ILLINOIS POLLUTION CONTROL BOARD
October 15, 1998

LIONEL P. TREPANIER, WES WAGER, MAUREEN COLE, LORENZ JOSEPH, MAXWORKS GARDEN COOPERATIVE AND AVI PANDYA,	)	
Complainants,	)	
v.	)	
SPEEDWAY WRECKING COMPANY and BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,	)	PCB 97-50 (Enforcement - Air, Land, Citizens)
Respondents.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

The University of Illinois, with the aid of contractor Speedway Wrecking Company (Speedway) and others, has demolished buildings in the area around the University of Illinois Chicago campus in Chicago, Illinois. Complainants Mr. Lionel Trepanier (Trepanier), Mr. Wes Wager (Wager), Ms. Maureen Cole (Cole), Mr. Lorenz Joseph (Joseph), Mr. Avi Pandya (Pandya), and the Maxworks Garden Cooperative (Maxworks) allege that in carrying out these demolitions, Speedway and the Board of Trustees of the University of Illinois (University) have violated the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq*. (1996) (Act). The provisions of the Act that complainants allege respondents have violated are Section 9(a), which addresses air pollution, and Sections 21(a) and (b), which address waste disposal.

Respondents now move for summary judgment on these claims. Complainants Trepanier and Wager oppose the motion, and the parties have filed various motions directed at the pleadings.

The Board grants the motion for summary judgment as to all claims except complainants' Section 9(a) and 21(b) claims regarding the demolition at 1261 S. Halsted. The Board's rulings on the motions directed at the pleadings are set forth at pages 3-7.

PROCEDURAL HISTORY

Complainants filed a complaint (Comp.) against respondents on September 9, 1996. In the complaint, complainants allege that respondents had contracted to demolish several buildings, specifically buildings at 712 Maxwell, 727 Maxwell, 815 Maxwell, and 1261 Halsted. Comp. at 6. Complainants also alleged that respondents had violated Sections 9(a), 21(a), and 21(b) of the Act. *Id*. These provisions, as further outlined below, prohibit air

pollution, open dumping of waste, and dumping of waste upon public highways or other public property.

On June 22, 1998, respondents Speedway and University filed a joint motion for summary judgment ("Mot. Sum. J."). Under the Board's rules, complainants had seven days after service of the motion to file a reply. See 35 Ill. Adm. Code 103.140(c). Complainants did not do so.

On July 13, 1998, however, complainants Trepanier and Wager filed a motion to strike ("Mot. Strike"): (1) the affidavits attached to the motion for summary judgment; and (2) the motion for summary judgment itself. Complainants Trepanier and Wager attached to the motion to strike two affidavits opposing the motion for summary judgment. On July 14, 1998, complainant Trepanier filed three exhibits, B, C, and D, that Trepanier and Wager had inadvertently not attached to the motion to strike. The Board accepts these additional exhibits to the motion to strike. On July 20, 1998, respondents filed a memorandum opposing the motion to strike ("Mem. Opp. Mot. to Strike"). The Board addresses the substance of the motion to strike below.

On July 14, 1998, complainant Trepanier filed a motion for continuance, asking for unspecified time to allow him to file a response to the motion for summary judgment. In an order dated August 7, 1998, the hearing officer granted complainants leave to file a response to the motion for summary judgment within seven days. Complainant Trepanier met that requirement by mailing his response to the Board on August 14, 1997 ("Resp."). See 35 Ill. Adm. Code 101.102(d). On August 17, 1998, Trepanier filed a motion to correct a typographical error in the affidavit he had attached to his response to the motion for summary judgment. The Board grants Trepanier's motion to correct the typographical error.

The hearing officer also granted respondents leave to file a reply to Trepanier's response. Respondents did so on August 21, 1998 ("Reply Mem.").

On September 8, 1998, complainants Trepanier, Cole, Joseph, Wager, and Pandya filed a motion for leave to file *instanter* a response to respondent's reply memorandum ("Mot. *Instanter*"), along with their response. In the motion, these complainants note that "given . . . the recent date of service of the respondents' pleadings, as well the nature of this case and the potential benefit to the environment and community at large from allowing personal remedies to environmental pollution and threats, it seems fair to allow these attached complainant's responses to the University's and Speedway's motions." Mot. *Instanter* at 2. On September 9, 1998, respondents filed a memorandum opposing that motion (Resp. Mot. *Instanter*). In that document, respondents note that the briefing schedule that the hearing officer set did not allow Trepanier to file another brief, and that the brief that Trepanier seeks to file raises new arguments and evidence. Resp. Mot. *Instanter* at 2. On September 23, 1998, complainants Trepanier, Cole, Joseph, Pandya, and Wager filed a response to respondents' memorandum opposing the motion, in which these complainants reassert that they should be able to reply because of the nature of this case, the potential benefit to the environment, and fairness.

