ILLINOIS POLLUTION CONTROL BOARD
May 5, 2005

PAUL AND DONNA FREDRICKSON,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 04-19
	)	(Citizens Enforcement – Noise, Air)
JEFF GRELYAK,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

Today's order addresses the respondent's motion for summary judgment filed on March 4, 2005, and the complainants' response, dated March 23, 2005.

On August 8, 2003, Mr. Paul and Mrs. Donna Fredrickson (the Fredricksons) filed a complaint against Mr. Jeff Grelyak. *See* 415 ILCS 5/31(d) (2002). The Fredricksons allege that Mr. Grelyak violated Section 9(a) of the Environmental Protection Act (Act) and Sections 900.102 and 901.102(a) of the Board's noise regulations. 415 ILCS 5/9(a) (2002); 35 Ill. Adm. Code 900.102; 901.102(a). The Fredricksons further allege that Mr. Grelyak violated these provisions by continually operating ATVs and motorcycles on his property, causing noise dust and fumes to travel onto the Fredricksons' property. The complaint concerns Mr. Grelyak's residence located at 8915 Ferris Road in Harvard, McHenry County. The Board accepted this matter for hearing on September 18, 2003.

Mr. Grelyak filed a motion to dismiss *instanter* on September 17, 2003, and the Fredricksons responded on September 26, 2003. On October 16, 2003, the Board denied Mr. Grelyak's motion to dismiss and ordered the parties to proceed to hearing.

For the reasons set forth below, the Board denies Mr. Grelyak's motion for summary judgment and orders the hearing officer to proceed expeditiously to hearing.

APPLICABLE LAW

Section 9(a) of the Act prohibits the violation of any Board air standards or regulations. Section 201.141 of the Board's regulations similarly sets forth a prohibition against causing air pollution in violation of any Board regulation or air quality standard. 415 ILCS 5/9(a) (2002); 35 Ill. Adm. Code 201.141.

Section 24 of the Act provides that:

> No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or

> activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2002).

Similarly, the Board's noise nuisance prohibition is found at Section 900.102 and provides:

> No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the [Act] so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter. 35 Ill. Adm. Code 900.102.

Section 901.102(a) prohibits the emission of sound during daytime and nighttime hours from any property-line-noise source located on Class A land to any receiving Class A land in access of certain numeric limitations at each of nine different frequencies. 35 Ill. Adm. Code 901.102(a).

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998); People v. City of Waukegan, PCB 01-104, slip op. at 2 (Aug. 23, 2001). 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." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370; Waukegan, PCB 01-104, slip op. at 2.

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." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370; citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). Even so, while the nonmoving party does not have to prove its case, it 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 (2nd Dist. 1994); Waukegan, PCB 01-104, slip op. at 2.

The Board's procedural rules provide that "if the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment**."** 35 Ill. Adm. Code 101.516.

MR. GRELYAK'S MOTION FOR SUMMARY JUDGMENT

In moving the Board to grant summary judgment in his favor, Mr. Grelyak relies exclusively on Section 4.1(b) of the Illinois Premises Liability Act as a defense to the nuisance noise allegations. Mot. at 1; citing 740 ILCS 130/4.1(b). Mr. Grelyak states that in pertinent part, Section 4.1(b) of the Premises Liability Act states: "An owner or operator of a off-road riding facility is not subject to any action for public or private nuisance . . . ." *Id*. Mr. Grelyak concludes that because this matter constitutes an "'action for public or private nuisance,'" the

Board should rule in favor of the respondent and deny any and all relief requested by the Fredricksons. Mot. at 2.

THE FREDRICKSONS' RESPONSE

In response, the Fredricksons state that the Board is not bound by the Premises Liability Act and has no authority to find violations thereunder. Resp. at 1. The Fredricksons state that Illinois Senate transcripts show that the Premises Liability Act applies to "prohibit civil claims against parks, State parks, and recreation facilities." *Id*. The Fredricksons claim that the areas regulated by the Premises Liability Act are areas granted State funds under the Recreational Trails Act of Illinois. *Id*. at 2. Further, the complainants state that Mr. Grelyak has not demonstrated that he has been granted funds under the Recreational Trails Act of Illinois and has not been licensed to operate an off-road facility by the Illinois Department of Natural Resources. *Id*.

Nonetheless, the Fredricksons state that the Board is authorized to conduct proceedings on alleged violations of the Act and Board regulations found at 415 ILCS 5/1 *et seq*. and 35 Ill. Adm. Code. As an example of a citizens' noise enforcement case alleging violations of the Act and Board regulations resulting from the operation of ATVs and motorcycles on neighboring property, the Fredricksons cite to Kamholz v. Sporleder, PCB 02-41 (Feb. 20, 2003). Accordingly, argue the Fredricksons, the Board must deny the motion for summary judgment and send the parties to hearing.

