ILLINOIS POLLUTION CONTROL BOARD
August 21, 2003

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-51
	)	(Enforcement – Air)
DRAW DRAPE CLEANERS, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M.E. Tristano):

This matter is before the Board on a motion for partial summary judgment filed by the People of the State of Illinois (People) on June 27, 2003, against Draw Drape Cleaners, Inc., (respondent). The People seek partial summary judgment on four of eight counts in its 2002 complaint alleging air pollution, operating and permit violations of the Environmental Protection Act (Act) and the Board's air rules. Respondent runs a dry cleaning facility in Chicago, Cook County.

On July 18, 2003, respondent filed a response in opposition to the motion, asserting that various mitigating circumstances dictate a finding in its favor. On July 31, 2003, the People filed a reply, accompanied by a motion for leave to file, which is granted by the Board.

The People seek summary judgment against respondent on four of the eight counts: count IV, construction of an emissions source without a permit; count V, operation of an emissions source without a permit; count VII, installation of a non-solvent recovery dryer and lack of a cartridge filter; and count VIII, failure to perform an initial flow rate test.

For the reasons outlined below, the Board grants the People partial summary judgment on the complaint by finding that respondents violated the Act and Board's rules as outlined in counts IV, V, VII, and count VIII. The parties are directed to proceed expeditiously to a hearing on remedy and penalty for these counts, and on all issues for the remainder of the contested counts in the complaint. Respondents are free to present any mitigating evidence or arguments as they may relate to the Board's consideration of the factors contained in Section 33(c) and 42(h) of the Act at hearing.

PROCEDURAL HISTORY

On October 15, 2002, the People filed an eight-count complaint against respondent. The complainant alleged that respondent violated various provisions of the Act, the Board's air pollution regulations, and its Federally Enforceable State Operating Permit (FESOP). The complaint involves a petroleum solvent dry cleaning facility operated by respondent at 2235-2239 West Roscoe Street, Chicago, Cook County.

On December 17, 2002, the respondent filed an answer to the complaint and offered five affirmative defenses. On January 16, 2003, the complainant filed a motion to strike or dismiss respondent's affirmative defenses. On February 20, 2003, the Board granted the complainant's motion to strike respondent's affirmative defenses for the reasons outlined in that order. People v. Draw Drape Cleaners, Inc., PCB 03-51 (Feb. 20, 2003).

On April 11, 2003, the People served respondent with written discovery, including a request for admission of facts. Respondent subsequently served the People with responses to written discovery including its response to the request to admit. (the People filed the responses as Exhibit B to its motion for summary judgment.) In the responses to the request to admit, respondent admitted that it failed to secure the required construction and operating permits for dryer #2. Respondent admitted that dryer #2 is not a solvent recovery dryer and lacks a cartridge filter. Finally, respondent admitted that it failed to perform an initial flow rate test on dryer #2.

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing part." *Id*.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief is clear and free from doubt." *Id*, citing Purtill v. Hess, 111 Ill. 2d 199, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Count IV: Construction Without Permit

Count IV of the complaint alleges that respondent constructed an emissions source without a permit in violation of Section 9(b) of the Act and Section 201.142 of the Board's air pollution regulations.

Section 9(b) of the Act provides as follows:

No person shall:

> (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

Section 201.142 of the Board's Air Pollution Regulations provides as follows:

> No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency, except as provided in Section 201.146.

The People argue that respondent admitted it installed dryer #2 at its facility without first obtaining a permit from the Agency. Mot. Ex. Resp. at 40. Thus, complainant argues that respondent violated Section 9(b) of the Act and Section 201.142 of the Board's Air Pollution Regulations and summary judgment should be awarded to complainant.

In response, Draw Drape argues that it installed dryer #1 in the 1960s and operated it in compliance with the Act until it was damaged in 1994. Draw Drapes asserts that the Act "grandfathered in" dryer #1, so that it did not need a permit. Due to a fire at the plant and forced to rebuild its plant, respondent obtained a permit to rebuild. To resume operations, respondent argues it needed a dryer with at least a 100 lb capacity to replace dryer #1. The respondent contends that in 1996 when the plant was rebuilt, a recovery dryer was not available. As a result, respondent purchased and installed dryer #2. Because the dryers were identical and dryer #1 was destroyed in the fire and it had obtained a permit to rebuild, respondent argues it believed it was operating dryer #2 in compliance with the Act and that its operating permit covered dryer #2. As soon as a recovery dryer became available in the proper size, Draw Drapes asserts it ordered and installed the recovery dryer. Resp. at 1, 3.

In its reply, the People contend that respondent cannot hide behind its assertion that it believed dryer #2 was constructed in compliance with the Act. The People argue that "a defendant is presumed to know the law and that ignorance of the law is no excuse." People v. Acosta, 331 Ill. App.3d I, 6; 768 N.E. 2d 746, 751 (2d Dist. 2001); People v. Terneus, 239 Ill. App.3d 669, 672; 607 N.E.2d 568, 570 (4th Dist. 1992).

