

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
CASEYVILLE SPORT CHOICE, LLC.)
an Illinois Limited Liability Company,)
)
Complainant,)
)
vs.) **PCB 2008-030**
)
ERMA I. SEIBER, Administratrix of the)
Estate of James A. Seiber, deceased and)
ERMA I. SEIBER, in her individual capacity)
and FAIRMONT PARK, INC.,)
a Delaware Corporation,)
)
Respondents.)

**RESPONDENT ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE
OF JAMES A. SEIBER, DECEASED, AND ERMA I. SEIBER, IN HER
INDIVIDUAL CAPACITY, MOTION TO DISMISS CAUSE AS
FRIVOLOUS FOR LACK OF BOARD AUTHORITY TO GRANT RELIEF OF
REIMBURSEMENT OF CLEAN UP COSTS AS REQUESTED BY COMPLAINANT**

Now comes the respondent (and counter-respondent) ERMA I. SEIBER, individually and in her capacity as administratrix of the Estate of James A. Seiber, deceased, by and through her attorneys, Sprague & Urban, and in support of its motion to dismiss the complaint of Caseyville Sport Choice, LLC (hereinafter referred to as “CSC”) as a frivolous complaint, respectfully states as follows:

1. The cause of action filed by CSC is based upon activity of James and Erma Seiber as prior property owners and who sold the subject property to CSC for \$1.46 million. The activity which is the subject of CSC’s complaint ended in 1993 with a court order issued by the 20th Judicial Circuit of St. Clair County, Illinois.

2. CSC seeks to obtain relief in the form of reimbursement of cleanup costs incurred in

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2005 and 2006 for the removal and disposal of solid waste (primarily horse manure recovered from Fairmont Park). See paragraphs 8 & 9 of CSC complaint for relief requested.

3. No provisions exist anywhere in the Illinois Environmental Protection Act to authorize a private party to obtain reimbursement of clean up costs for removal and disposal of solid waste. As such, the instant litigation is frivolous and should be dismissed.

4. Section 45(d) of the Illinois EPA (415 ILES 5/45)(“Act”) only provides reimbursement for cleanup costs if the State of Illinois brings an action under the Act. No such action has occurred here and there is no other authority in the Act for reimbursement of clean up costs as a remedy that the board can grant. Section 45(d), in pertinent part, reads as follows:

“If the State brings an action under this Act against a person with an interest in real property upon which the person is alleged to have allowed open dumping or open burning by a third party in violation of this Act, which action seeks to compel the defendant to remove the waste or otherwise clean up the site, the defendant may, in the manner provided by law for third party complaints, bring in as a third party defendant a person who with actual knowledge caused or contributed to the illegal open dumping or open burning, or who is or may be liable for all or part of the removal and cleanup costs. The court may include any of the parties which it determines to have, with actual knowledge, allowed, caused or contributed to the illegal open dumping or open burning in any order that it may issue to compel removal of the waste and cleanup of the site, and may apportion the removal and cleanup costs among such parties as it deems appropriate.

5. No other provision in the Act provides similar relief.

6. In the instant proceeding:

- a. The state of Illinois did not bring an action;
- b. The action filed by CSC does not seek to compel removal of waste or to otherwise clean up the site;
- c. There has been no third party action filed by Seibers against Fairmont

7. That based upon the clear and concise language of the Act, CSC has failed to state a

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valid cause of action rendering this case frivolous.

8. The Illinois Pollution Control Board lacks the authority to grant the relief requested by the complainant.

9. Section 101.500(a) of the Illinois Pollution Control Board rules of procedure state that “the board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.” (35 Ill. Adm. Code 101.500).

10. Pursuant to Section 5/2-619(a)(()) of the Illinois Code of Civil Procedure, dismissal is appropriate when a claim is barred by other affirmative matters avoiding the legal effect of or defeating the claim. 735 ILES 5/2-619(a)(9).

11. In the instant proceeding, Complainant, CSC, seeks relief which can not be awarded.

12. The facts of this case support this finding in that the State of Illinois did not bring an action to compel a clean-up of the site. Rather, CSC cleaned up the site on its own volition and obtained an “Environmental No Further Remediation” letter.

13. CSC’s Count I against Erma I. Seiber, individually and in her capacity as the Administratrix of James A. Seiber, deceased, must be dismissed with prejudice for failing to state a claim for which relief may be granted.

14. No supporting affidavits are required in connection with this motion since the motion is based upon facts plead by the complainant.

15. On November 1, 2007 the Board noted that “Section 31(d)(1) of the Act further provides that “unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing. Id.; see also 35 Ill. Adm. Code 103.212(a). A complaint is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of

action which the Board can grant relief.”

16. Previously the Board dismissed the counterclaim of Fairmount Park seeking to recover attorneys fees on the grounds that the Act did not allow such a recovery. The same principle applies to the relief sought by the complainant. The Board will not be able to cite any provision of the Act, the statute creating and authorizing the Board’s activities, that allows the board to order either respondent to reimburse clean up costs (other than in Section 45(d)) although this statement appears in the Board’s form Notice to Respondent Fairmont Park dated August 22, 2008.

17. It should also be noted that Section 31(d)(1) of the Act allows “any person may file with the board a complaint...against any person allegedly violating this Act....” There are no allegations of on-going violations and any violation occurred before 1993.

18. There is no remedy for this complainant under the Act as the facts developed by their own actions of cleaning up, obtaining an NFR, and then suing for reimbursement.

19. The relief sought by the complaint is based upon common law theories that lie in tort and/or contract, not the Environmental Protection Act.

WHEREFORE, for all of the reasons set forth herein, respondent Erma Seiber, individually and as administratrix of the Estate of James A. Seiber, deceased, requests that the Illinois Pollution Control Board find that it lacks authority to grant the COMPLAINANT’s requested relief and that therefore the cause is frivolous such that the Board GRANTS this motion to dismiss Count I of Caseyville Sports Choice, LLC’s complaint against the Seibers and Count II against Fairmount Park as well.

Respectfully submitted:

Erma I. Seiber, individually and in her capacity as
Administratrix of the estate of James A. Seiber,
Deceased.

By: /s/ Donald W. Urban

Donald W. Urban #3125254
Sprague & Urban
Attorneys at Law
26 East Washington Street
Belleville, IL 62220
618-233-8383
618-233-5374 (fax)
urban@spragueurban.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was forwarded to the below listed counsel by enclosing same in an envelope, with proper first class postage fully prepaid and depositing said envelope in a United States mail box in Belleville, Illinois this 23rd day of November, 2010.

David J. Gerber
Attorney at Law
241 North Main Street
Edwardsville, IL 62025

Penni S. Livingston
Attorney at Law
5701 Perrin Road
Fairview Heights, IL 62208

/s/ Donald W. Urban