The Board denies Trepanier's motion for leave to file *instanter* a response to respondents' reply memorandum. Neither the Board's procedural rules nor the briefing schedule set for this matter allow Trepanier to file such a response. In addition, while the Board may grant leave to file such a response – essentially a surreply – when a reply raises new arguments or evidence, the respondents' reply memorandum did not do so. Accordingly, the Board denies Trepanier's motion.

On September 9, 1998, respondents filed a motion to clarify the record. Complainants did not file a response. The Board addresses that motion below.

MOTION TO STRIKE AND RELATED MOTIONS

The motion to strike contains ten paragraphs, each asserting a different argument. In paragraphs 7-10 of the motion to strike, Trepanier and Wager assert various arguments in support of their claim that the motion for summary judgment itself should be stricken. While the Board will not strike the motion for summary judgment, the Board does consider the arguments set forth in paragraphs 7-10 of the motion to strike in its ruling on the motion for summary judgment (see pages 10-15 below).

Paragraphs 1-6 of the motion to strike address various affidavits and documents provided in support of the motion for summary judgment on various grounds, including that they do not meet the requirements of Illinois Supreme Court Rule 191(a). Illinois Supreme Court Rule 191(a), which the Board may look to for guidance (see 35 Ill. Adm. Code 101.100(b)), provides that affidavits submitted in support of a motion for summary judgment:

> shall be made on the personal knowledge of the facts; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. Illinois Supreme Court Rule 191(a).

As explained below, the Board denies this portion of the motion to strike except as it relates to the documents attached to the affidavit of Mr. James Henderson (Henderson).

Affidavit of James Henderson

In the motion to strike, Trepanier and Wager claim that Henderson's affidavit fails to meet several of standards set forth in Illinois Supreme Court Rule 191(a). First, "at par. # 6 the affidavit fails to state specific facts to form [the] basis of his conclusion that the demolition dusts [sic] generated by the University demolitions were 'moderate' or 'light' and further does not show competent evidence upon the question of what [were] dust pollution levels off-site generated by respondents' demolitions." Mot. to Strike at 1-2.

In response, respondents note first that Henderson's affidavit states that he visited the demolition site daily and observed the progress of the work, providing him with an adequate foundation for his conclusion that the level of dust was intermittently in the "light to

moderate" range. Mem. Opp. Mot. Strike at 7. Respondents also argue that terms "light to moderate" has a well-recognized meaning.

The Board finds that Henderson did have an adequate foundation for his statement regarding the dust at the site. The Board also will consider his testimony regarding the level of dust at the site, bearing in mind that Henderson was not at the relevant sites at all times during the demolitions. The Board notes that Trepanier himself used the term "heavy" when describing the dust at and emitted from the site; the Board will consider that testimony also.

Trepanier and Wager also move to strike paragraph 8 of Henderson's affidavit "to the extent information is reported for 807 Maxwell, a property not subject to this complaint." Mot. Strike at 2. Respondents argue that the parties 807 Maxwell is the same as 815 Maxwell, and that the property is also known as "Nate's Deli."[1] See Comp. at 6; Mot. for Sum. J. at 4 n.3. The Board agrees and therefore will not strike paragraph 8 of Henderson's affidavit.

Documents Referenced in Affidavit of James Henderson

Second, Trepanier and Wager argue that certain documents that refer to the presence or absence of asbestos at the demolition sites, either referred to in the affidavit of James Henderson or attached as Exhibit C to the motion for summary judgment, should be stricken. Trepanier and Wager argue that these documents are not complete and are not sworn to or certified, as Illinois Supreme Court Rule 191(a) requires. Mot. to Strike at 2, 3. Trepanier and Wager further argue that the records are misleading, fraudulent, and faulty. Trepanier and Wager allege that their Exhibits B, C, and D to the motion to strike show "that the notification required by law for asbestos removal was not actually provided in this case . . . ." Mot. to Strike at 3.

