

ILLINOIS POLLUTION CONTROL BOARD
September 15, 2005

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 05-181
) (Enforcement - Air
PATTISON ASSOCIATES LLC, an Illinois)
limited liability company, and 5701)
SOUTH CALUMET L.L.C., an Illinois)
limited liability company,)
)
Respondents.)

ORDER OF THE BOARD (by J.P. Novak):

On April 4, 2005, the People of the State of Illinois (People) filed a five-count air pollution complaint against respondents Pattison Associates L.L.C. (Pattison) and 5701 South Calumet LLC (5701 Calumet) (collectively, respondents). On June 24, 2005, respondents filed a motion to dismiss the complaint against them for failure to state a claim. 35 Ill. Adm. Code 101.500(a); 735 ILCS 5/2-615 (2004). The complaint concerns renovation activities conducted by Pattison at an apartment complex owned by 5701 Calumet in Chicago, Cook County. For the reasons set forth below, the Board denies respondents' motion to dismiss and directs respondents to file an answer on or before October 17, 2005.

PROCEDURAL HISTORY

On April 4, 2005, the People filed a five-count complaint (Comp.) against respondents. See 415 ILCS 5/31 (2004). The People allege that respondents, in the course of renovating a Chicago apartment complex, failed to inspect that complex thoroughly for the presence of asbestos. The People further allege that respondents failed to submit required notice of their renovation, to follow proper emission control procedures, and to follow proper disposal procedures. The People further allege that respondents' activities caused, threatened or allowed the discharge of asbestos into the environment so as to cause air pollution. Specifically, the People allege that respondents violated Sections 9(a) and 9.1(d)(1) of the Environmental Protection Act (Act), Sections 61.145(a), 61.145(b)(1), 61.145(c)(1), 61.145(c)(3), 61.145(c)(6), 61.145(c)(8), and 61.150(b)(1) of Title 40 of the Code of Federal Regulations, and Section 201.141 of the Board's regulations. 415 ILCS 5/9(a), 9(d)(1) (2004); 40 C.F.R. 61.145(a), 61.145(b)(1), 61.145(c)(1), 61.145(c)(3), 61.145(c)(6), 61.145(c)(8), and 61.150(b)(1); 35 Ill. Adm. Code 201.141.

On June 1, 2005, counsel for respondents filed a proposed agreed order granting an extension of the deadline to file an answer to June 17, 2005. On June 2, 2005, Board Hearing Officer Bradley P. Halloran granted that extension. On June 15, 2005, counsel for respondents

filed a proposed agreed order granting an extension of the deadline to file an answer to June 24, 2005. On June 16, 2005, Hearing Officer Halloran granted that extension.

On June 24, 2005, respondents filed a motion to dismiss (Mot.) the five counts in the complaint. On July 5, 2005, counsel for the People filed a proposed agreed motion for an extension of the deadline to respond to the motion to dismiss to July 22, 2005. On July 6, 2005, Hearing Officer Halloran granted that request. On July 22, 2005, the People filed their response (Resp.) to the motion to dismiss the five counts of the complaint.

BACKGROUND

At the time the complaint was filed, respondent 5701 Calumet was an Illinois limited liability company in good standing and owned an 18-unit apartment complex located at the site. Comp. at 2. At the time the complaint was filed, respondent Pattison was an Illinois limited liability company in good standing and was the contractor hired to conduct renovation activities in the 18-unit apartment complex located at the site. *Id.*

On October 15, 2003, the Agency inspected the site after an interior demolition had occurred there. Comp. at 3. The apartment complex had not been inspected before the renovation activities took place. *Id.* During that inspection, the inspector observed disturbed suspect material on the floor and suspect material on approximately twelve linear feet of pipes leading from a boiler in the basement of the site. *Id.* The inspector measured where approximately 350 feet of linear piping had been removed from the basement of the site. *Id.* Also on October 15, 2003, a sample of dry friable suspect material found in the basement boiler room tested positive for 20% chrysotile asbestos. *Id.* Also on October 15, 2003, a sample of dry friable suspect material obtained from a pipe above a boiler tested positive for 10% chrysotile asbestos. *Id.* On October 21, 2003, two microvacuum samplings taken at the site showed elevated levels of asbestos fibers in the basement of the site. *Id.*

STATUTORY AND REGULATORY PROVISIONS

Section 9(a) of the Act provides that “[n]o person shall 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) (2004).

