

ILLINOIS POLLUTION CONTROL BOARD

August 8, 2002

PEOPLE OF THE STATE OF ILLINOIS)
)
 Complainant,)
)
 v.) PCB 00-111
) (Enforcement – Air)
 R. FRIETSCH & COMPANY, INC., a)
 Delaware corporation,)
)
 Respondent.)

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

On December 30, 1999, the People of the State of Illinois, by and through its attorney, James E. Ryan, (People) filed an eight-count complaint against R. Frietsch & Company, Inc., (respondent). The complaint alleges that respondent violated specified air pollution provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)). The complaint alleges that the violations occurred relating to demolition of various facilities located in Tazewell and Peoria Counties, Illinois. This order denies the parties' cross-motions for summary judgment and sets the matter for hearing.

PROCEDURAL HISTORY

The complaint alleges that the respondent failed to comply with the National Emission Standards for Hazardous Air Pollutants regulations (NESHAP) for asbestos at eight locations in Tazewell and Peoria Counties. More specifically, the complaint charges that respondent failed to timely provide NESHAP notices to the Illinois Environmental Protection Agency (Agency) concerning demolition activities. On March 21, 2002, the complainant filed a motion for summary judgment. C. Mot. SJ. On May 8, 2002, the respondent filed a response to the complainant's motion for summary judgment and respondent's counter motion for summary judgment. R Res. SJ and R. Mot. SJ. On May 28, 2002, the complainant filed a motion to strike the affidavit of John Schmidt which was attached to the respondent's response to the complainant's motion for summary judgment and respondent's counter motion for summary judgment. C. Mot. to Strike. On June 4, 2002, the respondent filed a response to complainant's motion to strike. (R. Resp. Mot. to Strike).

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 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 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, 2666 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist.1994).

THE MOTIONS

The People argue that there is no genuine issue of material fact with regards to counts I-IV and VI-VIII of the complaint. C. Mot. SJ at 3. More specifically, the People assert that respondent admitted all material facts, which support the allegations of counts I-IV and VI-VIII of the complaint. The People argue that respondent admitted the notification forms were clearly insufficient. The insufficiency, the People argue, is evident from the review of the forms, which in some areas show the lack of complete information that respondent provided, and in various items on each notification the required information is not provided at all. C. Mot. SJ at 4. The People assert that in counts I-IV and VI-VIII, the respondent in its admission of facts, admitted that it faxed the notification for its facilities instead of hand delivering or mailing it. The People also assert that the respondent also admitted its representative filled out this notification, signed the notification, faxed the notification to the Agency, did not mail the notification to the Agency, did not hand deliver the notification to the Agency, and did not have a commercial delivery service deliver the notification to the Agency. C. Mot. SJ at 4. In addition, the People filed a motion to strike the affidavit of John Schmidt.

The respondent sets forth a number of arguments in response to the motion for summary judgment and in support of its own summary judgment request. First, the respondent asserts that the Agency acknowledged receiving the notifications. R. Res. SJ and R. Mot. SJ at 1. Respondent’s second argument is that it has been in constant communication with Ms. Funk and other representatives of the Agency regarding the information, which was required by the Agency on the notification forms. Respondent asserts that it was instructed by Ms. Funk as early as 1994 what sections of the forms needed to be completed and what sections did not. Respondent believes it complied with the Agency instructions, and at no time did any employee at the Agency indicate to the respondent that the forms were either insufficient or that additional information needed to be provided on the notification forms. R. Res. SJ and R. Mot. SJ at 2-3. Respondent also argues that the Agency usually allows three opportunities to properly submit NESHAP notifications, but denied respondent these opportunities. R. Res. SJ and R. Mot. SJ at 3.

The last argument is that the NESHAP notifications were not necessary for three of the properties identified in the complaint, which were residential. Respondent asserts that the *12715 Farmington Road* facility (count II) and the *Bolt Street* facility (count III) are, in fact, the same property. There were two separate notifications because the second notification was intended to amend the first one. This property, together with the *Cul De Sac* property (count V) were at all times residential properties and were intended always to be used as residential properties. The respondent asserts that the Act does not require NESHAP notification for properties that are residential and intended only for residential use after demolition. R. Res. SJ and R. Mot. SJ at 3-4.

DISCUSSION

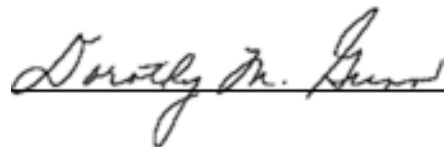
As discussed above, summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). The Board finds that in this case summary judgment is not appropriate. There exist genuine issues of material fact which require that the case proceed to hearing. For example, some of the factual issues in dispute include: whether Ms. Funk of the Agency represented that faxed notifications are permissible, whether Ms. Funk represented to the respondent that its previous notifications were complete, the capacity in which John Schmidt provided services to the respondent, and the effect of missing data on the notification forms. Clearly the factual issues in this proceeding can be better developed at hearing where examination and cross-examination of the witnesses can occur. It is also unnecessary to decide on the complainant's motion to strike the affidavit.

CONCLUSION

The Board denies the motions for summary judgment and finds it is unnecessary to decide on the complainant's motion to strike the affidavit. This matter shall proceed to hearing.

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 8, 2002, by a vote of.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board