

ILLINOIS POLLUTION CONTROL BOARD
December 4, 1990

DOUGLAS FURNITURE OF)
CALIFORNIA, INC.,)
)
Petitioner,)
)
v.) PCB 90-22
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a motion for summary judgment filed on November 8, 1990 by petitioner Douglas Furniture of California, Inc. (Douglas). On November 20, 1990, respondent Illinois Environmental Protection Agency (Agency) filed its response. On November 28, 1990, Douglas filed a motion for leave to file its reply and supporting memorandum instanter.

Initially, the Board will address Douglas' motion for leave to file its reply instanter. While a moving party does not have a right to file a reply (35 Ill. Adm. Code 101.241(c)), the importance of the issue presented by the Wells Manufacturing, Inc. v. PCB, 552 N.E.2d 1074 (1st Dist. 1990), which is the basis for the motion for summary judgment, prompts the Board to grant Douglas' motion for leave to file its reply instanter. In its reply, Douglas raises a question as to the timeliness of the Agency's response. A response to a motion is due 7 days after service. (35 Ill. Adm. Code 101.241(b).) 35 Ill. Adm. Code 101.144(c) provides that "[t]here is a rebuttable presumption that service by First Class mail is complete four days after mailing." Douglas' certificate of service states that on November 8, 1990 it served the attached motion by United States mail. Douglas' certificate of service fails to specify whether it was mailed via First Class mail. The Agency states in its response that it received Douglas' motion on November 13, 1990 -- five days after mailing. In any event, November 12, 1990 -- the fourth day of presumed receipt of mailing -- was a federal holiday. The Agency's response was filed on November 20, 1990 (35 Ill. Adm. Code 101.102(d) -- within seven days from the date of service. The Board finds the Agency's response to be timely filed.

Douglas filed with the Agency a permit renewal application dated September 29, 1989 on the standard form provided by the Agency. (R. 7.) By filing this application, Douglas sought renewal of an operating permit issued on February 8, 1985 with an expiration date of February 8, 1990. (R. 73.) The renewal form provided by the Agency allows the applicant to certify that "all

previously submitted information referenced in this application remains true, correct and current" by "affixing his signature" to the application for renewal; Stuart Applebaum, Vice President of Douglas, signed and certified the renewal application. (R. 7.)

On December 28, 1989, the Agency issued a permit denial letter stating that:

"[t]he application does not contain sufficient information to determine compliance with 35 Ill. Adm. Code 215.204(g). Manufacturer's specification sheets for the enamel coatings must be provided to demonstrate compliance with 35 Ill. Adm. Code 215.204(g) or calculations must be provided to show that emissions of volatile organic material from the facility do not exceed 25 tons/year as allowed by 35 Ill. Adm. Code 215.206(a)." (R. 1.)

The denial letter also contains the statement that "[t]he Agency will be pleased to re-evaluate your permit application on receipt of your written request and the necessary information and documentation to correct or clarify the deficiencies noted above." (R. 1.)

Douglas' motion for summary judgment is based upon the recent appellate court decision in Wells Manufacturing, Inc. v. PCB, 552 N.E.2d 1074 (1st Dist. 1990). In Wells, the petitioner filed a permit renewal application on the form provided by the Agency certifying that the previously submitted information referenced in the renewal application remained true, correct and current. (552 N.E.2d at 1075.) Wells did not submit any additional information in support of its renewal application. The next communication Wells received from the Agency was a denial letter offering to reevaluate the denial if Wells submitted nine categories of information. (552 N.E.2d at 1076.) Wells appealed to the Board and the Board affirmed the Agency's denial. (552 N.E.2d at 1076.) The appellate court determined that the Agency's permit renewal procedures, or lack thereof, did not afford Wells an opportunity to respond prior to the permit denial and, therefore, deprived Wells of due process. (552 N.E.2d at 1078.) The court explicitly found that a permit renewal applicant's opportunity to challenge the Agency's denial before the Board in a permit review hearing pursuant to Section 40 of the Environmental Protection Act did not cure the due process violations. (552 N.E.2d at 1078.) The court reversed the permit denial and remanded. (552 N.E.2d 1078.) On October 11, 1990, the Board remanded the matter to the Agency to act in accordance with the appellate court's decision. (PCB 86-48.)