In response, respondents argue that Henderson verified the documents referenced in the affidavit. Mem. Opp. Mot. to Strike at 7. On September 9, 1998, respondents also filed a motion for clarification stating that some of the documents that Henderson referred to in paragraph 8 of his affidavit were attached as Exhibit C to the motion for summary judgment. Respondents also stated that a complete set of the documents that Henderson referred to had previously been filed with the Board on December 5, 1997, as part of the University's response to complainant's request to produce. Respondents request that the Board enter an order stating that the motion for summary judgment shall include the documents that the University previously filed with the Board on December 5, 1997.

Courts have held that the failure to attach documents referred to in a motion for summary judgment is a technical defect that does not necessarily defeat a motion for summary judgment. In Otis Elevator Co. v. American Surety Co., 314 Ill. App. 479, 41 N.E.2d 987 (2d Dist. 1942), the court upheld a grant of summary judgment for plaintiff despite plaintiff's failure to attach copies of documents that plaintiff relied on in a motion for summary

[1] Actually, respondents' memorandum refers to 807 and 815 Halsted instead of Maxwell. Mem. Opp. Mot. Strike at 7-8. The Board believes this was inadvertent error on respondents' part and construes these references as references to Maxwell Street.

judgment. The court noted that the documents had been previously provided or made available to defendant and that it would be "'a supererogation to require plaintiff to attach copies of exhibits already in the files.'" Otis Elevator, 314 Ill. App. at 483, 41 N.E.2d at 989, quoting Roberts v. Sauerman Bros., Inc., 300 Ill. App. 213, 217, 20 N.E.2d 849, 850 (1st Dist. 1939). See also Missouri Pacific Railroad Co. v. American Re-Insurance Company, 286 Ill. App. 2d 129, 138-139, 676 N.E.2d 965, 971 (2d Dist. 1996) (following Otis Elevator). In this case, given that the documents relied upon were previously made available to the Board and complainants, the Board grants the motion for clarification and will not strike the documents on the ground that they were not attached to the motion for summary judgment.

Trepanier and Wager also argue, however, that these documents have not been sworn to or certified, as Illinois Supreme Court Rule 191(a) requires. In Ragen v. Wolfner, 43 Ill. App. 2d 70, 192 N.E.2d 560 (1st Dist. 1963), a plaintiff seeking to overturn a grant of summary judgment made a similar claim. The court held: "It is true that the exhibits were not separately sworn to as true copies of their originals, but the references thereto in the text of the affidavits were such as to render the exhibits verified copies in each instance." Ragen, 43 Ill. App. 2d at 76, 192 N.E.2d at 564. One of the cases that Trepanier relies upon, LaMonte v. City of Belleville, 41 Ill. App. 3d 697, 355 N.E.2d 70 (5th Dist. 1976), applies the same rule. See LaMonte, 41 Ill. App. 3d at 701, 355 N.E.2d at 75. In this case as well, Henderson's references to the documents in his affidavits verifies them.

Trepanier and Wager also argue that the documents are misleading, fraudulent, and faulty, and that they show that the notifications required were not sent for the properties at issue in this case. In support of this claim, Trepanier states as follows in an affidavit attached to the motion to strike:

> The University did not file notice of asbestos removal for any of their demolitions in the Maxwell area, including the properties subject to this complaint, 1261 S. Halsted, 712 Maxwell, or 815 Maxwell. I have learned from extensive research of IEPA asbestos database records and personal communication with Dennis Brown and Joseph E. Svoboda, assistant counsel and general counsel, respectively, both of the Division of Legal Counsel, Illinois E.P.A. there have been no notifications of asbestos removal filed by any person for any property in the Maxwell Street University Expansion area. The failure to file a notification of asbestos removal for this project violated state and federal regulations. In fact, failure to timely file such notification is often basis for IEPA enforcement actions brought before the Board. Mot. Strike, Aff. of Trepanier at 2-3.

The Board will not strike the documents on this ground. First, the statements that complainant attributes to Brown and Svoboda are hearsay and cannot be relied upon to strike the documents, or to raise an issue of fact in this motion for summary judgment. See People v. Carpenter, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963) (hearsay evidence includes written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted, and thus resting for its value upon the credibility of the person who made the assertion out of court); Johnson v. Owen-Corning Fiberglass Corp.,

284 Ill. App. 3d 699, 678, 672 N.E.2d 885, 891 (5th Dist. 1996) (inadmissible hearsay may not be relied upon to defeat motion for summary judgment). Second, Trepanier's assertion that the University did not file notice of asbestos removal also is inadmissible hearsay. Compare Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 936, 387 N.E.2d 1241, 1252 (1st Dist. 1979) (testimony regarding absence of entry in business records admissible only if it is established that documents are business records).

