ILLINOIS POLLUTION CONTROL BOARD
March 19, 1998

FOREST PRESERVE DISTRICT OF DUPAGE COUNTY, ILLINOIS, a body politic and corporate in the County of DuPage, State of Illinois,	)	
Complainant,	)	
v.	)	PCB 96-84
	)	(Enforcement - Land - Water)
MINERAL AND LAND RESOURCES CORPORATION, a Delaware corporation, SOUTHWIND FINANCIAL, LTD., an Illinois corporation, f/k/a ABBOTT CONTRACTORS, INC., and BLUFF CITY MATERIALS, INC., an Illinois corporation, as assignee of ABBOTT CONTRACTORS, INC.,	)	
Respondents.	)	

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on "Complainant's Motion for Reconsideration of December 18, 1997 Order" (Reconsideration Motion) filed by the Forest Preserve District of DuPage County, Illinois (FPD) on January 21, 1998. This motion was timely filed under 35 Ill. Adm. Code 101.246(a). On February 4, 1998, respondent Mineral and Land Resources Corporation (MLR) filed a timely response. Upon reconsideration, the Board affirms its ruling of December 18, 1997.

On December 18, 1997, the Board adopted an order granting "Mineral and Land Resource's Motion for a Finding in its Favor and Against Complainant" (Finding Motion), by which MLR sought a finding in its favor on the issue of liability at the close of complainant's presentation of evidence. In its Finding Motion, MLR asserted that no evidence had been presented by FPD establishing MLR's liability for any of the violations alleged in the complaint. The only evidence linking MLR to the alleged violations was two contracts: a license agreement between FPD and MLR, by which FPD granted MLR a license to mine minerals from a plot of land and MLR agreed to construct a wetland on the property, and a sublicense agreement between MLR and Abbott Contractors, Inc. (Abbott), now known and participating in this action as respondent Southwind Financial, Ltd. Under the sublicense agreement, MLR assigned its rights under the license agreement to Abbott, and Abbott assumed MLR's duties under the license agreement. FPD opposed MLR's motion, arguing that the sublicense agreement created a principal/agent relationship between MLR and Abbott, and that MLR was consequently vicariously liable for Abbott's acts. FPD also argued that

MLR exercised sufficient control over Abbott for MLR to be found to have "allowed" pollution which Abbott may have caused, pursuant to Section 21 of the Illinois Environmental Protection Act (Act), 415 ILCS 5/21 (1998). ("Allowing" pollution would be a basis for a finding of liability for some of the alleged violations.) After reviewing the evidence, the Board ruled that the sublicense agreement did not create a principal/agent relationship between MLR and Abbott, and that MLR had not allowed any pollution by Abbott.

FPD asks the Board to reconsider its December 18 order. The purpose of a motion for reconsideration is to bring to the tribunal's attention newly-discovered evidence which was not available at the time of the 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). Motions for reconsideration are governed by 35 Ill. Adm. Code 101.246. Under subsection 101.246(d), "[i]n ruling upon a motion [for reconsideration], the Board will consider factors including, but not limited to, error in the decision and facts in the record which were overlooked."

FPD first asserts that the Board erred in its finding that Abbott was an independent contractor rather than agent of MLR. In its December 18 order, the Board applied a two-prong test to determine whether an agency relationship existed. The Board inquired (a) whether the alleged principal has the right to control the conduct of the alleged agent, and (b) whether the alleged agent has the power to act on behalf of the alleged principal. See, *e.g.*, Moy v. County of Cook, 244 Ill.App.3d 1034, 1038, 614 N.E.2d 265, 267 (1st Dist. 1993); Letsos v. Century 21-New West Realty, 285 Ill.App.3d 1056, 1064, 675 N.E.2d 217, 224 (1st Dist. 1996); Milwaukee Mutual Insurance Co. v. Wessels, 114 Ill.App.3d 746, 749, 449 N.E.2d 897, 901 (2nd Dist. 1983). The Board found that the sublicense agreement did not give Abbott authority to act on behalf of MLR, and consequently there was no principal/agent relationship between MLR and Abbott.

