomic rates. Mr. Seiber, who sold the land to the Plaintiffs at profit to himself, open dumped this waste in spite of government enforcement actions against him. Fairmount Park did not cause or allow any illegal activities. Like the government, Fairmount thought the issue was taken care of with the last Court Order against Mr. Seiber which granted permanent injunctive relief. Fairmount did not renew Mr. Seiber's contract shortly after the last Court Order.

6. Defendant DENIES that it caused or allowed open dumping and further states that had

Mr. Seiber honored his agreement with Fairmount to haul and legally dispose of waste and had he honored his agreement with the government to apply the manure at agronomic rates and to continue to separate out general waste as IEPA reports show they observed being done, no waste would have been placed on Mr. Seiber's land by him in a manner that was illegal. But alas, Mr. Seiber did not comply with the law ergo why he was sued again and why a permanent injunction was entered against him in 1993; his contract was not renewed by Fairmount shortly thereafter. Furthermore, because Court Orders were entered against Mr. Seiber including in 1981 and again in 1993, it was reasonable for Fairmount to assume that the issue had been properly taken care of through the most recent Court Ordered remedies in 1993. The facts as shown by the discovery provided indicate that Mr. Seiber had disposed of manure, that it was well known to the government and others, including the Village of Caseyville who sued him in 1981 and who placed a Tax Increment Financing District upon this land (meaning that the land would have to be considered "blighted" under Illinois law). The Plaintiff took the land with the TIF upon it, thereby knowing it was blighted as also indicated in environmental assessments they had access to and which have also been provided in discovery, which knowledge occurred in 1998. Mr. Seiber's activities of polluting his own land to pocket more profit from his contract with Fairmount show that he was in violation of his agreement with Fairmount as well as in violation of the Illinois Environmental Protection Act. He may also have committed fraudulent misrepresentation as alleged by the Plaintiffs in their Federal lawsuit against Mr. Seiber, which seems odd given that Mr. Seiber wrote a letter in January 1999 "to whom it may concern" that found its way to the people who performed a Phase I environmental site assessment in 1998 where Mr. Seiber states that he had disposed of horse manure on the land and would be happy to show anyone where he had placed it.

7. The Defendant again DENIES that it caused or allowed open dumping of any waste but

admits that it appears that any waste improperly disposed of by Mr. Seiber and his son did occur during the years 1981 to 1993, more than 15 years prior to the filing of this action. The Defendant cannot speak to the other allegations in paragraph 7 and therefore denies them. Defendant would have no knowledge as to when Plaintiff became aware of the alleged open dumping without further discovery including depositions although Plaintiff should have been aware through performance of proper due diligence prior to purchase or conversation with Mr. Seiber, not when they were conducting work two years later.

8. Defendant has no personal knowledge of the allegations in paragraph 8 although they may be true. Therefore, Defendant DENIES said allegations. Defendant further states that entering the Site Remediation Program is a voluntary program and that manure can be applied for beneficial use at agronomic rates in Illinois. Plaintiff states in its Complaint that of the waste disposed of on Mr. Seiber's property, 159,000 tons consisted of horse manure and 2500 tons were of general refuse. Plaintiff should have sorted this material and found a less expensive alternative to land filling of the horse manure that is allowed under the law to be beneficially land applied at agronomic rates. Therefore, Defendant also denies that any such expenses incurred were necessary or proper.

9. Defendant DENIES that Plaintiff is entitled to the requested relief from this innocent Defendant and DENIES that such relief can be granted as requested. The relief sought by the Complainant is not allowed under the Illinois Environmental Protection Act. No proper citation is given to applicable law allowing reimbursement of clean up costs for improper disposal of manure and general waste. No hazardous waste was found and no provisions of RCRA or CERCLA apply or were alleged here. Furthermore, this Defendant did not cause the expense to be incurred. Any Civil penalty requested through amendment or otherwise would be to improperly punish this Defendant for the actions of another that occurred fifteen years ago with full knowledge of the

government and by anyone performing proper due diligence through a properly performed environmental site assessment. The purposes of the Act cannot be effectuated by penalizing this third party for the action of another on his own land and from which the other profited.

10. Defendant agrees that it has no other pending action against it nor has it ever had any action like this against it including during the time the government pursued Mr. Seiber for his illegal activities that form the basis for this current action.