However, Board will strike the documents on the grounds that the documents to which Henderson refers are themselves hearsay. While they may be admissible as business records, his affidavit did not set forth the prerequisites necessary to admit business records into evidence. See 35 Ill. Adm. Code 103; Cole Taylor Bank v. Corrigan, 230 Ill. App. 3d 122, 129, 595 N.E.2d 177, 182 (1st Dist. 1993) (reversing grant of summary judgment based, in part, on documents not admitted into evidence). Accordingly, the Board grants the portion of the motion of the strike that is directed at the documents referenced in paragraph 8 of Henderson's affidavit.

Statements Regarding Standard Demolition Practices

Finally, Trepanier and Wager move to strike the portion of Henderson's affidavit, and of the affidavit of Mr. Larry Kolko (Kolko), that state that Speedway "followed standard demolition practices [or techniques]." Mot. to Strike at 4; Mot. for Sum. J., Exh. A at 2, Exh. B at 2. Trepanier and Wager appear to equate "standard demolition practices" to "national demolition standards." Mot. to Strike at 4. Trepanier and Wager then argue that they have not had a fair opportunity "to traverse this claim of meeting a National Standard, if any such exists . . . ," and further that respondents have not attached these standards as Illinois Supreme Court Rule 191(a) requires.

The Board denies this portion of the motion to strike. The affidavits do not refer to any "national standard." While the affidavits do refer to "standard demolition" practices or techniques, there is no indication that Kolko or Henderson were relying on written standards. The Board further finds that the complainants have had ample opportunity to investigate these claims. For example, in its responses to interrogatories that complainant propounded, the University stated that its contractors used "standard methods for the demolition of the Subject Properties and for the control of dust." See University's December 5, 1997 Response to Petitioner's Interrogatories at 2. Furthermore, in response to complainant's second set of interrogatories, the University described at least one "standard practice," and further described methods that its contractors used to control dust. See University's April 17, 1998 Objections to Petitioner's Second Interrogatories to the University at 2, 11. The Board therefore denies this portion of the motion to strike.

Affidavits Submitted by Trepanier

The Board also will strike, on its own motion, one of statements from an affidavit of Maureen Cole attached to Trepanier's Response to the motion for summary judgment. In her affidavit, Cole states that she believed that exposure to dust from the demolition at 1261 S. Halsted "caused me throat pain for 2-3 weeks, an eye infection, headaches and flu-like symptoms with congestion." Cole Aff. at 2. Under Illinois Supreme Court Rule 191(a), opinions and conclusions may not be included in an affidavit submitted in support of a motion for summary judgment. See Majca v. Beekil, 1998 Ill. Lexis 936, *24 (Oct. 1, 1998) (striking, under Illinois Supreme Court Rule 191(a), portions of an affidavit in which a doctor opined that plaintiff was exposed to HIV, that plaintiff was at risk of contracting HIV, and that plaintiff's fear of contracting AIDS was reasonable). Furthermore, Cole has not been shown to be qualified to offer a medical opinion as to the cause of the illnesses she describes. See Draper and Kramer Incorporated v. Pollution Control Board, 40 Ill. App. 3d 918, 921-922, 353 N.E.2d 106, 109 (1st Dist. 1976) (reversing finding of air pollution based on injury to health when no scientific testimony introduced on causation); Gott v. M'Orr Pork (Feb. 20, 1997), PCB 96-68, slip op. at 13 (finding no unreasonable interference with complainant's health from hog odors when complainants failed to introduce medical testimony or other scientific proof linking their illnesses to odors). The Board therefore strikes this portion of her affidavit.

The Board also will strike, on its own motion, the affidavit of Mr. Daniel Miller (Miller), which Trepanier attached to his Response to the motion for summary judgment. In Miller's affidavit, he states that he photographed many demolitions in the Maxwell Street neighborhood between 1989 and 1998, some of which were performed by respondent Speedway, and then goes on to describe the demolitions and their effects. This affidavit does not specify whether the demolitions Miller refers to were of the buildings that are at issue in this complaint, and therefore does not "set forth with particularity the facts upon which claim . . . is based," as Illinois Supreme Court Rule 191(a) requires. The Board accordingly has stricken this affidavit.

STATEMENT OF FACTS

The following facts are uncontested unless otherwise stated.

