

ILLINOIS POLLUTION CONTROL BOARD

August 7, 1997

DEBRA CONWAY,)	
)	
Petitioner,)	
)	PCB 97-221
v.)	(Enforcement-Air-Water)
)	
WINONA AND EDWARD JOHNSON,)	
)	
Respondents.)	
)	

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

On June 5, 1997, Debra Conway (complainant) filed an enforcement action against Winona and Edward Johnson (respondents). The complaint (Comp.) alleges violations of 35 Ill. Adm. Code 101.160, 101.161, 101.162, 101.241, 101.243, 101.260, and 101.280. Comp. at 3. The complaint then describes the alleged pollution as sewer back-up in the basement and the bathtub of her apartment that is rented from respondents. Complainant asks the Board for relief in the form of a monetary penalty, an order directing respondent to cease and desist from further back-ups, cleaning of the complainant's apartment for three years, paying all hospital bills, written and verbal apologies, and free rent for three to seven years.

On June 13, 1997, the respondents filed a response to the complaint and on June 20, 1997, respondents filed a motion to dismiss (Mot.). Respondents assert that it had been brought to their attention that complainant was experiencing back-up problems in complainant's bathroom in April. Mot. at 2. Respondents assert that they questioned other tenants and inspected the building and basement for plumbing and back-up problems. *Id.* As a result of this inspection, respondents found only a leaky valve which they assert will be repaired during annual maintenance on the building. *Id.* Respondents maintain that they notified complainant that they would inspect her apartment but were unable to gain entrance to the apartment. Respondents ask the Board to dismiss this action, to bar complainant from further harassment and for complainant to vacate the apartment. Mot. at 1.

Complainant has not responded to the motion to dismiss. Therefore, complainant is deemed to have waived objection to the granting of the motion. 35 Ill. Adm. Code 101.241(b).

For the reasons discussed below the Board grants the motion to dismiss.

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476.) The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency (April 20, 1995), PCB 95-98.)

Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Environmental Protection Act (Act) (415 ILCS 5/31(b)), provides:

...If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124.

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp (June 13, 1985), PCB 85-68, 64 PCB 263.) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973), PCB 73-173, 8 PCB 46.)

DISCUSSION

Complainant alleges that respondents violated several sections of the Board's rules. However, the sections indicated are Board rules establishing the procedures to be followed by parties in proceedings before the Board. Thus, respondents could not be in violation of those regulations during the time the alleged violations occurred because this case was not yet before the Board. Therefore, the portion of the complaint alleging violations of the Board's procedural rules does not state a cause of action upon which relief can be granted in this proceeding.

The complaint does describe alleged pollution violations as sewer back-ups. However, the complaint does not cite to any provisions of the Act or Board regulations which correspond to such an alleged violation. Section 103.122(c)(1) of the Board's rules (35 Ill. Adm. Code 103.122(c)(1)) requires a formal complaint to contain a reference to the provisions of the Act and regulations which the respondents are alleged to be violating. A description of sewer back-up is not in itself sufficient to state a cause of action upon which relief can be granted.

Finally, the complaint requests numerous forms of relief should the Board find a violation of the Act or the Board's regulations. Of the relief requested, the Board could only grant two forms of relief requested, a monetary penalty and a cease and desist order. The remaining forms of relief are beyond the Board's authority.

The complaint does not sufficiently plead a cause of action upon which relief can be granted. Therefore, the complaint as filed is frivolous and the Board grants the motion to dismiss.

The Board also notes that respondents have asked the Board to bar complainant from further harassment and order complainant to vacate the apartment. Respondents did not cite any authority in either the Act or the Board's regulations which would allow the Board to issue such a ruling and the Board can find no such authority. Therefore, the Board cannot act on those requests by respondents.

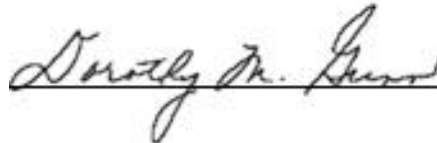
The complaint is hereby dismissed and the docket closed.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R.335; see also 35 Ill. Adm. Code 101.246 Motions for Reconsideration.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of August 1997, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board