ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. STATE OIL COMPANY, WILLIAM ANEST f/d/b/a S & S PETROLEUM PRODUCTS, PETER ANEST f/d/b/a S & S PETROLEUM PRODUCTS, CHARLES ABRAHAM, JOSEPHINE ABRAHAM, and MILSTREAM SERVICES, INC., Respondents.	)	PCB 97-103 (Enforcement - Land, Water)

ORDER OF THE BOARD (by C.A. Manning):

On December 13, 1996, the People of the State of Illinois (complainant) filed an enforcement action against State Oil Company, William Anest, Peter Anest, Charles Abraham, Josephine Abraham, and Milstream Services, Inc. (collectively, respondents) regarding a release of gasoline from an underground storage tank at a service station located in McHenry County, Illinois. In its two-count complaint (Comp.), complainant seeks: (1) a finding that respondents violated water and groundwater standards in violation of Section 12(a) of the Environmental Protection Act (Act) (see 415 ILCS 5/12(a) (1996); Comp. at 1-8); and (2) recovery from the station's current owners of complainant's costs to remediate contamination, and appropriate penalties, as allowed by Section 57.12 of the Act. See 415 ILCS 5/57.12 (1996); Comp. at 8-11.

On March 6, 1997, Charles Abraham, Josephine Abraham, and Milstream Services, Inc. (collectively, Abrahams) filed an answer to the complaint and a cross-claim. In their cross-claim, the Abrahams allege that, based on the prior fraudulent activities committed by the Anests, the Anests should be held liable to the Abrahams for any costs or penalties assessed under count II of complainant's complaint.

On April 18, 1997, William Anest and Peter Anest (Anests), filed a motion to dismiss the cross-claim filed by the Abrahams.[1] The Abrahams filed a response to the motion to dismiss on June 20, 1997. On June 30, 1997, the Anests filed their reply.[2]

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[1] The Anests filed an amended version of their motion to dismiss on May 1, 1997, to correct a typographical error.
[2] For a period of time subsequent to the filing of this pending motion to dismiss, the parties engaged in settlement negotiations and asked the Board to stay any ruling on the motion;

Prior to resolution of their motion to dismiss, on September 14, 1998, the Anests filed a motion for summary judgment. Complainant filed its response on September 30, 1998, along with a motion to strike portions of an affidavit attached to the Anests' summary judgment motion. On October 8, 1998, the Anests filed a motion for leave to reply, a reply, and a motion to strike portions of the affidavit attached to complainants' response.

For reasons set forth below, the Board grants the motion to dismiss the Abrahams' cross-claim, grants both complainant's and the Anests' motions to strike, and denies the Anests' motion for summary judgment. All future pleadings, as well as the caption in this order, shall reflect this change. Accordingly, the Board orders this matter to proceed to hearing on the merits of the underlying complaint.

THE COMPLAINT

On December 5, 1984, State Oil Company (State Oil) called the Illinois Environmental Protection Agency (Agency) to report gasoline seeping into Boone Creek, which runs along the eastern boundary of the service station. Comp. at 3. On that date, Agency workers inspected the area and determined that there was a gasoline leak from one of the underground storage tanks (USTs) at the service station. Comp. at 3. Based on the results of the inspection, State Oil contracted with SET Environmental Services Inc. (SET) to install absorbent booms along the bank of the creek to absorb the gasoline. SET was also hired to install two sump pumps connected by a gravel trench designed to collect the gasoline before it flowed into the creek. Comp. at 3.

Following these incidents, on August 15, 1985, Charles and Josephine Abraham signed a document entitled "Articles of Agreement" to purchase this same service station from William and Peter Anest d/b/a S & S Petroleum Products, who were, at that time, the owners of the property. Comp. at 4. Subsequently, on February 27, 1986, the Agency inspected the service station and observed that gasoline was again visible in the creek. Comp. at 3. As a result, the Agency informed the "manager" of the service station that the sumps needed to be pumped more frequently to prevent the leaking gasoline from reaching the creek. Comp. at 3. A little less than a year later, on January 28, 1987, the chief of the McHenry County Fire Department informed the Agency that gasoline was again seeping into the creek. Comp. at 5. At that time, members of the Agency's Emergency Response Unit inspected the service station and the two sump pumps at the service station. Comp. at 4.