The properties at issue in this case are located in Chicago, Illinois, and are known by the following addresses: 712 Maxwell; 727 Maxwell; and 815 Maxwell (also referred to as 807 Maxwell or Nate's Deli); and 1261 Halsted (collectively, the "Subject Properties"). Complaint (Comp.) at 6. The University owns all of the Subject Properties. See Mot. Sum. J., Exh. A (affidavit of James Henderson) at 1 and Exh. B (affidavit of Larry Kolko) at 1.

The University is currently involved in the renewal of the Maxwell Street area. Mot. Sum. J., Exh. A at 1. As a result of the project, aging apartment buildings, mostly over one hundred years old, will be replaced. *Id*. Many of these buildings are riddled with building code violations, in disrepair, and of poor quality. *Id*. The project also will replace some small shops and stores serving the community and a large open air market. *Id*. The project

involves demolishing most, but not all, existing structures in the area and replacing them with new residential construction, light commercial structures, and expansion facilities for the University. *Id*. The University retained contractors, including respondent Speedway, to perform the demolitions. Mot. Sum. J., Exh. A at 2, Exh. B at 1.

Among the buildings demolished were buildings at two of the Subject Properties. The demolition of 815 Maxwell, which Speedway did not perform, began on approximately May 19, 1995, and continued for three days. Mot. Sum. J., Exh. A at 2. The demolition of 1261 Halsted, which Speedway did perform, began on about September 5, 1996, and was completed on October 10, 1996. *Id*. There were no demolitions at 712 Maxwell or 727 Maxwell. Mot. Sum. J., Exh. D (deposition testimony of Trepanier) at 263, 264.

The University's contractors removed all demolition debris as it accumulated. Mot. Sum. J., Exh. A at 2. Speedway hauled demolition spoils away from the sites and disposed of it in a landfill. Mot. Sum. J., Exh. B at 2. No debris or demolition spoils remained on at 1261 S. Halsted after Speedway concluded its demolition. *Id*.

The parties agreed that the demolition at 1261 S. Halsted generated some dust, but the parties contest how much dust that demolition generated. Henderson stated that "while some dust was generated in the process, it was in the light to moderate range." Mot. Sum. J., Exh. A at 2. However, complainant Trepanier submitted affidavits to the contrary. See Resp., Affidavit of Trepanier at 2 ("These clouds of dust [generated by the demolition of 1261 S. Halsted] were very heavy"); Resp., Affidavit of Mr. Merlyn McFarland (McFarland) at 2 (describing dust generated by demolition of 1261 S. Halsted as heavy); Resp., Affidavit of Cole at 1 (stating that she observed "unknown substances leaving the demolition site at 1261 S. Halsted"); Resp., Affidavit of Pandya at 1 (stating that he saw "plumes of dust, greyish and dense in particulate matter, leave the demolition at 1261 S. Halsted").

The complainants did not submit any affidavits on the amount of dust generated at the demolitions at any other site, although McFarland submitted an affidavit stating that dust flew away from the demolition of Nate's Deli (815 Maxwell) into the air. Resp., McFarland Aff. at 1.

The parties also contest the extent to which the University's contractors used any measures to control dust. It is uncontested that the contractors used protective awning or barricades around each property. Mot. Sum. J., Exh. A at 2, Exh. B at 2. However, the parties do not agree on whether the University's contractors used any other techniques to control dust. Henderson, who supervised the University's demolitions, states that he visited the sites daily and observed contractors using standard demolition techniques, including wetting the sites to control dust. Mot. Sum. J., Exh. A at 2. Kolko agreed. Mot. Sum. J., Exh. B at 2.

However, complainant Wager stated that he saw Speedway dumping materials, including barrels, from an east window on the fourth floor at 1261 S. Halsted without a chute or any other containment, and that most of the material appeared to go into the air. Mot. to Strike, Affidavit of Wes Wager at 1. Trepanier also stated that he saw Speedway and the

University dumping wheel barrel loads of dust and demolition debris from a fourth floor window during the demolition of 1261 S. Halsted. Resp., Trepanier Aff. at 1. Trepanier stated that no water was being sprayed at that site. *Id*. Trepanier adds that at the time, there was no water service to the building, and no water hose attached to or entering the building. *Id*. at 2. He also stated that there was no control tubing or chute used to pass the dust and debris from the fourth floor to the ground. *Id*. He stated that "a great portion of the matter dumped from the fourth floor window did not drop to the ground, but moved sideways in the air, and traveled off the property and out to the heavily trafficked Halsted Street business district." *Id*.

