

ILLINOIS POLLUTION CONTROL BOARD
January 7, 1999

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 97-168
) (Enforcement - Land)
OLD WORLD INDUSTRIES, INC.,)
an Illinois corporation, and SPECIALTY)
SEALANT TAPES, INC., a dissolved)
corporation,)
)
Respondent.)

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

This matter is before the Board on a motion for certificate of appeal and to stay the pending proceedings (Mot.) filed October 22, 1998, by respondent, Old World Industries, Inc. (Old World). The motion requests that the Board certify for interlocutory appeal its September 17, 1998 order to the Illinois Appellate Court. Mot. at 1. In part, the September 17, 1998 order finds that the Illinois Business Corporation Act (805 ILCS 5/12.80 (1996)) does not protect from liability Old World, a viable parent corporation. See People of the State of Illinois v. Old World Industries, Inc., et al. (September 17, 1998), PCB 97-168, slip op. at 3. Additionally, Old World requests that the Board stay all proceedings in this matter pending resolution of the appeal. Mot. at 1. Old World filed a memorandum of law (Memo.) in support of its motion. On November 5, 1998, complainant, People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois, filed a response (Resp.) to Old World's motion. For the following reasons, the Board denies Old World's motion.

RELEVANT LAW

Old World asks that the Board issue an order in accordance with 35 Ill. Adm. Code 101.304 and Supreme Court Rule 308(a) (153 Ill. 2d R. 308), certifying an appeal of the Board's September 17, 1998 order in this matter. The Board, in its procedural rules, specifically provides for Board certification of interlocutory appeals in accordance with Supreme Court Rule 308(a). See 35 Ill. Adm. Code 101.304. Supreme Court Rule 308(a) provides:

When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may

be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order. 153 Ill. 2d R. 308.

The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. See People v. Pollution Control Board, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984); Getty Synthetic Fuel v. Pollution Control Board, 104 Ill. App. 3d 285, 432 N.E.2d 942 (1st Dist. 1982).

The Illinois Supreme Court has indicated that Rule 308 appeals are to be allowed only in certain exceptional circumstances. People v. Pollution Control Board, 473 N.E.2d at 456, citing People ex. rel. Mosley v. Carey, 74 Ill.2d 527 (1979). Thus, Rule 308 should be strictly construed and sparingly exercised. People v. Pollution Control Board, 473 N.E.2d at 456. In order for the Board to grant Rule 308(a) certification, it must determine that a two-prong test is satisfied: (1) whether the Board's decision involves a question of law involving substantial ground for difference of opinion; and (2) whether immediate appeal may materially advance the ultimate termination of the litigation. Residents Against a Polluted Environment and the Edmund B. Thornton Foundation v. County of LaSalle and Landcomp Corporation (November 7, 1996), PCB 96-243; Land and Lakes Co. v. Village of Romeoville (April 11, 1991), PCB 91-7. However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. Voss v. Lincoln Mall Management, 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988); Camp v. Chicago Transit Authority, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1st Dist. 1980).

ARGUMENTS OF THE PARTIES

In support of the motion for certification, Old World states that the Board's September 17, 1998 order departs from important precedent and raised questions of law as to which there are substantial grounds for differences of opinion. First, Old World asserts that the Board's findings concerning the application of Section 12.80 of the Illinois Business Corporation Act (805 ILCS 5/12.80 (1996)) to parent corporations is contrary to relevant case law. Memo. at 5. Old World argues that Illinois case law explicitly recognizes the applicability of Section 12.80 to the dissolved corporation's shareholders, in this case, Old World. Memo. at 5, citing Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co., 629 F.2d 1183 (7th Cir. 1980); Koepke v. First National Bank of DeKalb, 284 N.E. 2d 671 (2d Dist. 1972).

Second, Old World maintains that the Board's analysis of the factual sufficiency of complainant's complaint is contrary to the recognition of Illinois as a fact-pleading state, prior Board decisions, and the decision in United States v. Bestfoods et al., 118 S.Ct. 1876 (1998). Memo. at 6-9. Specifically, Old World asserts that the Board's implication that "as long as complainant alleges that Old World is an operator, its complaint is factually sufficient since it alleges ultimate facts necessary to state a claim" is an inaccurate legal conclusion and not an ultimate fact. Memo. at 8. In addition, Old World alleges that complainant has not alleged

any facts that Old World was an owner of the site such that piercing the corporate veil is appropriate. Memo. at 8.

Old World argues that interlocutory appeal of the issues decided by the Board on September 17, 1998, would materially advance the ultimate termination of the litigation. Old World asserts that Section 12.80 of the Illinois Business Corporation Act (805 ILCS 5/12.80 (1996)) specifically prohibits the instant litigation against Old World. Memo. at 9. Because Old World is not a proper party to this enforcement action, Old World argues the interlocutory appeal of the Board's order would materially advance the ultimate termination of the litigation as to Old World. Memo. at 9.