BOARD ANALYSIS

The Board denies Mr. Grelyak's motion for summary judgment. Before addressing the substantive issues of the motion for summary judgment, the Board begins by discussing several procedural issues.

First, Mr. Grelyak references a "Complainant's Response to Second Request to Admit" which is not attached to the motion for summary judgment or otherwise part of the record. Second, Mr. Grelyak refers to Exhibits B and C as items attached to the motion, but the Board finds only one unmarked attachment filed with the motion, the affidavit of Mr. Grelyak. Third, the Fredrickson's response, alleging new facts, was not supported by an affidavit. Section 101.242(a) of the Board's rules governs the contents of motions and states that "[f]acts asserted which are not of record in the proceeding shall be supported by affidavit. Therefore, the Board bases its summary judgment determination on the facts alleged in the complaint, and supported by Mr. Grelyak's affidavit, which is attached to the motion.

In an October 16, 2003 Board order, the Board found that the Fredricksons adequately alleged violations of Section 9(a) of the Act and Sections 900.102 and 901.102(a) of the Board's noise regulations. Mr. Grelyak did not address the allegations of numerical noise violations in the motion for summary judgment. Therefore, without further supported facts, the Board cannot grant judgment in favor of Mr. Grelyak with regard to the allegations of numerical noise violations under Section 901.102(a).

Regarding the alleged violations of the Act and Board regulations based on unreasonable interference from air and noise emissions, Mr. Grelyak argues that Section 4.1(b) of the Premises Liability Act bars these claims. Section 4.1 of the Premises Liability Act states in part:

> An owner or operator of a off-road riding facility is not subject to any action for public or private nuisance or trespass, and no court in this State may enjoin the use or operation of a off-road riding facility on the basis of noise or sound emissions resulting from the normal use of the off-road riding facility. 740 ILCS 130/4.1(b) (2002).

The Board has addressed the Premises Liability Act in the past, but only in situations where the complainant has alleged a *violation* of that statute. Logsdon, *et al.* v. South Fork Gun Club, PCB 00-177 (July 27, 2000) (holding that even though the Premises Liability Act addressed noise from firearm ranges, the Board had no authority to hear alleged violations of the Premises Liability Act); Shephard v. Northbrook Sports Club, PCB 96-206, slip op. at 5 (Sept. 5, 1996); Runyon v. Double D Gun Club, PCB 03-7 (Aug. 22, 2002).

Here, Mr. Grelyak raises the Premises Liability Act as a purported *defense* to the alleged violations of the Act and Board regulations prohibiting air and noise pollution. The Act and Board's regulations, respectively, define "air pollution" and "noise pollution" in terms of emissions that "unreasonably interfere with the enjoyment of life." 415 ILCS 5/3.115, 24 (2002); 35 Ill. Adm. Code 900.101.

In a past citizens air enforcement case, the Board found that an Illinois statute barring nuisance actions against farms did not bar claims of air pollution under the Act against a swine farm. Gott *et al*. v. M'Orr Pork, Inc., PCB 96-69 at 26 (Feb. 20, 1997). In that case, the respondent farm claimed that the Farm Nuisance Suit Act (FNSA), which protected farms from actions alleging "private or public nuisance," barred complainants' air pollution claim before the Board. The Board found, however, that the FNSA did not apply. Complainants in M'Orr Pork brought a statutory cause of action alleging an air pollution violation, rather than a common law "public or private nuisance" cause of action.

In M'Orr Pork, the Board noted the Illinois Supreme Court has held that actions under the Act alleging air pollution are distinct from common law nuisance claims. M'Orr Pork, PCB 96-69 at 27; citing Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 299, 319 N.E.2d 794, 799 (1974) (the violations of the Act in question are not defined in terms of nuisances); City of Monmouth v. PCB, 57 Ill. 2d 482, 485, 313 N.E.2d 161, 163 (1974). The Board also emphasized that although the FNSA became effective and was amended long after the Act was enacted, the FNSA made no reference to enforcement actions under the Act, instead referring only to "nuisance" actions.

As the FNSA protects farms, the Premises Liability Act protects off-road riding facilities from "any action for public or private nuisance." The Fredricksons, however, rely on the enforcement provisions of the Act in alleging air and noise pollution, not "public or private nuisance." This action before the Board is plainly distinct from one brought in court for common law nuisance. Further, Section 4.1 of the Premises Liability Act, effective January 1, 2003 makes no reference to enforcement actions under the now 35-year-old Act. Accordingly,

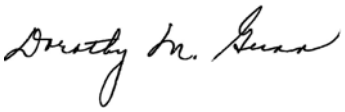
the Board finds that contrary to Mr. Grelyak's contention, Section 4.1(b) of the Premises Liability Act does not bar the Fredrickson's claims of statutory and regulatory violations based on air pollution and noise pollution.

CONCLUSION

The Board denies Mr. Grelyak's motion for summary judgment and directs the hearing officer to proceed expeditiously 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 May 5, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board