Merlyn McFarland submitted an affidavit stating that no water was sprayed on the facade of Nate's Deli during the demolition. Resp., McFarland Aff. at 1. He also stated that he saw "no pollution control or watering or spraying of a hose was occurring" at the demolition of 1261 S. Halsted. Resp., McFarland Aff. at 2.

Maureen Cole stated that she lived within one block of 1261 S. Halsted when it was being demolished in September 1996. Resp., Cole Aff. at 1. When she returned from work each day during September 1996, she was exposed to substances leaving the demolition. Maureen Cole also stated that no hose sprayed on the site of the 1261 S. Halsted demolition. Resp., Cole Aff. at 1. She also stated that she was not warned of the demolition and given an opportunity to avoid dust from the demolition. Resp., Cole Aff. at 2.

The parties also contest whether the dust contained toxic or hazardous materials. Trepanier asserts that the demolitions released asbestos into the air. Resp., Trepanier Aff. at 3. Maureen Cole also asserts that the dust from the demolition of 1261 S. Halsted contained toxic particles. Resp., Cole Aff. at 2. Wager provided an affidavit stating that he observed the interior of 1261 S. Halsted just before the demolition. He stated, "I observed [peeling] paint, that from my experience I believe to have been old leaded paint in this nearly 100 year old structure, and feces deposits of birds I observed living in the top floor." Mot. to Strike, Wager Aff. at 2.

Respondents did not address Wager's claims, but do assert that they arranged for all asbestos to be removed, as required, from buildings demolished in the Maxwell Street area. Mot. Sum. J., Exh. A at 2. Respondent Speedway inspected the buildings at 710 W. Maxwell and 1261 S. Halsted for asbestos and found none. Mot. Sum. J., Exh. B at 1.

Complainants also submitted affidavits regarding the effect of the dust. Trepanier "suffered eye irritation and coughing because of my exposure to the University-Speedway demolition at 1261 S. Halsted." Trepanier Aff. at 2. Trepanier does not identify the dates on which he was exposed to the dust, however, and in his deposition agreed that it like "common dust in your eye." Mot. Sum. J., Exh. D at 253-254. He did not recall rinsing his eyes out afterwards, did not seek attention for his eyes, and suffered no permanent damage from the dust. Mot. Sum. J., Exh. D at 254-255.

McFarland testified that he "observed demolition dust[] blowing away from the demolition of 1261 S. Halsted, Sept. '96, and into M.J. Sports at about 1302 S. Halsted and

damage[d] merchandise in the store." Resp., McFarland Aff. at 1. McFarland does not identify the date(s) on which he observed dust blowing into M.J. Sports, or describe the damage that occurred.

Pandya stated that he works at 714 W. 13th Street, which is separated from 1261 S. Halsted by an alley. Resp., Pandya Aff. at 1. For at least two weeks around September 1996, he observed plumes of dust and particulate matter leave the demolition at 1261 S. Halsted. "When the dust cloud was in my close quarters I felt breathless and uncomfortable." Resp., Pandya Aff. at 2.

Wager stated that on approximately September 10, 1996, he was 30 yards east of and observing the ongoing Speedway demolition at 1261 S. Halsted. When Speedway dumped barrels from the fourth floor, a black cloud came towards him from the demolition. "Immediately, I experienced eye trouble, uncontrolled twitching and pain, and difficulty breathing. I backed [a]way immediately attempting to avoid further exposure. My clothes were stained by the dust contact. My nose became plugged with blackened mucus." Mot. to Strike, Wager Aff. at 1-2.

DISCUSSION

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 party." *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 229, 240, 489 N.E.2d 867, 871 (1986).

Complainants have alleged that respondents have violated Section 9(a) and 21(a) of the Act. The Board considers the Section 9(a) allegations first.

Section 9(a) Claim

Complainants allege that respondents have violated Section 9(a) of the Act. Section 9(a) of the Act provides:

> No person shall:
>
> a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act . . . . 415 ILCS 5/9(a) (1996) (emphasis added).

"Air pollution" is "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with enjoyment of life or property." 415 ILCS 5/3.02 (1996) (emphasis added). A "contaminant" is "any solid, liquid or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.06 (1996). Dust is a contaminant. See, *e.g.*, Marblehead Lime Company, 42 Ill. App. 3d 116, 355 N.E.2d 607 (1st Dist. 1976) (finding air pollution in a case involving limestone dust).

