

ILLINOIS POLLUTION CONTROL BOARD
April 16, 2009

CASEYVILLE SPORT CHOICE, LLC,)
)
Complainant,)
)
v.) PCB 08-030
) (Citizens Enforcement - Land)
ERMA I. SEIBER, ADMINISTRATRIX OF)
THE ESTATE OF JAMES A. SEIBER,)
DECEASED, AND ERMA I. SEIBER, IN)
HER INDIVIDUAL CAPACITY, AND)
FAIRMOUNT PARK, INC.,)
)
Respondents.)

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

This citizen's enforcement concerns the disposal of manure and municipal waste on three parcels of land in St. Clair County. The case is before the Board today on a Motion to Dismiss the Counterclaim filed by Caseyville Sport Choice, LLC (Caseyville). Caseyville filed the motion to dismiss the counterclaim of respondent/counterclaimant Fairmount Park, Inc. (Fairmount). Co-respondent Erma I. Seiber, Administratrix of the estate of James A. Seiber, did not file a motion to dismiss a counterclaim filed against the estate of James A. Seiber by Fairmount. For the reasons below, the Board grants Caseyville's motion to dismiss Fairmount's counterclaim against Caseyville. The Board finds Fairmount's counterclaim is frivolous as the claim requests relief that the Board does not have the authority to grant.

Below, the Board will provide the procedural history of the case before ruling on the motion.

PROCEDURAL HISTORY

On August 26, 2008, Caseyville filed an amended two-count complaint against Fairmount, and Erma I. Seiber in her individual capacity and as administratrix of the estate of James A. Seiber (Seiber), alleging violations of the Illinois Environmental Protection Act (Act). On January 5, 2009, respondent Fairmount filed an answer (Frmt. Ans.) to the amended complaint, whereby that included a counterclaim against Caseyville. Fairmount's counterclaim alleges that Caseyville "filed a frivolous claim against...Fairmount Park, knowing that other entities are responsible for the alleged violations." Frmt. Ans. at 13.

On February 3, 2009, Seiber filed an answer to Fairmount Park's counterclaim, including replies to Fairmount Park's asserted affirmative defenses. On February 5, 2009, Caseyville timely filed a Motion to Dismiss the Fairmount Park Counterclaim (Mot. to Dis.), which also included answers to Fairmount Park's asserted affirmative defenses. 35 Ill. Adm. Code 101.506.

On February 18, 2009, Fairmount Park filed a response (Frmt. Res.) to Caseyville's motion to dismiss the counterclaim.

CASEYVILLE'S MOTION TO DISMISS

Caseyville argues that the only relief that Fairmount Park requests is an award of attorney's fees from Caseyville in order to reimburse Fairmount for litigation costs. Mot. to Dis., at 1. Caseyville further argues that nothing in the Board's procedural rules or the Act allows the Board to award attorney's fees in a citizen's enforcement. *Id.*

FAIRMOUNT PARK'S RESPONSE

Fairmount Park asserts in response to Caseyville's motion to dismiss that an award of attorney's fees is a "fair and proportionate approximation of damages incurred by [it] in an action wherein its participation is both unnecessary and improper." Frmt. Res., at 1. Fairmount also re-asserts the affirmative defenses as a basis for denial of Caseyville's motion to dismiss. *Id.*, at 2.

DISCUSSION

Under the Illinois Environmental Protection Act (Act), "any person may file with the Board a complaint, ... against any person allegedly violating this Act, [or] any rule or regulation adopted under this Act. ..." 415 ILCS 5/31(d)(1)(2006). In this case, Fairmount Park included a counterclaim within its answer to Caseyville's amended complaint. Frmt. Ans. at 10-14. The Board treats this counterclaim as a new complaint and examines the sufficiency under Section 31(d)(1) of the Act, which requires that a complaint not be "duplicative or frivolous." 415 ILCS 5/31(d)(1) (2006).

Section 101.202 of the Board's procedural rules defines "frivolous" as "a request for relief that the Board does not have the authority to grant. ..." 35 Ill. Adm. Code 101.202. Fairmount Park's counterclaim requests the Board to "hold... Caseyville accountable for all costs of litigation including attorney's fees. ..." Frmt. Ans. at 14. Neither the Act nor the Board's procedural rules authorize the Board to award attorney's fees in a citizen's enforcement case, a fact which Fairmount does not dispute. *See* 35 Ill. Adm. Code 103 and 415 ILCS 5/1 *et. seq.* (2006); *See also*, Frmt. Res. at 1. Also, the Board's procedural rules do not include the awarding of attorney's fees or costs as a sanction. *See* 35 Ill. Adm. Code 101.800 and 101.802. Further, the Illinois Appellate Court's Third District has affirmed that "where the inherent power of a court is not exercised, the absence of specific authority permitting an award of attorney's fees prevents the shifting of fees to another party." *See ESG Watts v. IPCB & IEPA*, 286 Ill. Ap. 3d 325, 676 N.E.2d 299 (1997).

Because the counterclaim seeks relief that the Board is not authorized to grant pursuant to the Act and Board regulations, the Board grants Caseyville's Motion to Dismiss the Counterclaim of Fairmount Park. Therefore, the Board dismisses the Fairmount Park counterclaim as frivolous. This matter has previously been accepted for hearing, and the Board directs the hearing officer to proceed.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 16, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board