Complainant also alleges that on numerous occasions from 1987 to 1989, the Agency directed Charles Abraham to pump out and dispose of the petroleum in the recovery trenches, deploy booms or absorbent pads to collect petroleum floating on the creek, conduct a site investigation to determine the scope of the contamination at the service station, and submit a long term corrective action plan to address soil, groundwater, and surface water contamination at and around the service station. Comp. at 4. Complainant maintains that the Abrahams did not perform the site investigation or submit a long-term corrective action plan. Comp. at 4.

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however, the parties were unable to reach a settlement and they now request that the Board rule on this motion.

On January 12, 1989, the Agency inspected the service station and again found petroleum seeping into the creek and free product floating in three of the monitoring wells at the site. Comp. at 4. The Agency subsequently notified Charles Abraham of the conditions and again requested that he address the contamination. Comp. at 4. When the Abrahams did not respond to the Agency's request, the Agency retained Heritage Remediation/Engineering, Inc. (Heritage) and Riedel Environmental Services, Inc. (Riedel) to respond to the release. Comp. at 4.

On January 5, 1990, the Agency sent Charles Abraham a Corrective Action Notice and again requested that the Abrahams take over the remedial activities at the site. Comp. at 5. On January 19, 1990, Groundwater Technology, Inc. (GTI) responded to the Agency's request on behalf of the Abrahams. Comp. at 5. GTI proposed to perform the trench inspections and pumping required by the Agency and to conduct a site investigation to identify the extent of the contamination and the hydraulic characteristics of the site. Comp. at 5. The Agency subsequently approved GTI's proposal and requested that Charles Abraham also submit a long-term remediation plan after the site investigation was completed. Comp. at 5. Since the Agency's approval of GTI's plan, however, complainant alleges that the Abrahams have not properly identified the full extent of soil and groundwater contamination, nor have they submitted a long term corrective action plan. Comp. at 5. On August 15, 1994, the Agency sampled the groundwater beneath the service station. The samples contained benzene, toluene, ethylbenzene, and xylene. Comp. at 5.

Based on the preceding occurrences, complainant maintains that State Oil, the Anests and the Abrahams have violated Section 12(a) of the Act (415 ILCS 5/12(a) (1996)) by causing or allowing the discharge of contaminants into Boone Creek and the groundwater beneath the service station. Comp. at 7. Complainant seeks an order finding that respondents violated Section 12(a) of the Act, enjoining respondents from further violations of the Act, requiring respondents to perform remediation, imposing a civil penalty, and assessing costs of the action. Additionally, complainant requests that the Board find Charles Abraham, Josephine Abraham, and Milstream liable for all costs incurred by complainant to perform the investigative, preventive, corrective, and enforcement actions related to the contamination at the site. See 415 ILCS 5/57.12 (1996).

THE ABRAHAMS' CROSS-CLAIM

On March 6, 1997, the Abrahams filed an answer to the complaint and a cross-claim (Cross-Claim) against the Anests. In the cross-claim, the Abrahams report that they filed an action in the Circuit Court for McHenry County on December 10, 1993, (Abraham v. Anest, No. 93 L 0354 (Cir. Ct. McHenry Co.)) alleging breach of contract and fraud against the Anests in connection with the sale of the facility, the condition of the tanks, and gasoline leaks on the property involved in this case. Cross-Claim at 19. Specifically, the cross-claim requests that "[t]o the extent that the Abrahams are found liable in this action, that liability is the result of the fraud committed by the Anests, and the Anests should be found liable to the Abrahams in the same amount and on the same terms as the Abrahams may be found liable." Cross-Claim at 19.

