

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUL 22 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

-vs-

PATTISON ASSOCIATES LLC, an
Illinois limited liability company,
and 5701 SOUTH CALUMET LLC, an
Illinois limited liability company,

Respondents.

No. 05-181

(Enforcement - Air)

To: Mr. Neal Weinfield
Bell Boyd & Lloyd
70 West Madison
Suite 2900
Chicago, Il. 60602

Mr. Bradley P. Halloran
Hearing Officer
100 W. Randolph, Room 11-500
Chicago, Il. 60601

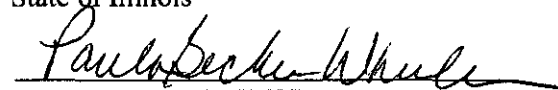
NOTICE OF FILING

PLEASE TAKE NOTICE that we have today, July 22, 2005, filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies of our Response to Respondents' Motion to Dismiss Counts I-V of the Complaint, a copy of which is attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the
State of Illinois

BY:


PAULA BECKER WHEELER
Assistant Attorney General
Environmental Bureau
188 W. Randolph St., 20th Flr.
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(312) 814-1511

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COMPLAINANT'S RESPONSE TO MOTION TO DISMISS

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the Motion of Respondent Pattison Associates LLC and Respondent 5701 South Calumet LLC (collectively "Respondents"), to Dismiss Counts I through V of the Complaint, said counts being all inclusive of the Complaint.

INTRODUCTION

1. On April 4, 2005, Complainant filed a five-count Complaint against Respondents. The Complaint alleged air pollution, failure to thoroughly inspect prior to renovation, failure to submit notification, failure to follow proper emission control procedures, and failure to follow proper disposal procedures, including violations of the Illinois Environmental Protection Act, 415 ILCS 5/ *et seq.* (2002) ("Act") and the Illinois Pollution Control Board's Air Pollution Regulations, as found in Title 35, Subtitle B, Chapter I of the Illinois Administrative Code. All of the counts in the Complaint were in response to the removal of asbestos at an uninhabited apartment building located at 5701 South Calumet Avenue in Chicago, Illinois being renovated.

by the Respondents. Said building is owned by Respondent 5701 South Calumet LLC, and the renovation work was being performed by Respondent Pattison Associates.

2. On June 24, 2005, Respondents filed their Motion to Dismiss this cause pursuant to Section 2-615 of the Code of Civil Procedure. Respondents' Motion to Dismiss is premised upon the Complainant's alleged failure to state a claim.

LEGAL STANDARD

3. "In ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences that can be drawn therefrom."

Bryson v. News America Publications, 174 Ill.2d 77, 86, 672 N.E.2d 1207, 1213 (1996). In Bryson, the Court further stated that a court should not dismiss an action unless it appears that no set of facts could be proved which would entitle the plaintiff to recover. Bryson, 174 Ill. 2d at 86-87, 672 N.E.2d 1207. See also Doe ex rel. Ortega-Piron v. Chicago Board of Education, 213 Ill.2d 19, 23-24, 820 N.E.2d 418 (2004), and Jenkins v. Concorde Acceptance Corp., 345 Ill. App.3d 669, 674, 802 N.E.2d 1270(1st Dist. 2003).

4. "In determining whether a complaint states facts or conclusions, the complaint must be considered as a whole and not in its disconnected parts". Courtney v. Board of Education of the City of Chicago, 6 Ill. App.3d 424, 286 N.E.2d 25, 26 (1st Dist. 1972) quoting Stenwall v. Bergstrom, 398 Ill. 377, 75 N.E.2d 864 (1947). Respondents state in their Motion that a pleading must be factually and legally sufficient. Motion to Dismiss, ¶ 1. But, in spite of the requirement that the complaint must contain allegations of fact bringing the case within the stated cause of action, "the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts." City

of Chicago v. Beretta U.S.A. Corporation, 213 Ill.2d 351, 821 N.E. 2d 1099, 1113 (2004), quoting *Chandler v. Illinois Central R.R. Co.*, 207 Ill.2d, 331, 338, 798 N.E.2d 724 (2003).

ARGUMENT

Count I

5. Respondents claim that the Complainant has not pled that the Respondents caused air pollution. Motion to Dismiss, ¶ 3. This is a misstatement. The Complaint defines air pollution in accordance with the Illinois Environmental Protection Act, Section 3.02, 415 ILCS 5/3.02 (2002), as follows:

"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, or to unreasonably interfere with the enjoyment of life or property.

Complaint, Count I, ¶ 18.