Section 9.1(d)(1) of the Act provides “[n]o person shall violate any provisions of Section 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto.” 415 ILCS 5/9.1(d)(1) (2004).

Section 61.145(a) of Title 40 of the Code of Federal Regulations provides in pertinent part as follows:

- (a) Applicability. To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation

activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

* * *

- (4) In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is
 - (i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components 40 C.F.R. 61.145(a).

Section 61.145(b)(1) of Title 40 of the Code of Federal Regulations provides:

Each owner or operator of a demolition or renovation activity to which this section applies shall:

- (1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable. 40 C.F.R. 61.145(b)(1).

Section 61.145(c) of Title 40 of the Code of Federal Regulations provides in pertinent part:

Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:

- (1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal
 - * * *
- (3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.
 - * * *
- (6) For all RACM, including material that has been removed or stripped:

- (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150; . . .

* * *

- (8) Effective 1 year after promulgation of this regulation, no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one onsite representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present 61 C.F.R. 61.145(c).

Section 61.150(b)(1) of Title 40 of the Code of Federal Regulations provides in pertinent part:

Each owner or operator of any source covered under the provisions of §§61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions:

* * *

- (b) All asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at:
 - (1) A waste disposal site operated in accordance with the provisions of Section 61.154 40 C.F.R. 61.150(b)(1).

Section 201.141 of the Board's air pollution regulations provides:

No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard. 35 Ill. Adm. Code 201.141.

STANDARD OF REVIEW

For purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleading must be taken as true, and all inferences from them must be drawn in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle the complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

COUNT I: AIR POLLUTION

Summary of Violation Alleged

Count I of the complaint alleges that the respondents caused or allowed air pollution in violation of Section 9(a) of the Act and Section 201.141 of the Board's air regulations "by allowing dry friable asbestos containing materials to remain in a friable state, exposed to the elements." Comp. at 6; *see* 415 ILCS 5/9(a) (2004); 35 Ill. Adm. Code 201.141. The People state that the Agency inspected the site on October 15, 2003, after an interior demolition had been performed there. Comp. at 3.

The People state that the Agency inspector observed suspect material on the floor and along 12 linear feet of pipes leading from a boiler in the basement area of the site. Comp. at 3. The People report that, on October 15, 2003, a sample of suspect material obtained from the northeast part of the boiler room in the basement of the site tested positive for 20% chrysotile asbestos and that a sample obtained from a pipe above the boiler tested positive for 10% chrysotile asbestos. *Id.* The People explain that, on October 15, 2003, the Agency inspector measured where approximately 350 feet of linear piping had been removed, leaving twelve feet of linear piping intact in the basement of the site. *Id.* The People further state that two microvacuum samplings taken at the site on October 21, 2003, showed elevated levels of asbestos fibers in the basement of the site. *Id.* The People contend that respondents, as owner and renovator, caused or allowed friable ACM to be deposited uncontained throughout the basement of the site. Comp. at 4. The People allege that this improper handling of the ACM and failure to follow emission control procedures caused or allowed the release of asbestos fibers to the atmosphere. *Id.*

Respondents' Motion to Dismiss Count I

Respondents argue generally, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, that Counts I-V fail to state a claim and should be dismissed. Mot. at 1; *see* 735 ILCS 5/2-615 (2004). Respondents further argue that, "although a court will liberally construe pleadings, the complaint still must allege facts sufficient to state a cause of action." Mot. at 1, citing Premier Electrical Construction Co. v. City of Chicago, 512 N.E.2d 44, 47 (1st Dist 1987).