The Board grants summary judgment to complainant on count IV of the complaint. Respondent admits that it failed to secure the required construction permit for dryer #2 at its facility. Respondent thereby violated Section 9(b) of the Act and Section 210.142 of the Board's air pollution regulations. Respondent's arguments about good faith or mistaken understanding are not an appropriate defense to liability. But respondent is free to raise them at hearing as to remedy and penalty issues, as they may relate to the Board's consideration of factors of 33(c) or 42(h) of the Act.

Count V: Operation Without Permit

Count V of the complaint alleges that respondent operated an emissions source without a permit in violation of Section 9(b) of the Act and Section 201.143 of the Board's Air Pollution Regulations.

Section 201.143 of the Board's Air Pollution Regulations provides:

> No person shall cause or allow the operation of any new emission source or new air pollution control equipment of a type for which a construction permit is required by Section 201.142 without first obtaining an operating permit form the Agency, except for such testing operations as may be authorized by the construction permit.

The People argue that respondent admitted it operated dryer #2 without first obtaining a permit from the Agency. Mot.at 7,Ex.B Resp. 41. Thus, the People argues that respondent violated Section 9(b) of the Act and Section 201.143 of the Board's Air Pollution Regulations and summary judgment should be awarded. *Id*.

Respondent argues that from the time it installed and began operating dryer #2, it operated it mainly to fluff draperies. Draw Drape contends that the process of fluffing does not emit VOMs into the environment. Respondent argues that during the time it operated dryer #2, it has emitted minimal VOMs into the environment. In support of this claim, Draw Drape cites to a verification that Richard Zell of Draw Drapes provided with respondent's answers to the complaint attesting to these facts:

> 1) Respondent has had a Federally Enforceable State Operating Permit (FESOP) since a permit was required; 2) Respondent has always operated its plant below the emissions allowed under its FESOP permit; and 3) Respondent would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP. Resp. at 3.

Draw Drape argues that Mr. Zell's statements constitute evidentiary facts and that complainant has no proved evidentiary facts to controvert them. Respondent further argues that unsworn and unverified statements cannot be considered on a motion for summary judgment. Rotzoll v. Overheard Door Corp., 289 Ill. App.3d 410, 161-62, 681 N.E.2d 156 (4th Dist. 1997), West v. Deere & Co., 201 Ill. App.3d 891, 900, 559 N.E.2d 511 (2nd Dist. 1990). Unsubstantiated hearsay statements cannot be considered in ruling on a motion for summary judgment. Laja v. AT &T, 283 Ill. App.3d 126, 136, 699 N.E.2d 645 (1st Dist. 1996). As such, the respondent argues that the Board cannot consider the unsworn and unverified statements of complainant's counsel contained in its motion for summary judgment. Resp. at 3-4.

In its reply, the People again contend that respondent cannot hide behind its assertion that it believed dryer #2 was operating in compliance with the Act. The People state that "a defendant is presumed to know the law and that ignorance of the law is no excuse." People v. Acosta, 331 Ill. App.3d I, 6; 768 N.E. 2d 746, 751 (2d Dist. 2001); People v. Terneus, 239 Ill. App.3d 669, 672 N.E.2d 568, 570 (4th Dist. 1992). Reply at 3.

Also, the People contend that its motion did not contain unsworn and unverified statements, since it cited to respondent's sworn answers to interrogatories. The People assert that Supreme Court Rule 213(h) states "answers to interrogatories may be used in evidence to the same extent as a discovery deposition." Reply at 2. A discovery deposition, according to

Supreme Court Rule 212(a)(4) may be used "for any purpose for which an affidavit may be used." The People, therefore, argue that an answer to an interrogatory may be treated as an affidavit for purposes of a motion for summary judgment. Komater v. Kenton Court Ass. 151 Il. App. 3d 632, 637; 1502 N.E. 2d 1295, 1298 (2d Dist. 1986). Reply at 2.

The Board finds that the complainant has proven that it is entitled to summary judgment on Count V. Mr. Zell himself has verified the facts on which the People rely as proof of violation: Draw Drape's response to the first request to admit facts. Mot. Ex. B at p. 12. Again, Draw Drape is free to introduce evidence and arguments at hearing in mitigation of the violation as allowed by Sections 33 (c) and 42(h) of the Act.

Count VII: Failure to Install Compliant Dryer

Count VII of the complaint alleges that respondent did not install a solvent recovery dryer with a cartridge filter as required by Section 60.622 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act.