Pursuant to the Act, the Complainant must prove at hearing that the Respondents caused or *threatened to cause* the discharge of asbestos into the environment so as to cause or *tend to cause* air pollution, 415 ILCS 5/9(a) (2002) and 35 Ill. Adm. Code 201.141 (2002) (emphasis added). Complainant alleges the improper containment of asbestos as causing or threatening the discharge of the friable asbestos into the atmosphere. Complaint, Count I, ¶ 13. Complainant further identifies the asbestos continuing in this friable state and exposed to the elements as threatening the discharge of asbestos into the atmosphere, causing or allowing air pollution. Complaint, Count I, ¶ 26. The Complaint further alleges that asbestos is a known human carcinogen, Complaint, Count I, ¶ 15. Apparently, the Respondents are denying these

allegations, but improperly so in their Motion to Dismiss, instead of through the proper pleading of an Answer.

6. One of the few decisions that addresses the issue of pleading, as opposed to proving, a violation of Section 9(a) of the Act, confirms the sufficiency of Count I. In Ralston Purina Company v. Pollution Control Board, the complainant alleged that the company "operated its plant since the specified date so as to cause, threaten, or allow the discharge or emission of fly ash and other contaminants into the environment so as to cause, or tend to cause, air pollution", and that the company "created such intense odors in the operation of its plant so as to cause, threaten, or allow air pollution." In response to the company's argument that the allegations of the complaint were not sufficiently specific, the Court concluded that the company "clearly . . . was put upon specific notice as to its alleged violation." 27 Ill.App.3d 53, 325 N.E.2d 727, 729 (4th Dist. 1975). In the instant case, the Respondents have also clearly been put on specific notice as to the alleged violations, including the nature of the contaminant (asbestos), the time frame and the location. It appears that Respondents are, in actuality, contesting the facts as pled, not the legal sufficiency of the complaint.

Count II-IV

7. Respondents claim that the Complainant has not presented evidence that Respondents have "stripped, removed, dislodged, cut, drilled, or similarly disturbed asbestos..." certain quantities of asbestos containing material. Motion to Dismiss, ¶ 6.

8. As owners/operators of the building undergoing demolition and reconstruction, the Respondents are liable for the exposed asbestos in the building. The building contained asbestos material which had been stripped from the pipes, with some of it still remaining, and the

Respondents were performing renovation activities at the time of the inspection. Complaint, Count I, ¶ 6-12, Count II, ¶ 25-28. In *Yuretich v. Sole*, the Court held that where facts of necessity are within the defendant's knowledge and not within plaintiff's knowledge, a complaint which is as complete as the nature of the case allows is sufficient. 259 Ill. App.3d 311, 631 N.E.2d 767, 769-770 (4th Dist. 1994). In the instant case, the Complainant has alleged facts within its knowledge or that can be inferred from the circumstances. Some facts, such as the parameters of Respondents renovations, are solely within the Respondents knowledge at this time. The Complaint before the Board is as complete as the nature of the case allows.

9. Respondents are contending that they are not responsible for the removal of any of the asbestos, which is a dispute of material fact. A motion to dismiss is not the proper pleading for a judgment on the resolution of this factual issue. See *Vine Street Clinic vs. HealthLink, Inc.*, 353 Ill.App.3d 929, 932, 819 N.E.2d 363 (4th Dist. 2004).

Count V

10. Respondent alleges that Complainant does not show that Respondents are the owner/operators that are responsible for the demolition and renovation of an asbestos containing building. Motion to Dismiss, ¶ 7. In fact, the complaint does allege that Respondents are the owners/operators of the property and that demolition and renovation are taking place or have taken place at the property. Complaint, Count I, ¶ 4-5, 11, 24-25. This issue is, once again, a factual dispute and has no place in a Motion to Dismiss based on Section 2-615 of the Illinois Code of Civil Procedure.

CONCLUSION

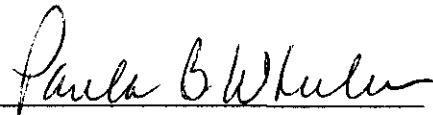
Complainant has affirmatively shown that Counts I through V are legally sufficient and state claims pursuant to the Act and related regulations. The Complaint has clearly set out the

ultimate facts to be proved and the Respondents' are specifically informed as to what the violations are against them. Respondents' Motion to Dismiss Counts I through V pursuant to Section 2-615 should be denied, and Respondents should be ordered to file an answer addressing the substance of the allegations in the Complaint.

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY: 
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(312) 814-1511

CERTIFICATE OF SERVICE

I, PAULA BECKER WHEELER, an Assistant Attorney General in the case of People v. Pattison Associates et al., PCB 05-181, do certify that I caused to be served this 22nd day of July, 2005, the foregoing Response to Respondents' Motion to Dismiss Counts I-V of the Complaint upon the persons listed on said Notice by depositing same in an envelope, by first class postage prepaid, with the United States Postal Service at 188 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.


PAULA BECKER WHEELER

July 22, 2005