Douglas argues that the facts in the instant renewal permit appeal are virtually identical to Wells so that Wells is

controlling, that there are no issues of material fact and that it is entitled to summary judgment as a matter of law. Douglas requests that the Board reverse the Agency's permit denial, direct the Agency to issue an operating permit and any other appropriate relief, as justice requires.

The Agency attempts to distinguish Wells from the instant case. The Agency argues that Wells is restricted to those cases where the Agency denies a renewal application based on information not known to the applicant. According to the Agency, Douglas had notice of its non-compliance through Agency compliance inquiry letters dated November 24, 1987 and December 28, 1989, an Agency pre-enforcement conference letter dated April 14, 1988 and Agency 31(d) meetings on January 6, 1988 and May 10, 1988. (R. 12, 57 and 67.) The Agency also asserts that material issues of fact exist as to whether Douglas has demonstrated compliance with the Act and regulations such that summary judgment is inappropriate.

The Board disagrees with the Agency's assertion that a genuine issue of material fact exists and precludes summary judgment in this case. While there may be a factual dispute over whether Douglas' application demonstrates compliance with the Act and regulations, which is the ultimate issue in this case, there is no dispute concerning the facts which are pertinent to a determination of whether Wells applies and whether the Agency followed the proper procedures in issuing its permit renewal denial. The existence of procedural defects obviates the need to reach, at this time, the ultimate issue of compliance. Therefore, the Agency's arguments relating to factual disputes concerning compliance are not relevant to the disposition of the motion for summary judgment presented here.

The Agency's interpretation of Wells as being limited to those cases where the Agency denies an application based on information not known to the applicant is not borne out by a reading of Wells. It is not possible to glean from the Wells decision whether Wells knew of the 250 verified citizen complaints in the Agency's files which apparently formed the basis of the Agency's denial. Given that the appellate court did not make a distinction between information not known to an applicant and information known to the applicant but not relied upon in seeking renewal, the Board declines to make such a distinction here.

The Agency's attempt to distinguish Wells from the instant matter on the basis that Douglas had knowledge of the information upon which the Agency based its denial and, therefore, a pre-denial opportunity to rebut such information is also unpersuasive. In Wells, the Agency apparently denied Wells' application based upon approximately 250 citizen complaints which it had in its file regarding alleged odor violations. In fact, such complaints had been the basis for previous enforcement action by the Agency against Wells. In the instant case, a formal enforcement action

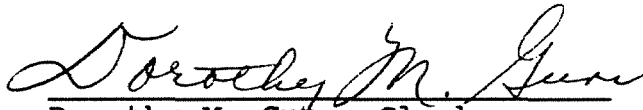
was not filed until April 18, 1990, approximately four months after the permit denial. Here, Douglas was no more on notice of allegations of non-compliance than was Wells.

Pursuant to Wells, where insufficient information forms the basis of the Agency's denial, an applicant seeking renewal of a permit who certifies that previously submitted information remains true, correct and current must be given a fair chance to respond and provide information prior to the denial. The Agency failed to provide Douglas with a fair chance to protect its interest. There being no genuine issues of material fact, and finding that Douglas is entitled to judgment as a matter of law based upon Wells, Douglas' motion for summary judgment is hereby granted. Although Douglas has requested that the Board grant summary judgment and direct the Agency to issue the permit, it is clear that under Wells the appropriate relief is to remand this matter to the Agency with the directive that it adhere to the procedures enunciated in Wells.

IT IS SO ORDERED.

B. Forcade dissents.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 4~~th~~ day of December, 1990 by a vote of 5-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board