

ILLINOIS POLLUTION CONTROL BOARD

April 21, 2011

E.R. 1, LLC, assignee of CASEYVILLE)	
SPORT CHOICE, LLC,)	
)	
Complainant,)	
)	PCB 08-30
v.)	(Citizens Enforcement - Land)
)	
ERMA I. SEIBER, ADMINISTRATRIX OF)	
THE ESTATE OF JAMES A. SEIBER,)	
DECEASED, ERMA I. SEIBER,)	
INDIVIDUALLY and FAIRMONT PARK,)	
INC.,)	
)	
Respondents.)	

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

The Board today rules on motions for reconsideration and for interlocutory appeal filed by Erma I. Seiber, Administratrix of the estate of James A. Seiber, deceased, and Erma I. Seiber, in her individual capacity (Seiber) and Fairmount Park, Inc. (Fairmount Park) (collectively, respondents). In addition respondents challenge the ability of E.R. 1, LLC (E.R. 1) to appear without filing a motion for intervention. E.R. 1 is assignee of complainant Caseyville Sport Choice, LLC (Caseyville). The Board denies the motions to reconsider and for interlocutory appeal. In addition the Board finds that E.R. 1 need not file a motion to intervene and may appeal for Caseyville as the assignee.

Below, the Board first summarizes the background of this case and then discusses E.R. 1's standing in this proceeding. Next, the Board addresses the motion for reconsideration. Then, the Board will discuss the motion for interlocutory appeal.

BACKGROUND

On February 3, 2010, the Board denied a motion to dismiss filed by Fairmount Park and Seiber in this citizen's enforcement action. On February 3, 2010, the Board also denied a motion for summary judgment filed by Fairmount Park. Specifically, the Board denied the motions to dismiss as the Board has consistently found that the Board has the authority to grant cost recovery. In addition the Board denied the motion for summary judgment filed by Fairmount Park as there exist genuine issues of material fact.

On March 4, 2011, Fairmount Park filed a motion for reconsideration of the Board's February 3, 2010 decision and in the alternative a motion for leave to seek interlocutory appeal (Mot. F.). Fairmont Park also challenges the standing of E.R.1 in that motion. On March 7,

2011, Seiber joined this motion (Mot. S.). On March 18, 2011, E.R. 1, as assignee of Caseyville filed a response to respondents' motions (Resp.).

E.R.1'S STANDING

Respondents allege that Caseyville was dissolved on October 8, 2010 and is no longer a recognized entity in Illinois. Mot. F. at 8. Respondents maintain that a third party, E.R. 1, is pursuing Caseyville's cause without proper intervention. *Id.* Respondents further maintain that E.R. 1 should not be allowed to intervene because no purpose of the Act would be furthered by intervention because no ongoing violations exist to pursue and because an NFR letter was issued to Caseyville. *Id.* at 9-10.

E.R. 1 argues that because Caseyville has assigned Caseyville's claims in this case to E.R. 1, E.R. 1 has the same standing as Caseyville. Resp. at 9-10. E.R. 1 argues that intervention does not apply because E.R. 1 is not seeking to join the case as an additional party but rather is stepping into the shoes of Caseyville as the party prosecuting this action. *Id.* at 10.

As a general rule, an assignment is a transfer of some identifiable property, claim or right from the assignor to the assignee. Owens v. McDermott, Will & Emery, 316 Ill. App. 3d 340, 350; 736 N.E.2d 145, 150 (1st Dist. 2000). The assignment operates to transfer to the assignee all the right, title or interest of the assignor in the thing assigned. *Id.*, citing Litwin v. Timbercrest Estates, Inc., 37 Ill. App. 3d 956,958; 347 N.E.2d 378, 379 (1st Dist. 1976). The Board agrees with E.R. 1 that intervention is not necessary, because E.R. 1 is not a third party. The Board finds that, as an assignee, E.R. 1 has the rights and interest of Caseyville and may stand for Caseyville. The Board will amend the caption in this order to reflect E.R. 1's standing.

RECONSIDERATION

Respondents argue that dismissal of the case is appropriate because no ongoing violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq.* (2008)) or Board regulations exist. Mot. F. at 2. Respondents argue that the Board does not have the authority to order cost recovery because no provision of the Act authorizes a private party to obtain reimbursement for clean-up costs associated with the removal and disposal of solid waste. *Id.* at 13. Respondents also allege that the No Further Remediation (NFR) Letter issued to Caseyville protects the Respondents from suits for the respondents' past violations of the Act. *Id.* at 7.