As an exhibit to their cross-claim, the Abrahams attached a copy of the complaint (McHenry Comp.) filed in the McHenry County case. That complaint contained three claims against the Anests for: (1) breach of a warranty contained in the contract to purchase the service station; (2) fraud connected with the sale of the service station; and (3) violation of the Consumer Fraud and Deceptive Practices Act. Pursuant to their claim for fraud, the McHenry County complaint alleges that the Abrahams would "suffer damages in the future, in all likelihood, to comply with further governmental demands for yet further remediation." McHenry Comp. at 9. Accordingly, the Abrahams requested that the court render:

> . . . judgment against [the Anests] in the amount of approximately $140,000.00 or such other sum as is shown by the evidence to be the cost incurred by [the Abrahams] in connection with reasonable efforts to remedy the continuing problem of the gasoline leaking onto the creek in a governmentally acceptable manner, including the legal costs incurred in dealing with governmental entities in this regard, plus, the attorneys fees incurred by [the Abrahams] in this case. McHenry Comp. at 10.

The Abrahams further assert that a jury returned a verdict in favor of the Abrahams which was upheld on appeal to the Illinois Appellate Court, Second District. Cross-Comp. at 19. The cross-claim does not contain any exhibits or information in support of this assertion.

THE ANESTS' MOTION TO DISMISS THE ABRAHAMS' CROSS-CLAIM

The Anests filed a motion to dismiss the cross-claim and a memorandum in support of the motion (collectively, Mot.) on April 18, 1997. In their motion, the Anests contend that *res judicata* bars the Abrahams from maintaining their cross-claim. Mot. at 1. Specifically, they argue that since the Abrahams "recovered once for their injuries which they received from the claimed fraud, they cannot now recover again." Mot. at 2. In the alternative, the Anests maintain that the cross-claim is barred by the five-year statute of limitations for fraud. See 735 ILCS 5/13-205; Mot. at 2.

The Abrahams, in their response (Resp.), assert that the doctrine of *res judicata* does not prevent them from pursuing their cross-claim because the claim raised now is a "different" claim. Resp. at 3. Specifically, the Abrahams contend that *res judicata* does not apply to this case because the jury in the McHenry County case was only "asked to compensate the Abrahams for the money that [they] expended as a consequence of the Anests' wrongful actions" and not for possible future liabilities related to the fraud. Resp. at 4. In addition, the Abrahams contend that it would have been premature for them to request recovery for this claim, because the State had not presented a formal demand for those expenses at the time that the McHenry County suit was filed or at the time that it was tried. Resp. at 4. Further, since the McHenry County suit did not raise the issue of who would undertake a cleanup or who was responsible for the State's expenses, the Abrahams assert that *res judicata* does not bar those issues from being resolved here. Resp. at 5.

In response to the Anests' statute of limitations defense, the Abrahams maintain that the cross-claim is one for "contribution and/or indemnity" that arises from the claims made by

complainant. Resp. at 5. Thus, they contend that the applicable statute of limitations is not the fraud statute, but rather the statute for contribution and indemnity. Resp. at 5-6. Essentially, the Abrahams argue that the statute of limitations did not begin to run against the cross-claim until complainant filed its claim against them. See 735 ILCS 5/13-204(b); Resp. at 5-6.

The Anests reply (Reply) that *res judicata* bars the cross-claim because it is not "new or different," as the Abrahams contend, but rather is "the very injury [that] . . . was specifically included in the prior suit." Reply at 1-2. In support of their position, the Anests cite to paragraph 32 of count I and paragraph 31 of count II of the McHenry County complaint where the Abrahams specifically recognize future liability to the State. Thus, the Anests maintain that the Abrahams have already been compensated for the injury when they prevailed on their fraud claim in the McHenry County suit.