Respondents argue that the People "filed this Complaint more to engage in a discovery fishing expedition than to inform Pattison of its alleged wrongdoing." Mot. at 3. Respondents state that the People have "not pled that Pattison caused air pollution, and indeed no such allegation can be made because none of the tests cited in the Complaint sampled the air." Mot. at 2. Respondents state that the complaint refers first to a test of the asbestos material itself and second to microvacuum sampling that tests non-airborne dust. *Id.* (referring to ASTM Standard D5755-03). Respondents argue that "[t]here is no factual allegation that the asbestos entered the 'atmosphere,' let alone existed in 'sufficient quantities' and of such 'characteristics and duration as to be injurious'" so as to constitute "air pollution" under the Act. Mot. at 2; *see* 415 ILCS 5/3.115 (2004). Respondents characterize the complaint as alleging "simply that friable asbestos was seen on the property." Mot. at 2. Pattison thus claims that it is unable to determine from the

complaint whether it is alleged to have removed asbestos and, if so, to determine the manner, time, and quantity of the alleged removal. *See id.*

People’s Response to Motion to Dismiss Count I

The People argue generally that respondents’ motion to dismiss should be denied and that respondents should be directed to file an answer addressing the substance of the complaint. Resp. at 5-6. Acknowledging that the complaint must allege facts bringing the case within the stated cause of action, the People state that “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.” Resp. at 2, citing City of Chicago v. Beretta U.S.A. Corp., 821 N.E. 2d 1099, 1113 (2004). In addition, the People argue that, “[i]n determining whether a complaint states facts or conclusions, the complaint must be considered as a whole and not in its disconnected parts.” Resp. at 2, citing Courtney v. Board of Education of the City of Chicago, 286 N.E.2d 25, 26 (1st Dist. 1972).

The People note their burden of proving 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.” Resp. at 3, citing 415 ILCS 5/9(a) (2002) and 35 Ill. Adm. Code 201.141 (2002) (emphasis in original). In the Complaint, the People allege that improper handling and containment of ACM throughout the basement of the site “allowed asbestos fibers to be released to the atmosphere.” Resp. at 3, citing Comp. at 4 (¶ 13). The People further argue that they identify asbestos in a friable state and exposed to the elements. Resp. at 3. The People contend that this exposure threatened the discharge of asbestos into the atmosphere, causing or allowing pollution. Resp. at 3, citing Comp. at 6 (¶ 26). Having alleged that “asbestos is a known human carcinogen” (Comp. at 4), the People argue that they have provided “specific notice as to the alleged violations, including the nature of the contaminant (asbestos), the time frame and the location.” Resp. at 4.

Referring to the case as one of the few that distinguishes pleading from proving this alleged violation, the People cite Ralston Purina Co. v. IPCB, 325 N.E.2d 727 (4th Dist. 1975). In that case, the complainant alleged that the respondent “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. . .” in violation of Section 9(a) of the Act. Resp. at 4, citing Ralston Purina Co., 325 N.E.2d at 729; *see* 415 ILCS 5/9(a) (2004). Although the company argued that the allegations brought before the Board were not sufficiently specific, the court stated that “[c]learly, in this case, Ralston was put upon specific notice as to its alleged violation.” Resp. at 4, citing Ralston Purina Co., 325 N.E.2d at 729. The People argue that respondents appear to be improperly denying the allegations in a motion to dismiss instead of properly denying them in an answer. Resp. at 3-4.

Board Discussion of Count I

Count I of the complaint alleges that respondent 5701 Calumet was and is the owner of the 18-unit apartment complex located on the site. Comp. at 2. The People have further alleged that respondent Pattison was and is the contractor hired to conduct renovation activities at the

site. *Id.* The People have further alleged, on the basis of an October 15, 2003 inspection after an interior demolition had been performed, that friable ACM was present both in the basement and on pipes at the site. Comp. at 3. The People further allege that asbestos is a contaminant under the Act. Comp. at 5, *see* 415 ILCS 5/3.165 (2004). The People have further alleged that the friable ACM at the site had been improperly handled and exposed to the elements, causing or allowing air pollution in violation of Section 9(a) of the Act and Section 201.141 of the Board's air regulation. Comp. at 6; *see* 415 ILCS 5/9(a) (2004); 35 Ill. Adm. Code 201.141. After reviewing the language of the complaint and the Act, the Board cannot conclude that no set of facts could be proven under the allegations in count I of the complaint that would entitle the People to relief. Accordingly, the Board denies respondents' motion to dismiss count I.

