

ILLINOIS POLLUTION CONTROL BOARD

May 2, 2002

DONALD MCCARRELL and ANN )  
MCCARRELL, )  
 )  
Complainants, )  
 )  
v. ) PCB 98-55  
 ) (Citizens Enforcement - Land)  
AIR DISTRIBUTION ASSOCIATES, INC., )  
 )  
Respondent. )

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

On October 16, 1997, Donald and Ann McCarrell (McCarrells) filed a complaint against Air Distribution Associates, Inc. (ADAI). The McCarrells allege that ADAI violated Section 21(a) of the Environmental Protection Act (Act) (415 ILCS 5/21(a) (2000)) by causing or allowing the open dumping of waste at a Wood Dale, DuPage County property, thereby contaminating the property's soil. As a remedy for the alleged violation, the McCarrells seek to recover \$37,261.81 that they purportedly spent to clean up the soil contamination.

This case is before the Board today on a motion for summary judgment filed by the McCarrells on March 20, 2002. ADAI did not respond to the motion for summary judgment. For the following reasons, the Board denies the McCarrells' motion. Before explaining its ruling on the McCarrells' motion for summary judgment, the Board provides background on this case.

**BACKGROUND**

In their motion for summary judgment,<sup>1</sup> the McCarrells assert that there are no contested issues of material fact in this case. Mot. Summ. J at 3. They argue that the Board should find as a matter of law that ADAI violated Section 21(a) of the Act (415 ILCS 5/21(a) (2000)) and require ADAI to reimburse the McCarrells for \$37,261.81 in alleged cleanup costs. *Id.* at 2-3. The McCarrells' motion for summary judgment includes the affidavits of Donald McCarrell and William W. Frerichs (Frerichs), the latter of whom is described as a "Registered Environmental Property Assessor" and a principal with The Green Environmental Group Ltd. (Green).<sup>2</sup> Frerichs Aff. at 1. The Board summarizes the affidavits below by way of background.

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<sup>1</sup> The McCarrells' motion for summary judgment is cited as "Mot. Summ. J at \_."

<sup>2</sup> Donald McCarrell's affidavit is cited as "McCarrell Aff. at \_;" Frerichs' affidavit is cited as "Frerichs Aff. at \_."

According to David McCarrell's affidavit, the McCarrells purchased a property located at 935 Lively Boulevard, Wood Dale, DuPage County from ADAI on July 15, 1993. McCarrell Aff. at 1. The McCarrells established a bindery business at the property in September 1993, which ceased operating in September 1995. *Id.* at 2. In the fall of 1995, the McCarrells hired Green to perform an environmental assessment of the property. David McCarrell's affidavit states that Green discovered "contaminants, including trichloroethane, in excess of legal limits." *Id.* at 1. According to David McCarrell, "[i]ndustrial degreasers such as trichloroethane are not typically used in the bindery business." *Id.* at 2. David McCarrell's affidavit provides that he and Ann McCarrell spent \$37,261.81 to remove the contaminants. *Id.* at 1-2. Attached to the affidavit are copies of invoices "for the costs and expenses of the cleanup." *Id.* at 1. The McCarrells sold the property shortly after the cleanup. *Id.*

According to Frerichs' affidavit, ADAI hired Green to perform a Phase I environmental assessment of the Wood Dale property in 1993, and Frerichs was in charge of that project. Frerichs Aff. at 1. During the 1993 assessment, Frerichs observed ADAI "storing 55-gallon drums at the northeast corner of the [Wood Dale] Property in the same location that was found in late 1995 to be contaminated with trichloroethane." *Id.* at 3. According to Frerichs, during Green's work for the McCarrells in 1995, Green discovered contaminants at the property "which exceeded the standards then applicable." Frerichs Aff. at 2. Green in turn excavated 220 cubic yards of soil in December 1995 and January 1996, concluding that the "floors and walls of the excavated area are clean according to Illinois Soil Remediation Criteria." *Id.* at 3.