E.R. 1 argues that the respondents' arguments are a reiteration of the respondents' arguments that have been previously rejected by the Board. Resp. at 2. E.R. 1 further argues that the plain language of the Act supports the right to bring claims for past violations. *Id.* at 3. With regard to the NFR Letter, E.R. 1 argues that the letter does not absolve someone in the respondents' position, that of polluter, of liability. *Id.* at 5.

Relevant Law

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-

156 (Mar. 11, 1993), the Board observed that “the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

Discussion on Reconsideration

In denying respondents’ motion to dismiss, the Board has already ruled that the Board has the authority to grant cost recovery. PCB 08-30, slip op. at 5 (Feb. 3, 2011). With regard to respondents’ argument about the NFR Letter, this argument does not bring to the Board’s attention any newly discovered evidence which was not available when respondents filed their motion to dismiss and Fairmount Park filed its motion for summary judgment. The Board finds that the NFR Letter is not newly discovered evidence.

The Board finds that respondents have not provided any new evidence or a change in the law that would indicate that the Board’s February 3, 2010 order was in error. Therefore, the Board denies the motion to reconsider.

INTERLOCUTORY APPEAL

Respondents request that the Board certify for interlocutory appeal the question of whether the Board can award private citizens cost recovery for past violations of the Act. Mot. F. at 21. Respondents maintain that the Board’s authority to award private citizens cost recovery for past violations of the Act is a question of law involving substantial ground for difference of opinion because an appellate court has never decided this issue. *Id.* at 23. Respondents also argue that an immediate appeal will advance the termination of this litigation. *Id.*

E.R. 1 argues that the Board should not certify the issue for interlocutory appeal because respondents have not shown that the issue warrants exceptional treatment. Resp. at 8. E.R. 1 further argues that one of respondents primary reasons for seeking interlocutory appeal, avoiding litigation costs, does not justify an interlocutory appeal. *Id.*

Relevant Law

The Board’s rules allow the Board to consider an interlocutory appeal under Supreme Court Rule 308 (Ill. S. Ct. Rule 308). 35 Ill. Adm. Code 101.908. Supreme Court Rule 308 provides in part:

When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion

or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order. Ill. S. Ct Rule 308 (2011)

The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. See People v. PCB, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984); Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285, 432 N.E.2d 942 (1st Dist. 1982). The Illinois Supreme Court has indicated that Rule 308 appeals are to be allowed only in certain exceptional circumstances. People v. Pollution Control Board, 473 N.E.2d at 456, *citing* People ex. rel. Mosley v. Carey, 74 Ill.2d 527 (1979). Rule 308 should be strictly construed and sparingly exercised. People v. PCB, 473 N.E.2d at 456.

Thus, before the Board can certify an issue for interlocutory appeal, the Board must determine that a two prong test is satisfied: 1) whether the Board's decisions involves of question of law involving substantial ground for a difference of opinion; and 2) whether immediate appeal may materially advance the ultimate termination of the litigation. Residents Against a Polluted Environment and the Edmund B. Thornton Foundation v. County of LaSalle and Landcomp Corporation, PCB 96-243 (Nov. 7, 1996); *see also* People v. State Oil Company, et al., PCB 97-103 (May 16, 2002). However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. Voss v. Lincoln Mall Management, 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988); Camp v. Chicago Transit Authority, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1st Dist. 1980).

Discussion on Interlocutory Appeal

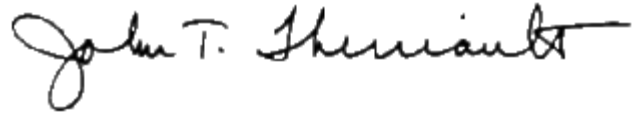
The Board finds that respondents have failed to prove that this exceptional relief is warranted. The Board has consistently found that the Board can award private citizens cost recovery for past violations of the Act. Simply because an appeals court has not affirmed the Board's decision, does not mean that in this case there is a question of law involving substantial ground for a difference of opinion. Furthermore, the respondents have not put forth any persuasive argument to the Board that an immediate appeal will materially advance the ultimate termination of this litigation. Therefore, the Board denies respondents' motion for interlocutory appeal.

CONCLUSION

The Board denies respondents' motion for reconsideration and motion for leave to seek interlocutory appeal. The Board recognizes E.R. 1's standing in this proceeding as assignee of Caseyville

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 21, 2011, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

John Therriault, Clerk
Illinois Pollution Control Board