The Illinois Supreme Court explained Section 9(a)'s provisions as follows:

> [T]he legislature has by definition created two categories of "air pollution." The first is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property. The second category is the presence of such contaminants in such amounts, characteristics and duration as to unreasonably interfere with enjoyment of life or property. Incinerator, Inc. v. Pollution Control Board, 59 Ill. 2d 290, 295, 319 N.E.2d 794, 796-97 (1974).

When determining whether either category of air pollution exists, the Board must consider the factors set out in Section 33(c):

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> 2. the social and economic value of the pollution source;
>
> 3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> 4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> 5. any subsequent compliance. 415 ILCS 5/33(c) 1996.

See Sangamo Construction Company v. Pollution Control Board, 27 Ill. App. 3d 949, 953, 328 N.E.2d 571, 575 (4th Dist. 1975) (Board must consider Section 33(c) factors before finding either of the two types of air pollution discussed in Incinerator, Inc.). Complainants need not submit evidence on each factor, or prevail on each factor, to sustain a claim of

unreasonable interference. See, *e.g.*, Processing & Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68, 76, 351 N.E.2d 865, 869 (1976). In this case, the motions for summary judgment have focused primarily on the first factor – the character and degree of the injury allegedly resulting from the demolitions.

With these standards in mind, the Board considers whether there is any genuine issue of material fact on complainants' Section 9(a) claims.

712 Maxwell and 727 Maxwell

Complainants have not presented any evidence on the demolitions at these sites. In responding to a motion for summary judgment, complainants may not rest on their pleadings, but must "present a factual basis which would arguably entitle him to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994). Complainants have not done so.

At his deposition, Trepanier stated that the allegations in the complaint referring to 712 Maxwell were actually referring to 710 Maxwell. Mot. Sum. J., Exh. D at 264. Even if the Board were to construe references to 712 Maxwell as references to 710 Maxwell, however, there is still no evidence in the record that suggests that there was any air pollution at 710 Maxwell. The Board therefore grants respondents summary judgment on complainants' Section 9(a) claims relating to 712 Maxwell and 727 Maxwell.

815 Maxwell Street

The only evidence regarding this site that complainants introduced was the affidavit of Merlyn McFarland, who stated that he photographed the demolition of this site in April 1995. Resp., McFarland Aff. at 1. He further stated that demolition dust flew away from the property into the air, and that no water was being sprayed on the facade of the building during demolition. McFarland does not allege any interference, unreasonable or otherwise, from the dust leaving this site.

The Board finds that complainants have not presented any evidence that creates a genuine issue of material fact on this claim. Before the Board can find air pollution, there must be a showing of some injury to health or property, or some unreasonable interference with the enjoyment of life. The fact that dust may have left the demolition site at 815 Maxwell, standing alone, is not sufficient to suggest that the demolition resulted in air pollution. The Board accordingly grants respondents summary judgment on this claim.

1261 S. Halsted Street

The Board must find that complainants have raised several genuine issues of material fact regarding their Section 9(a) claim on this site. The affidavits that complainant Trepanier submitted raise a factual issue over the extent and nature of the dust that the demolition at this site generated. The affidavits that complainants Trepanier and Wager submitted also state that people suffered difficulty breathing, irritated eyes and throats, and observed property damage because of dust from the demolition of 1261 S. Halsted during the month of September 1996. In other cases, similar evidence supported a finding of air pollution. See, *e.g.*, Marblehead Lime Company, 42 Ill. App. 3d 116, 355 N.E.2d 607 (1st Dist. 1976); Aluminum Coil Anodizing Corporation v. Pollution Control Board, 40 Ill. App. 3d 785, 351 N.E.2d 612 (2d Dist. 1976); Sangamo Construction Company v. Pollution Control Board, 27 Ill. App. 3d 949, 328 N.E.2d 571 (4th Dist. 1975). While more detail on the duration and effects of the dust would be helpful in determining whether the interference was unreasonable, complainants need not prove their case at this stage of the litigation. Instead, complainants must show some evidentiary facts to support elements of a cause of action that arguably would entitle them to judgment. See, *e.g.*, Gauthier, 266 Ill. App. 3d at 219, 639 N.E.2d at 999. The Board finds that complainants have done so.