COUNTS II-IV: FAILURE TO INSPECT, SUBMIT NOTIFICATION, AND FOLLOW EMISSION CONTROL PROCEDURES

Summary of Violations Alleged

Count II of the complaint alleges that the “[r]espondents, as owners and/or operators of a renovation activity, failed to thoroughly inspect the apartment complex for the presence of asbestos prior to commencement of renovation activities or at any time”, thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 11; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(a).

Count III of the complaint alleges that “[r]espondents, as owners and/or operators of a renovation activity, failed to notify the Administrator of their intent to demolish or renovate,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 13; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(b)(1).

Count IV of the complaint alleges that respondents failed to follow proper asbestos emission control practices. Specifically, the complaint alleges that “[r]espondents, as owners and/or operators of a renovation activity, failed to have any onsite representative trained in the provisions of the asbestos NESHAP,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 16; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(c)(8). Count IV also alleges that “[r]espondents, as owners and/or operators of a renovation activity, failed to adequately wet all RACM and ensure that it remained wet until collected and contained or treated in preparation for disposal,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 16; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(c)(6)(i). Count IV goes on to allege that [r]espondents, as owners and/or operators of a renovation activity, failed to adequately wet all RACM in place before stripping it from the facility components at the facility,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 16; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(c)(3). Count IV further contends that “[r]espondents, as owners and/or operators of a renovation activity, failed to remove all RACM from a facility being renovated or demolished before an activity began that would break up, dislodge, or similarly disturb the material or preclude access for subsequent removal,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 15; *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.145(c)(1).

Respondents' Motion to Dismiss Counts II-IV

Respondents emphasize that demolition and renovation standards apply only when specified quantities of RACM are “to be *stripped, removed, dislodged, cut, drilled, or similarly disturbed.*” Mot. at 3, citing 40 C.F.R. 61.145(a)(4) (emphasis in original). Respondents argue that “[t]he Complaint does not even allege that Pattison engaged in any handling of asbestos anywhere in the building.” Mot. at 3. Respondents further argue that the People have not alleged that Pattison in the basement of the building performed any of the acts listed in the language of the demolition and renovation standards. *Id.*

People's Response to Motion to Dismiss Counts II-IV

The People dispute respondents' claim that the complaint fails to present evidence that they have “stripped, removed, dislodged, cut, drilled, or similarly disturbed asbestos. . . .” Resp. at 4, citing Mot. at 3, 10 (¶¶ 6-12, 25-28). The People argue that, “[a]s owners/operators of the building undergoing demolition and reconstruction, the Respondents are liable for the exposed asbestos in the building.” Resp. at 4. The People have alleged that, while respondents performed renovation activities at the site, inspection showed “disturbed suspect material” both on the floor and remaining on pipes. Comp. at 7 (incorporating allegations from count I).

Furthermore, the People argue 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.” Resp. at 5, citing *Yuretich v. Sole*, 631 N.E.2d 769, 769-70 (4th Dist. 1994). The People further argue that their complaint is as complete as the case allows because the details of the renovation of the site are now known solely by the respondents. Resp. at 5. The People state that they have “alleged facts within [their] knowledge or that can be inferred from the circumstances.” *Id.*

In addition, the People argue that respondents “are contending that they are not responsible for the removal of any of the asbestos, which is a dispute of material fact.” Resp. at 5. The People further argue that this motion to dismiss is not the proper means of obtaining judgment on the resolution of a factual issue. *Id.*