Section 60.622 of Title 40 of the Code of Federal Regulations provides:

> (a) Each affected petroleum solvent dry cleaning dryer that is installed at a petroleum dry cleaning plant after December 14, 1982, shall be a solvent recovery dryer. The solvent recovery dryer(s) shall be properly installed, operated and maintained.
>
> (b) Each affected petroleum solvent filter that is installed at a petroleum dry cleaning plant after December 14, 1982, shall be a cartridge filter. Cartridge filters shall be drained in their sealed housings for at least 8 hours prior to their removal.

Section 9.1(d) of the Act provides:

> No person shall:
>
> (1) violate any provisions of Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or
>
> (2) construct, install, modify or operate an equipment, building, facility, source or installation which is subject to regulation under Sections 111, 112, 165 or 173 of the Clean Air Act, as no or hereafter amended, except in compliance with the requirements of such Sections and federal regulations adopted pursuant thereto, and no such action shall be undertaken without a permit granted by the Agency or in violation of any conditions imposed by such permit.

The People argue that respondent admitted that dryer #2 is not a solvent recovery dryer and that it lacks a cartridge filter as admitted in Exhibit B – Response No. 17, 19 (Mot. at 7-8, Ex. B Resp. 17 and 19). The People conclude that respondent violated Section 60.622 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act and that summary judgment should be awarded.

Draw Drape argues that a recovery dryer with a cartridge filter of the proper size to replace the dryer destroyed by the fire was not available in 1996. When a recovery dryer in the proper size became available in May 2002, respondent states it immediately ordered a new recovery dryer. Respondent asserts the manufacturer accepted respondent's order for the new recovery dryer in May 2002 and delivered the new dryer in late September 2002. Draw Drape relates that it obtained a permit and installed and began operation of the new dryer in May 2003. Resp. at 4.

In its reply, the People contend that the unavailability of a proper sized dryer does not excuse respondent from complying with the law. Comp. Resp. at. 3.

The Board grants summary judgment to the People on Count VII of the complaint. Respondent admitted that it dryer #2 is not a solvent recovery dryer and lacks a cartridge filter. Respondent thereby violated Section 60.622 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Respondent may offer evidence and argument relevant to Sections 33(c) and 42(h) of the Act about equipment availability at hearing.

Count VIII: Failure to Perform Initial Emissions Test

Count VIII of the complaint alleges that respondent did not perform the initial test required by Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Section 60.624 provides:

> Each owner or operator of an affected facility subject to provisions of Section 60.622(a) shall perform an initial test to verify that the flow rate of recovered solvent from the solvent recovery dryer at the termination of the recovery cycle is no greater than 0.05 liters per minute. This test shall be conducted for a duration of no less than 2 weeks during which no less than 50 percent of the dryer loads shall be monitored for their final recovered solvent flow rate.

The People argue that respondent admitted it did not initially test dryer #2 to verify the flow rate of recovered solvent after dryer #2 was installed in 1996. Mot. at 9-11; Ex. B Resp. 45, 46, and 47. Thus, the People conclude that the respondent violated Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act and summary judgment should be awarded.

Draw Drape notes it did not perform an emissions test when it began operating the new dryer because no commercial emissions test was available at the time. In addition, respondent contends it has had a FESOP since a permit was required and that it has always operated its plant

below the emissions allowed under its FESOP permit. Respondent estimates that it would have to emit additional 1,000 gallons per year to reach the emissions allowed under its FESOP to be in violation. Respondent argues that it verified this fact and complainant did not controvert this properly supported material fact. Resp. at 4.

In the reply, the People contend that respondent could have performed the test outlined in Section 60.624 with a graduated cylinder, a stopwatch, pen and paper, knowledge of simple arithmetic, and time to measure every other dryer load for two weeks. Respondent's possession of a FESOP, the People state, does not excuse failure to perform the test. The People argue that respondent failed to perform the test by its own admission and thereby violated the Act and the Code of Federal Regulation. Reply at 4.

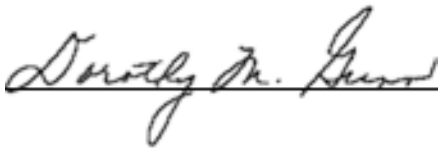
The Board grants summary judgment to the People on count VIII of the complaint. Respondent admitted that it did not initially test dryer #2 to verify the flow rate of recovered solvent after the dryer was installed in 1996. Respondent' argument that it could not perform the test because no commercial emissions test was available at the time does not bar a finding of liability. As the People contend, respondent could have tested in other ways. Respondent violated Section 60.624 of Title 40 of the Code of Federal Regulations and Section 9.1(d) of the Act. Respondent may make any appropriate arguments under Sections 33(c) and 42(h) during the next phase of this proceeding.

CONCLUSION

The Board grants the People's motion for partial summary judgment on the complaint by finding that respondents violated the Act and Board's rules as outlined in counts IV, V, VII, and count VIII. The parties are directed to proceed expeditiously to hearing on the remainder of the contested counts of the complaint, as well as on remedy and penalty issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board