Similarly, the parties contest whether respondents sprayed water or used other techniques to control dust. This issue is material to the fourth Section 33(c) factor – *i.e.*, the technical practicability and economic reasonableness of reducing the dust emissions. A hearing is therefore necessary to address this issue as well. The Board therefore denies the motion for summary judgment on complainants' Section 9(a) claim regarding 1261 S. Halsted.

Section 21(a) Claim

Respondents also move for summary judgment on complainant's Section 21(a) claim. Section 21(a) provides:

No person shall:

a. Cause or allow the open dumping of waste. 415 ILCS 5/21(a) (1996).

The Act defines "open dumping" as the "consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.24 (1996). "Refuse" means "waste," (415 ILCS 5/3.31 (1996)), and "waste" includes "discarded material, including solid . . . material resulting from industrial, commercial . . . activities, and from community activities . . . ." 415 ILCS 5/3.53 (1996).

Complainants argue that respondents engaged in open dumping when they knocked materials to the ground during the demolition of 1261 S. Halsted. Mot. Sum. J., Exh. D at 209; Mot. to Strike at 5. It is undisputed, however, that the respondents hauled these materials away from the site for disposal. Mot. Sum. J., Exh. A at 2. In such situations, there is no open dumping: "Under the Act, 'open dumping' happens not when refuse is consolidated at the point

of demolition, but when it is consolidated at a disposal site that does not fulfill sanitary landfill requirements." EPA v. Pollution Control Board, 219 Ill. App. 3d 975, 978-979, 579 N.E.2d 1215, 1217 (5th Dist. 1991). Complainants have introduced no evidence that refuse from the demolition of 1261 S. Halsted was so consolidated, and therefore summary judgment is appropriate.

Complainants also appear to contend that respondents engaged in open dumping by allowing dust to escape from the demolition of 1261 S. Halsted onto the surrounding streets. See, *e.g.*, Resp., McFarland Aff. at 2. Allowing dust to escape does not constitute the "consolidation" of refuse, however, and cannot support an open dumping claim.

The Board notes that complainants introduced no evidence of open dumping at any other site. The Board therefore grants respondents' motion for summary judgment on complainants' Section 21(a) claim.

Section 21(b) Claim

As noted earlier, complainants also allege that respondents violated Section 21(b) of the Act. That section provides as follows:

> No person shall: . . .
>
> b. Abandon, dump, or deposit any waste upon the public highways or other public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board. 415 ILCS 5/21(b) (1996).

The motion for summary judgment requests that all Section 21 claims be dismissed, and the affidavits that respondents submitted state that protective barriers and awnings were constructed at demolition sites to prevent dust and demolition debris from falling onto streets and sidewalks. Mot. Sum. J,. Exh. A at 2, Exh. B at 2. Complainant Trepanier, on the other hand, submitted an affidavit stating that dust from the demolition at 1261 S. Halsted did blow onto Halsted Street. Resp., Trepanier Aff. at 2.

Dust is "waste" under the Act. 415 ILCS 5/3.53 (1996). The affidavits that Trepanier submitted raise a material issue of fact as to whether respondents dumped or deposited this waste onto Halsted Street. Accordingly, the Board denies this portion of the motion for summary judgment as it relates to 1261 S. Halsted Street. Complainants submitted no evidence on the other sites at issue, however, and the Board grants the motion for summary judgment on those sites.

CONCLUSION

The Board grants respondents' motion for summary judgment in part and denies it in part, as set forth in this opinion and order. This matter shall proceed to hearing on complainants' Sections 9(a) and 21(b) claims regarding the demolition of 1261 S. Halsted.

ORDER

1. Respondents' motion for summary judgment is granted as to:

    a. Complainants' Section 9(a) claims regarding 712 Maxwell, 727 Maxwell, and 815 Maxwell;

    b. Complainants' Section 21(a) claims regarding 712 Maxwell, 727 Maxwell, 815 Maxwell, and 1261 S. Halsted;

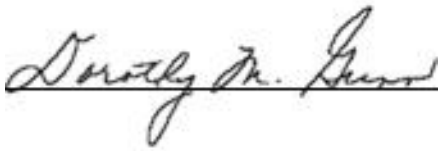
    c. Complainants' Section 21(b) claims regarding 712 Maxwell, 727 Maxwell, and 815 Maxwell.

2. Respondents' motion for summary judgment is denied as to complainants' Section 9(a) and Section 21(b) claims regarding 1261 S. Halsted.

3. This matter shall proceed to hearing on the complainants' Section 9(a) and 21(b) claims regarding 1261 S. Halsted.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of October 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board