11. Defendant admits that Belsheim and Bruckert represent the Plaintiff.

12. Defendant admits that Caseyville Sport Choice is the apparent Plaintiff in this matter.

AFFIRMATIVE DEFENSES

In further response to the Plaintiff's Complaint, Defendant Fairmount Park sets forth the following Affirmative Defenses:

First Affirmative Defense

The Plaintiff fails to state a cause of action upon which relief can be granted as to this Defendant as no allegations of fact are made making this Defendant responsible for the actions of another. The Defendant responsible for the violations of law is James Seiber. The Complaint as alleged against this Defendant should be dismissed.

Second Affirmative Defense

The open dumping and activities conducted without IEPA permits from 1981 to 1993 as alleged in the Complaint were caused solely by the superseding and intervening acts or omissions of third parties who were not employees or agents of this Defendant. Defendant Seiber's activities were in violation of his contract with Fairmount as well as in violation of the Illinois Environmental Protection Act. At no time did Defendant exercise control over the person responsible for the

alleged violations of law. At all times, the Defendant acted with due care with respect to proper hauling and disposal of waste by requiring compliance with all laws in the contract, by having a contract price capable of supporting proper disposal, and by fully cooperating with Illinois EPA. To the extent any environmental assessment was performed that did not detect these obvious “visually” observable open dumps, those parties are responsible to the Plaintiff, not Fairmount Park, who never dumped anything anywhere nor knew of any information that would lead one to believe that the issue had not been properly dealt with in the context of the IEPA enforcement action resulting in the June 1993 Court Order against Mr. Seiber for the very issues being complained of here. Collateral estoppel and res judicata may very well apply.

Third Affirmative Defense

The Plaintiff is barred from recovery as against this Defendant by the doctrines of estoppel, waiver, laches, and acquiescence. Also collateral estoppel and res judicata may apply.

Fourth Affirmative Defense

The Plaintiff has failed to allege that any of the activity of the Defendant gives rise to joint and several liability. Consequently, the Board cannot grant relief against this Defendant when the other defendant is clearly the guilty party and no allegations are made to the contrary. The Plaintiff is further barred from recovery as against this Defendant by the provision in Section 2 of the Illinois Environmental Protection Act that states that it is the purpose of the Act “to assure that adverse effects upon the environment are fully considered and borne by those who cause them.” See 415ILCS 5/2(b). Fairmount Park did not cause any violations of the law and they did not “allow” them either.

Fifth Affirmative Defense

Plaintiff comes to the Board with unclean hands in either failing to perform due diligence through a proper environmental assessment prior to purchase or by knowing the information disclosed to the entity performing 1998 Phase I Environmental Site Assessment, provided to Defendant by the Plaintiff in discovery. The Plaintiff knew or should have known about disposal of manure on the property prior to purchase such that they could have negotiated clean up or a diminution in the price from the responsible party, Mr. Seiber, the original Defendant or they could have chosen not to purchase, given the expenses. Furthermore, aerial photos as provided show the areas where horse manure and solid waste were deposited. Plaintiff's "Comprehensive Site Investigation" of the Seiber property relies on "visual observations of changes in surface features" as a reliable indicator of solid waste dump locations. Timely due diligence would have disclosed Mr. Seiber's activities on his land (as would a search of the Illinois EPA Collinsville regional office records through FOIA as provided through discovery or a mere phone call to that office or even a conversation with Mr. Seiber). Plaintiff's unclean hands can also be seen in the fact that this property was bought with the benefit of being in a Tax Increment Financing District which means the Plaintiff was put on notice that the land was "blighted" ergo the legal standard for getting the millions of dollars in tax breaks.

Sixth Affirmative Defense

Plaintiff has failed to meet any applicable Statute of Limitation as they have known or should have known about the presence of manure and other waste for over five years prior to bringing action against this Defendant. Plaintiff has further violated the doctrine of laches by "sitting on its hands" instead of bringing an action immediately upon learning of the presence of manure (which may and should have been prior to closing on the property).

Seventh Affirmative Defense

No remedy may be given in this matter as against this Defendant. Pursuant to Section 33(b) of the Act, the Board may direct a Defendant to cease and desist from violations of the Act and/or the Board may impose civil penalties in accord with Section 42 of the Act. Neither of these remedies would be appropriate here as there is nothing to cease and desist from committing and a penalty would be unjust and not further the purposes of the Act. No authority exists for the Board to issue the remedy requested by the Plaintiff in ordering remedial action costs.

Eighth Affirmative Defense

The cause of action brought in this case as against this Defendant is barred by the cost assignment provisions of Section 58.9 of the Act as Fairmount Park did not proximately cause releases of anything, let alone regulated substances, which are not involved in this case. No authority exists for the Board to issue the remedy requested by the Plaintiff in ordering remedial action costs.