THE ANESTS' MOTION FOR SUMMARY JUDGMENT

In their most recent filing, the Anests ask the Board to grant summary judgment in their favor on count I of the underlying complaint. The Anests attach a statement of facts (Facts), the affidavits of Richard Barnes (Aff. R.B.) and Bill Anest, a memorandum of law in support of summary judgment (SJ Memo), and a copy of the service station purchase agreement, entitled "Articles of Agreement" (Articles). In their memorandum, the Anests contend that they can only be found liable if they "had the capability of control over the pollution or [they were] . . . in control of the premises where the pollution occurred." SJ Memo at 2. They maintain that they were not in control of the premises in question after August 15, 1985, and thus cannot be liable for pollution occurring after that date. SJ Memo at 2. The Anests further assert that any pollution occurring prior to August 15, 1985, was properly addressed at that time, as evidenced by Richard Barnes' affidavit. SJ Memo at 4. Thus, they contend that the imposition of civil penalties is unwarranted. SJ Memo at 4.

Complainant's response (SJ Resp.) counters that the Anests' admission of releases in 1984, coupled with Richard Barnes' statement that he reported seepage into Boone Creek at that time, establishes that the Anests are liable on count I. SJ Resp. at 2. Thus, complainant claims that "there is no genuine issue of material fact regarding the issue of liability and if summary judgment is proper for any party, it should be for the Complainant." SJ Resp. at 2. Additionally, complainant contends that imposition of civil penalties against the Anests is appropriate in this case. SJ Resp. at 3. In particular, complainant maintains that Park Crematory v. Illinois Pollution Control Board, 264 Ill. App. 3d 498, 637 N.E.2d 520 (1994), cited by the Anests, is not applicable in the present case because in that case there was no actual environmental pollution and the owner corrected the violations before contacting the Agency. SJ Resp. at 3-4. Rather, complainant contends that in this case the Anests did cause environmental pollution through the release of gasoline into Boone Creek and did not adequately remediate the contamination despite that fact that they did take some action.

Complainant also challenges Richard Barnes' affidavit regarding its assessment of the manner in which the Anests dealt with the initial release. To bolster this challenge, complainant cites to the affidavit attached to their response prepared by Jay Hamilton, an

employee of the Agency. SJ Resp. at 6. Specifically, complainant maintains that since Barnes' and Hamilton's accounts differ on what actions were taken in 1984 following the initial release, there is a genuine issue of material fact which needs to be resolved at hearing. SJ Resp. at 6. In a separate pleading, complainant also asks the Board to strike a paragraph of Richard Barnes' affidavit because: 1) no foundation is laid for the statement contained in paragraph six; 2) the statement is hearsay; and 3) the Anests' failure to produce the test results referred to in the affidavit prevented complainant from independently reviewing the procedures, methods, and conclusions of the testing.

In their reply, the Anests reiterate the arguments made in their memorandum. Additionally, they admit that paragraph six of Richard Barnes' affidavit is hearsay, but contend that the Board should grant summary judgment in their favor nonetheless. The Anests have also filed a motion in which they ask the Board to strike paragraphs five, six, seven, and eight of Jay Hamilton's affidavit. Specifically, the Anests contend that these paragraphs constitute hearsay. Additionally, they maintain that paragraphs five, six, seven, and eight also violate the best evidence rule.

DISCUSSION

Motion to Dismiss

As outlined above, the Anests ask the Board to dismiss the Abrahams' cross-claim on two bases: 1) that the doctrine of *res judicata* bars the Abrahams' cross-claim; and 2) alternatively, that the statute of limitations for the Anests' cross-claim has run. The Board has closely examined the Abrahams' cross-claim and the Anests' motion to dismiss. Based on our review, the Board finds that the Abrahams' cross-claim fails to allege a violation of the Act which is required in order for the Board to have jurisdiction over the claim. 415 ILCS 5/5(d) (1996). As drafted, the cross-claim requests that the Anests be found liable to the Abrahams based on fraud, a claim which does not fall within the purview of the Act. *Id.* Thus, the Board must dismiss the Abrahams' cross-claim for lack of jurisdiction. Accordingly, the Board need not resolve the *res judicata* or statute of limitations issues because the cross-claim, as plead, is insufficient. The Board notes that nothing prohibits the Abrahams from filing an amended cross-complaint alleging violation(s) of the Act.