Board Discussion of Counts II-IV

Counts II-IV of the complaint allege that respondents were “owner or operator of a demolition activity” under 40 C.F.R.61.141. That provision defines those terms in part as persons owning, operating, controlling, or supervising the facility being demolished or renovated or the demolition or renovation operation. Comp. at 9-10; *see* 40 C.F.R. 61.141. The People further allege that, at the time of an October 15, 2003 inspection, interior demolition had occurred at the site. Comp. at 3. The People further allege that the site contained ACM both in the basement and on pipes at the site. *Id.* After reviewing the language of the complaint, the Board cannot conclude that no set of facts could be proven that would entitle the People to relief under counts II-IV of the complaint alleging failure to inspect, notify, and follow proper emission control procedures. Accordingly, the Board denies respondents' motion to dismiss counts II-IV.

COUNT V: FAILURE TO FOLLOW DISPOSAL PROCEDURES

Summary of Violation Alleged

Count V of the complaint alleges that respondents failed to follow proper disposal procedures. Specifically, the complaint alleges that “[r]espondents failed to deposit regulated asbestos-containing waste material as soon as practical in an appropriate waste disposal site,” thus violating Section 9.1(d)(1) of the Act and federal asbestos regulations. Comp. at 18, *see* 415 ILCS 5/9.1(d)(1) (2004); 40 C.F.R. 61.150(b)(1).

Respondents’ Motion to Dismiss Count V

Respondents state that the waste disposal requirements referred to in the complaint apply only to owners or operators described in four sections of the federal regulations. Section 61.145 applies to demolition and renovation activities, and respondents argued above that they have not conducted those activities as they are defined. Mot. at 3-4. Section 61.144, 61.146, and 61.147 apply to manufacturing, spray application, and fabricating operations, respectively, and respondents argue that there is “absolutely no allegation or evidence” that Pattison engaged in those activities. Mot. at 4. Consequently, respondents argue that Count V also fails to plead sufficient acts and should be dismissed. *Id.*

Petitioner’s Response to Motion to Dismiss Count V

Respondents have argued that the waste disposal allegation in this count does not apply to them because the People have failed to allege activities associated with demolition or renovation. *See* Resp. at 3-4 (§ 7). The People argue that they have specifically alleged that respondents are owner/operators of the site. Resp. at 5, citing Comp. at 2 (§§ 4-5). The People further argue that they have alleged that demolition and renovation are taking place or have taken place at the site. Resp. at 5, citing Comp. at 5-6 (§§ 24-25).

The People also argue that respondents in their response to this count raise a factual issue that is not properly addressed in a motion to dismiss. *See* Resp. at 5.

Board Discussion of Count V

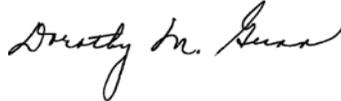
Count V of the complaint alleges that respondents are either owner or operator of a demolition activity, making them subject to asbestos waste disposal requirements. Comp. at 2, 18. The People have further alleged that, as owner or operator, respondents failed to deposit asbestos-containing waste material as soon as practical at an appropriate site. Comp. at 18. After reviewing the language of the complaint, the Board cannot conclude that no set of facts could be proven that would entitle the People to relief under count V of the complaint alleging failure to follow proper disposal procedures. Accordingly, the Board denies respondents’ motion to dismiss count V.

CONCLUSION

For the reasons above, the Board denies the respondents' motion to dismiss. A timely filed motion to dismiss under Section 103.212(b) or 101.506 stays the 60-day period to file an answer. 35 Ill. Adm. Code 103.204(e). Both sections require respondents to file the motion within 30 days of the date it is served with the complaint. Because they were granted motions for extension of that 30-day period, respondents' motion to dismiss filed June 24, 2005 was timely under Section 101.506 of the Board's procedural rules. Thus, the motion to dismiss stayed the 60-day period to file an answer. *See* 35 Ill. Adm. Code 103.204(e). The stay is lifted as of the date of this order, and respondents have until October 17, 2005, or 30 days from the date of this order, to answer the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 15, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board