Ninth Affirmative Defense

Plaintiff did not cause or allow any open dumping of any waste at any time or any location ever. Defendant cannot prove otherwise because it is simply not true that Fairmount caused or allowed Mr. Seiber to place horse manure and other materials on his own land instead of taking it to a permitted landfill or beneficially land applying the material allowed to be applied at agronomic rates. His contractual compensation and economic benefit show that he is the only party responsible for his deliberate actions as does the 1981 and 1993 Court Orders against him by the government.

Tenth Affirmative Defense

Plaintiff failed to mitigate its damages by failing to perform proper due diligence or upon knowing of the waste disposed of by Mr. Seiber. Entering the Site Remediation Program is a voluntary action whereby the applicant proposes the solutions to obtain a no further remediation

status. Manure can be applied for beneficial use at agronomic rates in Illinois yet this was not proposed to IEPA by the Plaintiff in the SRP application. Plaintiff states in its Complaint that of the waste disposed of on Mr. Seiber's property, 159,000 tons consisted of horse manure and 2500 tons were of general refuse. Plaintiff should have sorted this material and found a less expensive alternative to land filling of the horse manure that is allowed under the law to be beneficially land applied at agronomic rates. The remaining waste disposal should be paid for by the Plaintiff or by the party who profited from placing it at the location: Mr. Seiber.

Eleventh Affirmative Defense

The Defendant reserves the right to assert any other defenses or affirmative defenses of which it may become aware after further discovery and investigation.

WHEREFORE for all these reasons and as the evidence will support, Defendant, Fairmount Park, Inc. respectfully requests that the Illinois Pollution Control Board dismiss this case as against them or in the alternative, hold a hearing and thereafter find in favor of this Defendant as to the Plaintiff's alleged cause of action based upon the facts and the law.

Respectfully submitted:

Fairmount Park, Inc.

By: /s/ Penni S. Livingston
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Penni S. Livingston, #06196480
Livingston Law Firm
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Fairview Heights, IL 62208
(618) 628-7700

COUNTERCLAIM AGAINST SEIBER

Pursuant to 735 ILCS 5/2-608 cross claims are to be filed with an Answer as against any other defendant and are to be called counterclaims in the Answer. Fairmount Park, Inc. hereby files this Counterclaim against the other named Defendant, Erma Seiber as the administrator of her husband's estate and in her individual capacity, hereinafter referred to as "Cross-Defendant." Defendant and Cross-Claimant Fairmount Park is hereinafter referred to in this claim as "Cross-Claimant." In support of said Cross-Claim, Cross-Claimant Fairmount Park states as follows:

COUNT I

1. Cross Claimant incorporates by reference all affirmative defenses and answers herein as though stated within the Counterclaim, as allowed pursuant to 5/2-608 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-608.

2. Pursuant to Section 2(b) of the Illinois Environmental Protection Act, "It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."

3. Mr. James Seiber is responsible for the environmental harm described in the nine count Complaint filed by the People of the State of Illinois in the above entitled and numbered cause.

4. To the extent that the Court Order issued against Mr. Seiber was not complied with by him, he is in contempt of St. Clair County Court.

5. Mr. Seiber is responsible for his own actions and conducted his alleged open dumping business without the knowledge or acquiescence of Fairmount Park.

6. To the extent that Mr. Seiber violated Illinois law, he was in breach of his contract with Fairmount which is subject to hold harmless and indemnification provisions.

7. Cross Claimant adopts all allegations of the Plaintiff's Count I herein against Mr. Seiber and any facts proved at a full blown hearing.

WHEREFORE, the Cross Claimant, Fairmount Park, Inc., requests that the Illinois Pollution Control Board hold Mr. Seiber's estate accountable for all costs of remediation determined to be attributable to Fairmount Park in any way and to pay all costs of litigation including attorneys' fees to Fairmount Park and grant such other relief as the Board deems just and proper.

Respectfully submitted:

Fairmount Park, Inc.

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COUNTERCLAIM AGAINST PLAINTIFF CASEYVILLE SPORT CHOICE

Pursuant to 735 ILCS 5/2-608 counterclaims are to be filed with an Answer as against any other party. Fairmount Park, Inc. hereby files this Counterclaim against the Plaintiff as a Counter Defendant. Fairmount Park is hereinafter referred to in this claim as "Counter Claimant." In support of said Counterclaim, Counter Claimant Fairmount Park states as follows:

COUNT I

1. Counter Claimant incorporates by reference all affirmative defenses and answers herein as though stated within the Counterclaim, as allowed pursuant to 5/2-608 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-608.