Motion for Summary Judgment

Procedural Issues

Before reaching the merits of the Anests' motion for summary judgment, we must resolve two separate motions to strike: one filed by complainant; and one filed by the Anests.

Complainant's Motion to Strike. As previously noted, complainant's motion asks the Board to strike paragraph six of Richard Barnes' affidavit. Paragraph six states that: "on or about December 6, 1984, the underground storage tanks at the site were pressure tested by IT, and those tests revealed no leaks." Aff. R.B. at 1. Complainant requests that this paragraph be stricken on the grounds that: 1) no foundation for the statement contained in paragraph six

is laid; 2) the statement is hearsay; and 3) the Anests' failure to produce the test results referred to in the affidavit prevented complainant from independently reviewing the procedures, methods, and conclusions of the testing.

Under Illinois law, hearsay is defined as "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." Tomaszewski v. Godbole, 174 Ill. App. 3d 629, 636, 529 N.E.2d 260 (3d Dist. 1988). Based on this definition, the Board finds that paragraph six is inadmissible hearsay. Thus, that portion of Richard Barnes' affidavit will be stricken.

The Anests' Motion to Strike. The Anests' motion to strike requests that the Board strike paragraphs five, six, seven, and eight of Jay Hamilton's affidavit (Aff. J.H.). Those portions of the affidavit read as follows:

5. That records in the Milstream Union 76 file document that on December 5, 1984, Richard Barnes, on behalf of State Oil Company, reported that gasoline was released from the Milstream Union 76 site into Boone Creek, and that additional records also document that release from the Milstream Union 76 site into Boone creek continued at least until October 1990.

6. That interceptor trenches and sumps installed at the site were inadequate to contain and intercept gasoline in the soils at the site and to prevent the gasoline from traveling to and discharging into Boone Creek, necessitating the periodic use of booms and absorbent diapers to intercept the gasoline release into Boone creek from approximately December 1984 through at least October 1990.

7. That the extent of contamination at the site from the 1984 release and any subsequent releases have never been fully delineated.

8. That the records in the Milstream file do not show that activities at the site have adequately remediated the contamination at the site. Aff. J.H. at 2.

The Anests argue that these paragraphs should be stricken because they constitute hearsay statements. Additionally, they contend that since these paragraphs are based on Hamilton's review of the Agency file, complainant's failure to produce the file violates the best evidence rule. In response, complainant contends that paragraphs five, six, seven, and eight are based on Hamilton's personal knowledge of the case which he gained during his two years as the project manager on the case. Complainant also maintains that the best evidence rule does not apply in this case.

The Board agrees with complainant that the best evidence rule does not require it to strike paragraphs five, six, seven, and eight, because the rule is inapplicable to the present

situation. Specifically, "the best evidence rule does not apply where a party seeks to prove a fact which has an existence independent of any writing, even thought the fact might have been reduced to, or is evidenced by, a writing." Jones v. Consolidation Coal Co., 174 Ill. App. 3d 38, 42, 528 N.E.2d 33 (5th Dist. 1998). However, the Board does find that those paragraphs constitute the type of hearsay which does not fall within any recognized exception under Illinois law. Although the Board's procedural rules allow for a relaxed standard in admitting evidence at hearing (see 35 Ill. Adm. Code 103.204(a)), Hamilton's affidavit, as presently written, does not satisfy that threshold. Those portions of the affidavit which the Anests seek to have stricken merely summarize what is contained within the Agency files and are not based on Hamilton's personal knowledge of events. While the records themselves may be admissible under an exception to the hearsay rule, Hamilton's recapitulation of the Agency file is not. See Northern Illinois Gas Co. v. Vincent DiVito Construction, 214 Ill. App. 3d 203, 215, 573 N.E.2d 243 (2d Dist. 1991). Therefore, the Board grants the motion to strike paragraphs five, six, seven, and eight of Hamilton's affidavit and does not consider them in ruling on the motion for summary judgment.

