

ILLINOIS POLLUTION CONTROL BOARD
September 23, 1999

JAMES R. and LUCILLE J. METZ,)	
)	
Complainants,)	
)	
v.)	PCB 98-18
)	(Enforcement - Citizens, Noise)
UNITED STATES POSTAL SERVICE)	
and BRADLEY REAL ESTATE,)	
)	
Respondents.)	

ORDER OF THE BOARD (by G.T. Girard):

On July 22, 1999, respondent, Bradley Real Estate (Bradley) filed a motion for summary judgment (Bradley motion). On August 9, 1999, respondent United States Postal Service also filed a motion for summary judgment (USPS motion). Complainants have not filed a response to the motions for summary judgment. Pursuant to the Board's rules at 35 Ill. Adm. Code 103.140(c), failure to respond to a motion means a party is deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board in its determination. Based on the arguments presented in the motions and the case record, the Board grants, in part, both motions for summary judgment and denies, in part, both motions for summary judgment. The hearing officer is directed to set this matter for hearing.

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose 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). When 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," 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 229, 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, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994). For the reasons stated below, the Board finds that no genuine issues of fact exist on complainants' allegation that respondents violated Section 23 of the Environmental Protection Act (Act) (415 ILCS 5/23). However, the Board also finds that issues of fact still exist as to whether a violation of Section 24 of the Act has occurred.

Both motions for summary judgment set forth in essence the same arguments, so the Board will not discuss them separately except for one issue regarding Bradley¹ which will be discussed later. First, both motions argue that the allegation that respondents violated Section 23 of the Act should be dismissed. Respondents point out that Section 23 of the Act merely recites legislative declaration and provides no substantive rights to the complainants. Bradley motion at 4. The Board agrees with the respondents and consistent with our decision in Brunson v. MCI Worldcom, Inc. (January 7, 1999), PCB 99-71, we dismiss the portions of the complaint alleging violations of Section 23 of the Act.

Respondents next argue that Section 24 of the Act prohibits emission of sound beyond the boundaries of the respondents' property which unreasonably interferes with the enjoyment of life or any lawful business or

¹ Bradley argues that sound measurements taken by the Agency's expert, Mr. Gregory Zak, were not taken consistent with the procedures established by regulations (35 Ill Adm. Code 951.105) for taking those measurements. They cite to several alleged inconsistencies. Bradley motion at 5-6. However, the actual sound measurements are not a part of the record and, accordingly the Board need not address this issue.

activity in violation of any regulation or standard adopted by the Board. The respondents maintain that based on the depositions of the complainants and an Illinois Environmental Protection Agency (Agency) expert, there is no genuine issue of material fact and respondents are entitled to judgment as a matter of law. Respondents assert that facts of the case clearly demonstrate that there has been no unreasonable interference with complainants' enjoyment of life, based on statements made by the complainants in depositions taken by respondents. Bradley motion at 6.

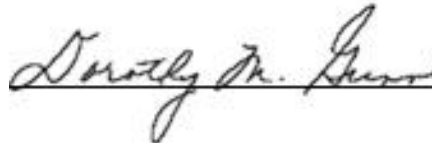
The Board disagrees that the facts clearly demonstrate that there has been no unreasonable interference with complainants' enjoyment of life. The excerpts from the transcripts which have been attached to the motions actually demonstrate that there are still issues of fact to be adjudicated. For example, the testimony of complainants establishes that the noise did interfere with their enjoyment of life. James Metz testified that the noises "that are most bothersome are the intermittent loud noises" which he hears when he is using his backyard. USPS motion Exhibit 1 at numbered pages 66-67. Mr. Metz also testifies that "I won't say it causes us loss of sleep, but it wakes us up earlier in the morning." USPS motion Exhibit 1 numbered page 82. Mrs. Metz also testified as to disturbances. Mrs. Metz was asked: "In the complaint also, again, you allege that the sound emissions have interfered with your enjoyment of your property?" She answered: "Yes, very much." USPS motion Exhibit 3 at numbered page 18. Mrs. Metz also stated that the noise did interfere in the inside of the house. USPS motion Exhibit 3 at numbered page 35. These statements support the alleged violations made in the complaint that the noise generated by the loading docks has resulted in an unreasonable interference with the use and enjoyment of complainants' property. Amended complaint at 3. Therefore, the Board finds that genuine issues of material fact still exist and summary judgment is not appropriate as to the alleged violations of Section 24 of the Act.

The motions for summary judgment differ only in that Bradley asserts one additional argument in its motion. Bradley maintains that it is merely the lessor of the facility and has not controlled or participated in any of the sound emissions identified in the amended complaint. Bradley motion at 14. The Board has already determined that Bradley may be responsible for the alleged violations and nothing Bradley has argued in its present motion convinces the Board otherwise. See Metz v. USPS and Bradley Real Estate (October 15, 1998), PCB 98-18.

In summary, the Board grants the motions for summary judgment as to the allegation of violation of Section 23 of the Act. The Board denies the motions for summary judgment as to allegations of violation of Section 24 of the Act. The Board directs that the hearing officer set this matter for 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 23rd day of September 1999 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board