Frerichs' affidavit states that "trichloroethane is used in industry as a solvent to degrease equipment prior to painting, and . . . paint solvents and degreasers (such as trichloroethane) were used by [ADAI] in preparing large commercial air conditioner units for repainting . . . ." Frerichs Aff. at 5. According to Frerichs, the 1995-1996 excavations revealed that the highest concentrations of trichloroethane in the soil were close to the location of ADAI's paint booth at the northeast corner of the building. *Id.* at 4. Frerichs concludes that "based on the depth below grade, the pattern, and the concentrations, of trichloroethane and the other contaminants . . . , the trichloroethane and the other contaminants could not have been introduced into the soil in the time period between July 15, 1993 and December 20, 1995, and had been present in the soil at [the Wood Dale property] before July 1993." *Id.* at 5.

Though it did not respond to the McCarrells' motion for summary judgment, ADAI, on October 30, 1997, filed an answer to the McCarrells' complaint.<sup>3</sup> ADAI states that it has no knowledge of any alleged soil contamination or cleanup at the property or any alleged cleanup expenses incurred by the McCarrells. Ans. at 1-2. In its answer, ADAI "denies that the alleged pollution occurred prior to July 15, 1993, when [ADAI] owned the subject property and conducted its business." *Id.* at 1. ADAI further "denies that the alleged soil

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<sup>3</sup> The answer is cited as "Ans. at \_."

contamination occurred as the result of solvents and chemicals being dumped by [ADAI's] employees." *Id.* at 1-2.

### DISCUSSION

The McCarrells ask the Board to grant them summary judgment, finding that ADAI violated Section 21(a) of the Act (415 ILCS 5/21(a) (2000)) and requiring ADAI to reimburse the McCarrells for alleged cleanup costs. Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that 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); *see also* 35 Ill. Adm. Code 101.516(b). When 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." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless 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).

The Board therefore must review all filings in this record, and consider them strictly against the McCarrells. The provision of the Act allegedly violated, Section 21(a), provides that "[n]o person shall . . . [c]ause or allow the open dumping of any waste." 415 ILCS 5/21(a) (2000). Though ADAI did not respond to the McCarrells' motion for summary judgment, ADAI's answer to the complaint specifically denies that the alleged soil contamination (1) occurred when ADAI owned the Wood Dale property or (2) resulted from any dumping of solvents or chemicals by ADAI's employees. Ans. at 1-2. Accordingly, the Board finds that there are genuine issues of material fact that preclude summary judgment. The Board therefore denies the McCarrells' motion.

### HEARING

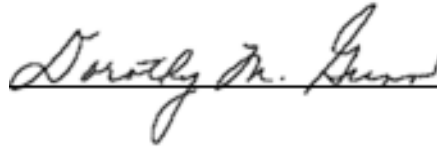
ADAI has not participated in this enforcement case since its attorney withdrew on February 3, 2000. John Kinney (Kinney), the sole shareholder of ADAI, is not an attorney and therefore cannot represent ADAI in this case. *See* 35 Ill. Adm. Code 101.400(a)(2). Kinney has been advised in four hearing officer orders that ADAI must be represented by a licensed attorney. *See* hearing officer orders of Feb. 16, 2000, June 20, 2001, Nov. 5, 2001, Mar. 28, 2002.

The Board directs the hearing officer to expeditiously schedule a hearing in this case. At hearing, ADAI must be represented by an attorney. If it is not, ADAI will default. *See* 35

Ill. Adm. Code 101.608(a). If ADAI defaults, the Board could order ADAI to pay \$37,261.81 to the McCarrells, with ADAI having foregone its opportunity to introduce any evidence in its favor or cross-examine any witness of the McCarrells. Even if ADAI defaults, the McCarrells must nevertheless prove their *prima facie* case to prevail on the merits. *See* 35 Ill. Adm. Code 101.608(b). The McCarrells' requested remedy, including its economic reasonableness, may be addressed through evidence at hearing and in briefing after hearing. *See* 415 ILCS 5/33(c) (2000).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 2, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board