ILLINOIS POLLUTION CONTROL BOARD
March 3, 2022

DOUG AND GERI BOYER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 22-09
	)	(Citizens Enforcement – Noise)
MRB DEVELOPMENT, LLC d/b/a COPPER FIRE, RENAE EICHHOLZ AND MARK EICHHOLZ,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by A. Palivos):

On September 30, 2021, Doug and Geri Boyer (complainants) filed a complaint against Renae and Mark Eichholz, individually, and MRB Development, LLC d/b/a Copper Fire (respondents). The complaint concerns the Copper Fire bar, restaurant and live music venue owned and operated by Renae and Mark Eichholz's company, MRB Development, LLC, located at 200 East Main Street in Belleville, St. Clair County.

On December 6, 2021, the Board received respondents' motion to dismiss Renae and Mark Eichholz individually as respondents. On the same date the Board also received respondents' motion to strike paragraphs 33 through 38 of the complaint pertaining to alleged violations of the Belleville City Code and the St. Clair County Zoning Code. The complainants have not filed a response to either motion.

For the reasons below, the Board strikes as frivolous paragraphs 33 through 38 of the complaint, along with the complaint's request for injunctive relief. The Board denies respondents' motion to dismiss and denies as moot respondents' motion to strike. The Board accepts for hearing the complaint, as modified by this order. Renae and Mark Eichholz may file, by April 4, 2021, an answer to the complaint, so modified.

DUPLICATIVE OR FRIVOLOUS DETERMINATION

Under the Environmental Protection Act (Act) (415 ILCS 5 (2020)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2020); 35 Ill. Adm. Code 103. In this case, complainants allege that respondents are violating Section 24 of the Act (415 ILCS 5/24 (2020)) and the Board noise regulations at 35 Ill. Adm. Code 900.101, 900.102, 901.101 and 901.102 by hosting live music events in Copper Fire that generate noise which has been unreasonably interfering with complainants in an adjacent building since early 2021. Complainants ask the Board to: (1) temporarily enjoin respondents from hosting live music events and violating state and local noise laws pending this action; (2) permanently enjoin respondents from hosting live music events or

otherwise violating state and local noise laws unless and until respondents install sound mitigation equipment on their property; and (3) provide such other relief as the Board deems just and equitable.

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2020); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). As discussed below, respondents filed a motion to dismiss the individual respondents and a motion to strike provisions of the complaint as beyond the Board's authority.

Nothing in this record indicates that the complaint is duplicative. The Board also finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f). However, parts of the complaint are frivolous. Complainants' first and second requests for relief ask that the Board enjoin respondents from their alleged noise-generating behavior. The Board has the authority to order a respondent to, for example, cease and desist from violating the Act and Board regulations, as well as implement specific abatement measures to remedy noise violations (*see* 415 ILCS 5/33(a), (b) (2020); *see also*, *e.g.*, Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc., PCB 98-81, slip op. at 15-16 (May 6, 1999)), but the Board has no authority to issue injunctions (*see*, *e.g.*, Leesman v. Cimco Recycling, PCB 11-1, slip op. at 3 (Oct. 7, 2010)). Because the complaint requests relief that the Board lacks the authority to grant, the Board strikes as frivolous the first two requests for relief.

The Board also has no authority to hear alleged violations of local rules. *See* 415 ILCS 5/31(d)(1), 33(b) (2020); *see also*, *e.g.*, Flagg Creek Water Reclamation Dist. v. Village of Hinsdale, PCB 06-141, slip op. at 8 (June 1, 2006). Paragraphs 33 through 38 of the complaint therefore fail to state a cause of action upon which the Board can grant relief. Accordingly, the Board strikes them from the complaint as frivolous.

MOTION TO DISMISS

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993), citing A, C & S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part[,]'" A, C & S, quoting People ex rel. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001).

Respondents seek to dismiss Renae and Mark Eichholz individually as respondents. Initially, the Board notes that respondents' dismissal motion was not timely filed. A motion to dismiss must be filed within 30 days after service of the complaint, "unless the Board determines that material prejudice would result." 35 Ill. Adm. Code 101.506. The Board finds that material prejudice would result if it were not to consider the dismissal motion. *See*, *e.g.*, People v. Emmett Utilities, Inc., PCB 04-81, slip op. at 5 (May 6, 2004) (denying motion to strike late-filed dismissal motion because "material prejudice will result if [the dismissal] motion is not heard").

The complaint alleges that Renae and Mark Eichholz "are both managers of MRB Development, LLC" and respondents "own and operate Copper Fire" (Comp. at ¶ 2), the venue alleged to be the source of the noise violations. Taking all well-pled allegations of the complaint as true and drawing all reasonable inferences from them in favor of complainants, the Board cannot conclude that there clearly is no set of facts that could be proved to establish that Renae and Mark Eichholz are individually liable for the alleged violations of the Act and Board regulations. The Board therefore denies respondents' motion to dismiss.

MOTION TO STRIKE

Respondents argue that the Board lacks jurisdiction to hear alleged violations of local ordinances and therefore should strike the paragraphs of the complaint alleging violations of the Belleville City Code and the St. Clair County Zoning Code. Although respondents' motion to strike was also filed late (*see* 35 Ill. Adm. Code 101.506), a challenge to the Board's jurisdiction may be raised at any time during the proceeding. *See*, *e.g.*, People v. Michel Grain Co., PCB 96-143, slip op. at 2 (Oct. 2, 2003) (even though dismissal motion was filed ten months late, Board addressed its merits because it purported to challenge the Board's authority). However, the motion to strike is mooted by the Board's finding above that paragraphs 33 through 38 of the complaint are frivolous based on the Board lacking authority to hear alleged violations of these local ordinances. Accordingly, the Board denies the motion to strike as moot.

BOARD ACCEPTS COMPLAINT, AS MODIFIED, FOR HEARING

The Board accepts for hearing the complaint, as modified by this order. *See* 415 ILCS 5/31(d)(1) (2020); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code

103.204(d). If a respondent timely files a motion to dismiss or strike a complaint under Section 101.506, the 60-day period to file an answer is stayed by procedural rule; that stay begins when the motion is filed and ends when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(e).

Respondent MRB Development filed its answer to the complaint on December 6, 2021. As MRB Development was served with the complaint on September 30, 2021, MRB Development's answer was filed one week late. Respondents Renae and Mark Eichholz were served with the complaint on October 6, 2021. They have not filed an answer, although the attorney for MRB Development, who represents all three respondents, filed MRB Development's answer within 60 days after Renae and Mark Eichholz were served with the complaint. *See* 35 Ill. Adm. Code 101.300(a).

To avoid material prejudice, the Board accepted above respondents' late-filed motion to dismiss Renae and Mark Eichholz as respondents. If the Board were to reject MRB Development's answer and bar Renae and Mark Eichholz from filing any answer as untimely, respondents would suffer material prejudice because they would be deemed to have admitted the material allegations of the complaint. *See* United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 11 (Nov. 4, 2010) (noting that movant might have misconstrued its late-filed dismissal motion as staying the 60-day answer period, the Board found movant "would plainly suffer material prejudice if it is deemed to have admitted the material allegations" of complaint and therefore allowed movant time to file answer). Under these circumstances, the Board accepts MRB Development's answer and grants Renae and Mark Eichholz leave to file an answer or separate answers by April 4, 2022, which is the first business day following the 30th day after the date of this order.

The Board directs the hearing officer to proceed expeditiously to hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2020). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical

practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2020). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 3, 2022, by a vote of 5-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board