2. Counter-Claimant adopts all allegations of the Plaintiff's Count I herein against Mr. Seiber as well as its own answers to Count II and any facts proved at a full blown hearing.

3. Due diligence is required prior to the purchase of property. Failure to perform such inquiry is an assumption of the risk.

4. Either no appropriate inquiry was made or the all appropriate inquiry made alerted the Counter Defendant to the truth of the situation existing on the property before it purchased said property, which is in a Tax Increment Financing District and was therefore known to the Counter Defendant to be "blighted" land. Either way, Counter Defendant is responsible for its own property loss or expenses as it assumed the risk.

5. No responsibility attaches to a third party who had a contractual relationship with the same party that Counter Defendant had a contractual relationship with for purchase of the property. No privity of contract exists here between Counter Defendant and Counter Claimant.

6. Prior to purchase, Counter Defendant Caseyville Sport Choice had knowledge or should have known, through its agent who performed an environmental assessment, that manure had been placed on the Seiber property by Mr. Seiber. Mr. Seiber wrote such in a letter in January 1999 to Geotechnology and/or Burns and McDonnell as seen by the fax indicators on the page. This knowledge makes this case against Fairmount Park inappropriate and frivolous.

7. To the extent that any environmental assessment was performed prior to purchase that did not detect obvious "visually" observable open dumps as noted in the additional and more comprehensive 2006 environmental assessment performed for Counter Defendant Caseyville Sport Choice, those parties may be responsible to the Counter Defendant, not Fairmount Park, who never

dumped anything anywhere nor did they know or have reason to know that any illegal disposal issue had not been properly dealt with in the context of the IEPA enforcement action resulting in the June 1993 Court Order against Mr. Seiber for the very issues being complained of here.

8. Defendant Seiber's activities as alleged were in violation of his contract with Fairmount Park if they were in violation of the Illinois Environmental Protection Act or any other law. At no time did Fairmount Park exercise control over the person responsible for the alleged violations of law. At all times, Fairmount Park acted with due care with respect to proper hauling and disposal of waste by requiring compliance with all laws in the contract, by having a contract price capable of supporting proper disposal, by fully cooperating with Illinois EPA, and by failing to renew Mr. Seiber's contract after the Court Order. All waste has been properly applied at agronomic rates by the current independent contractor, Keller Farms, since 1994.

9. Counter-Defendant Caseyville Sport Choice failed to mitigate its damages by failing to perform proper due diligence. The waste disposal costs should therefore be paid for by the Counter-Defendant as they assumed the risk by failing to meet the standards of all appropriate inquiry.

10. Counter-Defendant Caseyville Sport Choice failed to mitigate damages upon knowing of the waste disposed of by Mr. Seiber. Entering the Site Remediation Program is a voluntary action whereby the applicant proposes the solutions to obtain a no further remediation status. Manure can be applied for beneficial use at agronomic rates in Illinois yet this was not proposed to IEPA by the Plaintiff in the SRP application. Counter Defendant should have sorted this material and found a less expensive alternative to land filling of the horse manure. The waste disposal costs should therefore be paid for by the Plaintiff.

11. Counter-Defendant Caseyville Sport Choice filed a frivolous claim against Counter-Claimant Fairmount Park, knowing that other entities are responsible for the alleged violations. Therefore, the Counter Defendant filed false charges to which they must be accountable for costs

of defense upon finding of same.

12. Upon finding the facts in this case, the Board should grant attorneys' fees to Fairmount Park for defending a cause that should never have been brought against it given that there is no law to support the remedy requested and given that the facts do not support liability by Fairmount for the actions of another from over 15 years ago that were or should have been discovered by due diligence and appropriate inquiry by Caseyville Sport.

WHEREFORE, the Counter-Claimant, Fairmount Park, Inc., requests that the Illinois Pollution Control Board find in its favor on all controversies and hold Counter Defendant Caseyville Sport Choice accountable for all costs of litigation including attorney's fees and for such other relief as the Board deems just and proper.

Respectfully submitted:

Fairmount Park, Inc.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I caused to be mailed on the 5th day of January, 2009, the foregoing Answer Including Affirmative Defenses and Counterclaims to the attorneys of record by depositing the same with the Fairview Heights, Illinois branch of the United States Postal

Service with first class postage in place.

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