FPD has cited two cases in which courts set forth different tests for agency. In Dumas v. Lloyd, 6 Ill.App.3d 1026, 286 N.E.2d 566 (1st Dist. 1972), the court made the following statement: "[T]he relationship of principal and agent exists if the principal has the right or duty to supervise and control, and also the right to terminate the relationship at any time." 6 Ill.App.3d at 1029, 286 N.E.2d at 569. Subsequent panels of the First District Appellate Court, however, have adopted the test used by the Board. See, *e.g.*, Moy; Letsos. Even if the Dumas court intended in its opinion to set forth the definitive test for agency, the Board's decision would not change, because under the test in Dumas the Board would still find that Abbott was not an agent of MLR. Under paragraphs 10 and 11 of the sublicense agreement MLR did not have the right to terminate the relationship at any time, as Dumas would require; the sublicense agreement could only be terminated under certain conditions or by mutual agreement.

FPD also cites Phipps v. Cohn, 139 Ill.App.3d 210, 212, 487 N.E.2d 428, 430 (5th Dist. 1985), where the court stated that "[t]he classic test as to whether a contractor is independent or a mere servant depends upon his right to control the manner and method in which the work is carried on independent of supervision and direction by his employer." The test set forth in Phipps is a test to determine whether a master/servant relationship exists, not a

principal/agent relationship. The Phipps court cited Gunterberg v. B & M Transportation Co., Inc., 27 Ill.App.3d 732, 327 N.E.2d 528 (1st Dist. 1975) for its authority; that case dealt only with determination of whether a party was an employee. The Phipps court noted that the trial court had found that a principal/agent relationship existed, but it does not appear that the distinction between principal/agent and master/servant was significant in Phipps. Inasmuch as other panels of the Fifth District Appellate Court have also applied the test used by the Board (see Wargel v. First National Bank of Harrisburg, 121 Ill.App.3d 730, 460 N.E.2d 331 (5th Dist. 1984); HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 172 Ill.App.3d 718, 527 N.E.2d 97 (5th Dist. 1988), *aff;d in part, rev'd in part on other grounds*, 131 Ill.2d 145, 545 N.E.2d 672 (1989)), the Board does not conclude, based on Phipps, that it erred in its application of the test for agency.

FPD cites language from Hoffman & Morton Co. v. American Insurance Co., 35 Ill.App.2d 97, 102, 181 N.E.2d 821, 823 (1st Dist. 1962), where the court noted that "[a]n agent is generally defined by the Illinois courts as being one who undertakes to manage some affairs for another by his authority, on account of the latter, . . . and to render an account," and argues that under the sublicense agreement "Abbott undertook to manage MLR's mining of the land and constructing of a wetland[.]" Reconsideration Motion at 6. The Board does not accept FPD's characterization of Abbott's work as "manag[ing] MLR's mining . . . and construction." In any case, the characterization of Abbott's activities does not avoid the requirement that a party, in order to be found an agent of another, must have authority to affect legal relationships of the other. Indeed, the Hoffman court found this a "distinguishing characteristic" of an agent, as the Board discussed in its December 18 order. Forest Preserve District of DuPage County, Illinois v. Mineral and Land Resources Corporation (December 18, 1997), PCB 96-84, slip op. at 5. The Board concludes that it applied the proper test for agency in its December 18 order.

Next, FPD argues that even under the test applied by the Board, Abbott did have the authority to contract for MLR, in that it had the authority to sell gravel mined at the site and authority to construct the wetland. Neither of these "authorities" translates into authority to contract on behalf of MLR. The Board finds that ownership of gravel removed from the property was among the rights granted to Abbott under the sublicense agreement, recognized explicitly in paragraph 14 of the sublicense agreement ("All . . . finished product shall remain the property of Sublicensee until sold to a third party[.]"). Accordingly, when it sold gravel mined at the property, Abbott was not selling MLR's property and was thus not affecting legal relationships of MLR. The authority to construct the wetland does not differentiate Abbott from any other independent construction contractor or explain how any subcontracts into which Abbott may have entered would bind MLR.