Finally, Old World argues that the Board should stay the instant proceedings pending appeal. In the absence of stay, Old World argues the parties will be forced unnecessarily to conduct discovery and prepare for hearing, thereby spending substantial time and expense. Memo. at 10.

In response to the motion, complainant argues that the Board's September 17, 1998 order does not involve a question of law to which there is substantial ground for difference of opinion. Complainant asserts that the Board has previously held that a disagreement with how the Board interprets precedent does not raise a substantial ground for difference of opinion. Resp. at 4, citing Residents Against a Polluted Environment, PCB 96-243. Complainant further argues that allowing immediate appeal from the Board's order will not materially advance the ultimate termination of the litigation. Citing Voss v. Lincoln Mall Management Co., 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988), complainant asserts that Old World has not established that an appeal will "materially advance" the termination of this litigation. Resp. at 4. Complainant maintains that certifying an appeal here would undermine the precedent that these types of appeals should only be used in exceptional circumstances. Resp. at 4. Finally, complainant argues that this case should not be stayed pending the outcome on appeal because there are numerous witnesses of whom depositions must be taken, and the more passage of time will increase the chances of these witnesses' memories fading or necessary documents being destroyed. Resp. at 5.

DISCUSSION

Old World's motion to certify is denied as it has failed to prove that this exceptional relief is warranted under the circumstances of this case. The Board is not persuaded that its September 17, 1998 order concerning the application of Section 12.80 of the Illinois Business Corporation Act involves a question of law on which there is substantial ground for difference of opinion.

Old World contends the Board's decision contradicts legal precedent recognizing the applicability of Section 12.80 of the Illinois Business Corporation Act to a dissolved corporation's shareholders. In support of this proposition, Old World cites Canadian Ace Brewing Co., et al. v. Joseph Schlitz Brewing Co., et al., 629 F.2d 1183 (7th Cir. 1980) and Koepke v. First National Bank of DeKalb, 5 Ill. App. 3d 799, 284 N.E.2d 671 (2d Dist.

1972). As the parent corporation, Old World states it was the sole shareholder of the now defunct corporation, Mystic Tape Corporation (Mystic Tape). Therefore, Old World alleges that, according to Section 12.80 of the Illinois Business Corporation Act, its shareholder status protects it from this lawsuit because complainant filed it more than five years after dissolution of Mystic Tape.

The Board disagrees with Old World's interpretation of Section 12.80. As the Board stated in its September 17, 1998 order, the respondent in this matter is Old World, not Mystic Tape. People v. Old World Industries Inc., PCB 97-168, slip op. at 3. Section 12.80 protects only the dissolved corporation from suit after five years of the date of its dissolution not a viable parent corporation such as Old World. People v. Old World Industries, Inc., PCB 97-168, slip op. at 3.

The Board finds Old World's reliance on Canadian Ace and Koepke is not on point in this matter. In both of those cases, shareholders unsuccessfully attempted to sue dissolved corporations after the timeframe provided by the applicable corporate survivor statutes. In this case, however, Old World attempts to utilize its parent corporation status to hide from potential liability. Old World's allegations that it was the sole shareholder of Mystic Tape do not negate the fact that, as a viable corporation, it too may be liable for its own actions or inactions. The Canadian Ace or Koepke decisions do not suggest that a viable corporate parent is protected from a suit brought five years after the dissolution of its subsidiary. Therefore, the Board denies Old World's motion to certify on this ground.

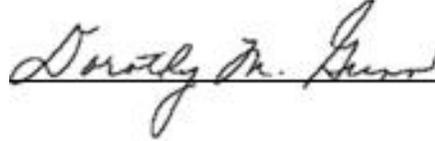
Similarly, no substantial ground for difference of opinion on a question of law is created by Old World's allegations that the Board misapplied complainant's factual assertions. In allowing this case to proceed to hearing, the Board found that complainant has alleged at least some facts to warrant an inquiry into piercing the corporate veil between Old World and its subsidiary, Mystic Tape. Old World, PCB 97-168, slip op. at 4. Complainant must still prove, through further factual inquiries at hearing, that piercing the corporate veil is warranted in this matter. The Board finds that it is prudent to proceed to hearing in this matter as it will create the record necessary to make a determination regarding this issue.

Moreover, because the Board finds that Old World has not established substantial grounds for difference of opinion on a question of law, we do not find that immediate appeal of this issue may materially advance the ultimate termination of the litigation. The Board notes that it has discretionary authority to issue an interlocutory appeal. See Voss, 166 Ill. App. 3d 442, 519 N.E. 2d 1056 (1st Dist. 1988). In light of the fact that interlocutory appeals should be strictly construed and sparingly used, the Board finds that Old World's assertions do not warrant issuance of a certification of appeal.

For these reasons, the Board denies Old World's motion for certificate of appeal. As the Board denies the motion for certificate of appeal, the Board finds it is unnecessary to stay the present proceedings. Accordingly, the Board also denies Old World's motion to stay the pending proceedings. The parties are directed to enter into discovery, if they have not already done so, and proceed to hearing.

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 7th day of January 1999 by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board