Substantive Analysis

Summary judgment is considered a "drastic means of disposing of litigation." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998), *citing* Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867 (1986). As such, in determining whether to grant a motion for summary judgment, the Board is confined to review of the pleadings affidavits, depositions, admissions, and exhibits on file and may only grant the motion if the record, when viewed in the light most favorable to the non-moving party, reveals no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Zekman v. Direct American Marketers, Inc., 182 Ill. 2d 325, 333, 662 N.E.2d 397 (1996). Only where the moving party's right to relief "is clear and free from doubt" can the Board award summary judgment. Dowd & Dowd, Ltd., 181 Ill. 2d at 483.

The Anests ask the Board to grant summary judgment in their favor on count I, thereby relieving them of any liability in the present case. Based on our review of the facts before us, the Board finds that summary judgment is not appropriate at this time. The facts presented in the underlying complaint, as well as the various other filed pleadings, do not resolve all questions regarding the extent or nature of the Anests' liability for the alleged violations in this case.

In particular, it remains unclear as to the true nature of the Anests' legal interests in the property in question. In their pleadings, the parties refer to the execution of the purchase agreement on August 15, 1985, as the dispositive date in determining ownership of the property in question. However, it appears that the parties have overlooked the fact that the Articles of Agreement document, executed by the Anests and the Abrahams, was an installment contract which did not automatically give the Abrahams legal title to the property. Rather, the contract provides that: "No right, title or interest, legal or equitable, in the premises, or any part thereof, shall vest in Purchaser until the delivery of the deed aforesaid by Sellers, or until the full payment of the purchase price at the times and in the manner herein provided." Articles at 3. The record is silent as to whether the Abrahams ever received a

deed to the property and if so, when the delivery occurred.[3] Under the terms of the contract, the Abrahams were not obligated to make their last payment on the property until July 1, 1990. Thus, it is unclear as to how and at what point the Abrahams obtained legal title to the property in question. Accordingly, a genuine question of material fact exists regarding the property's ownership at various times.

Nevertheless, even if the Anests' legal interests in the property ceased on August 15, 1985, the Board still finds an award of summary judgment unwarranted in this case. Specifically, both parties contest the effect and scope of the initial gasoline release in 1984. The Anests maintain that the 1984 release was entirely remediated before the sale of the property and thus, had no connection with later releases. Complainant, on the other hand, contends that the Anests' actions in 1984 were entirely inadequate because they only nominally addressed the contamination of Boone Creek and completely failed to address soil contamination concerns.

Viewing these facts in the light most favorable to complainant, it is clear that a genuine issue of material fact exists as to the Anests' liability on count I. Neither side has presented the Board with dispositive evidence of whether the 1984 release was related to the releases that followed. Thus, a genuine issue of fact exists as to the source of the alleged contamination. Accordingly, the Board denies the Anests' motion for summary judgment on count I and orders the case to proceed to hearing on the merits.

Because the Board finds that the Anests' liability must be resolved at hearing, it is premature for the Board to discuss whether and to what extent civil penalties are or are not appropriate. Thus, we refrain from discussing the parties' arguments on those points.

CONCLUSION

In summary, the Board grants the Anests' motion to dismiss the Abrahams' cross-claim. The Board also denies the Anests' motion for summary judgment and, in doing so, grants both complainant's and the Anests' motions to strike. Accordingly, the Board orders this matter to proceed to hearing on the merits of the underlying complaint.

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 19th day of November 1998 by a vote of 7-0.

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[3] The complaint does include a reference to a document, dated September 5, 1986, which purports to give the Abrahams "an interest" in the property, but no additional information on that document has been filed with the Board.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board