The Board concludes that it did not err in its determination that Abbott did not have the power to affect legal relationships of MLR. Having determined that this prong of the test for agency was not met, there is no need for the Board to consider FPD's arguments concerning the other prong, *i.e.*, the level of control MLR had over Abbott.

FPD also argues that the Board erred in its determination that MLR did not "allow" pollution by Abbott. Although FPD asserts the existence of "numerous Board decisions on this issue," it has cited only one opinion: Illinois Environmental Protection Agency v. Patel

(February 4, 1988), PCB 85-136, a very different case from the one before us. The Board's research has turned up very few prior decisions on the narrow issue of when is a party liable for allowing pollution based upon the acts of an independent contractor, and the relevant decisions are discussed in the Board's December 18 order.

In its December 18 order, the Board concluded that the proper inquiry was "whether, in light of statutory policy, a respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution," citing Environmental Protection Agency v. James McHugh Construction Co. (May 17, 1972), PCB 71-291, slip op. at 3. The Board found that MLR was not in such a relationship to Abbott that it was reasonable to expect it to exercise control to prevent pollution, noting that (a) MLR and Abbott were separate corporations, (b) MLR did not maintain a presence at the site, (c) the sublicense agreement gave Abbott specific instructions regarding its duties, and (d) pollution by Abbott would be an exceedence of the terms of the sublicense agreement. FPD does not take issue with the test applied by the Board; indeed, it cites Patel to establish that very test, and Patel cites back to, *inter alia*, McHugh. Instead, FPD argues that the Board ignored aspects of the relationship between MLR and Abbott which made it reasonable for MLR to have exercised control to prevent Abbott's pollution.

FPD's principal argument centers on a provision of the license agreement under which MLR is obligated to remove "all construction materials, debris and materials determined to be inappropriate for the purposes of a wetland by FPD" prior to the expiration of the license agreement. FPD characterizes this duty of MLR under the license agreement (assumed by Abbott under the sublicense agreement) as a duty to prevent pollution, but we do not read it so. This provision deals with the duty to remove materials from the site, but places no prohibition on placing any particular materials at the site; indeed, it will not come into play unless and until such materials are placed on the site. The Board reads this provision of the license agreement not to mean "do not bring particular materials onto the site," but rather, "clean up the site before you go." This obligation could include a duty to remove any number of things which might not be pollutants. Thus, MLR's duty under the cited provision of the license agreement is not, as FPD argues, a "contractual duty to prevent pollution."[1] This case can therefore be distinguished from McHugh, where the contract in question was for construction of a pollution control facility (a settling basin to remove suspended solids from water).

Finally, FPD argues that the Board's decision is contrary to the policy underlying the Act. We recognize the statutory policy identified by FPD, that those in a position to prevent pollution must do so. Liability, however, is to be imposed where a party can reasonably be

[1] Elsewhere in its motion, FPD states that the Board ruled that "MLR has no liability for illegal dumping at the site, effectively denying the public and [FPD] any remedy against that corporation and eviscerating MLR's obligations to the District under the License Agreement." Actually, the Board ruled that the evidence presented by FPD did not establish that MLR violated the Act. The Board expressed and expresses no opinion on whether MLR is contractually liable to FPD. No contractual obligations of MLR to FPD under the License Agreement are affected by the Board's ruling.

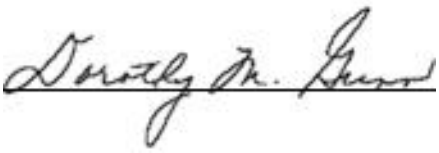
expected to exercise control to prevent pollution. McHugh, slip op. at 3. The only way for MLR to have prevented any pollution by Abbott (and thus complied with the Act, under FPD's interpretation) would have been for MLR to have actively monitored Abbott's work at all times. Where pollution is not a reasonably foreseeable result of the performance of a contract (*i.e.*, where pollution could result only from an exceedence of the terms of the contract by an independent contractor), we do not believe that such an obligation is either reasonable or required by the policies underlying the Act.

Upon reconsideration, the Board finds no error in its ruling of December 18, 1997.

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 19th day of March 1998, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board