

ILLINOIS POLLUTION CONTROL BOARD  
June 7, 2007

DALE L. STANHIBEL, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 07-17  
 ) (Citizens Enforcement – Air, Noise)  
 TOM HALAT d/b/a TOM’S VEGETABLE )  
 MARKET, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by A.S. Moore):

The respondent, Tom Halat d/b/a/ Tom’s Vegetable Market (Halat), filed a motion for summary judgment in this citizens air and noise enforcement complaint filed by Dale L. Stanhibel. Today the Board finds that the record in this case is not sufficient for full consideration of Halat’s motion for summary judgment and a determination whether or not to grant it. Under the circumstances of this case, however, the Board construes the motion as an unopposed motion to dismiss and dismisses Stanhibel’s complaint with prejudice.

**PROCEDURAL BACKGROUND**

On September 18, 2006, Stanhibel filed a complaint (Comp.) against Halat. Stanhibel alleges that Halat violated Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2004)) and Section 900.102 of the Board’s noise regulations (35 Ill. Adm. Code 900.102).

In an order dated November 2, 2007, the Board directed Stanhibel to file by Monday, November 27, 2006, proof of service of the complaint upon Halat. On November 8, 2006, Stanhibel timely filed the certified mail receipt showing service upon Halat on September 19, 2006. *See* 35 Ill. Adm. Code 101.300(b)(2).

On December 1, 2006, Halat filed a motion to vacate any possible default, to extend time to respond to the complaint, and for leave to file a motion to dismiss. In an order dated December 7, 2006, the Board noted that Stanhibel failed to include in his complaint language regarding an answer that is required by 35 Ill. Adm. Code 103.204(f). In that order, the Board granted Halat’s motion for leave to file a motion to dismiss and directed Halat to file that motion by January 8, 2007. The Board also stated that, because service of the complaint did not fully comply with the Board’s procedural rules, the Board would accept a motion to dismiss filed by January 8, 2007, as a timely motion. Having granted Halat’s motion for leave to file the motion to dismiss, the Board denied as unnecessary Halat’s motion to extend time to respond to the complaint. The Board also denied as moot Halat’s motion to vacate any possible default. Finally, the Board reserved ruling on whether the complaint is frivolous or duplicative and whether to accept the complaint for hearing. *See* 35 Ill. Adm. Code 103.212(a).

On January 9, 2007, Halat filed and the Board received a motion to dismiss or, in the alternative, motion for judgment on the pleadings. Stanhibel filed no response to the motion. In an order dated March 1, 2007, the Board denied Halat's motion to dismiss and also denied Halat's motion for judgment on the pleadings. Also in that order, the Board found that the complaint is neither frivolous nor duplicative and accepted it for hearing.

On March 13, 2007, Halat filed an answer and affirmative defenses (Ans.). As affirmative defenses, Halat alleges that "the Illinois Pollution Control Board does not have subject matter jurisdiction over this issue" and that the Illinois Department of Natural Resources and the Illinois Conservation Police preempt the Board's authority over this issue. Ans. at 2, citing 520 ILCS 5/2.37 (authority to kill wildlife responsible for damage).

On April 27, 2007, Halat filed a motion for summary judgment (Mot.). Stanhibel filed no response to the motion.

### **THE COMPLAINT'S ALLEGATIONS**

The complaint alleges that, during the months of August, September, and October in both 2005 and 2006 at 10214 Algonquin Road in Huntley, the respondent fired propane cannons at regular intervals. Comp. at 3. The complaint further alleges that firing the propane cannons caused loud popping sounds between 9:30 a.m. and 5:30 p.m. or between dawn and dusk. *Id.* The complaint further alleges that these sounds violated section 24 of the Act and Section 900.102 of the Board's noise regulations. *Id.*; see 415 ILCS 5/24 (2004) and 35 Ill. Adm. Code 900.102. The complaint claims that these alleged violations caused Stanhibel to experience a headache and nervousness, prevented the complainant from enjoying the use of his own patio and backyard in two years, and required sedation of his five-year-old dog. *Id.* at 4.

### **MOTION FOR SUMMARY JUDGMENT**

Halat states that, on March 13, 2007, he "issued and served the Complainant with Interrogatories, Request to Admit the Genuineness of Document (with corresponding Exhibits), Request to Produce and Request to Admit." Mot. at 2. Halat states that the Board's procedural rule addressing admission "requires the Complainant to respond to each request for admission within twenty-eight days of the service of the Request to Admit." *Id.*; see 35 Ill. Adm. Code 101.618(a). Halat further notes that Section 101.618(c) of the Board's procedural rules requires a request to admit to include the following statement: "Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney." *Id.*, citing 35 Ill. Adm. Code 101.618(c); see 35 Ill. Adm. Code 101.618(f). Halat states that this required statement appeared in his request to admit. Mot. at 2; see Mot., Exh. A.

Halat claims that Stanhibel's 28-day period for responding to the request to admit ended April 16, 2007. Mot. at 2. Halat states that, during an April 5, 2007, telephone conference with the parties, the hearing officer advised Stanhibel that responses to Halat's requests would be due

on April 16, 2007. Mot. at 3; *see also Stanhibel v. Halat*, PCB 07-17 (Apr. 26, 2007) (Hearing Officer Order setting May 7, 2007 deadline). Although Halat acknowledges that Stanhibel provided answers to interrogatories on April 12, 2007, Halat argues that the answers were insufficient and not completed under oath as required by 35 Ill. Adm. Code 101.620(b). Mot. at 3; *see Mot.*, Exh C. Halat further argues that “no other discovery requests were answered or responded to including the Request to Produce, Request to Admit the Genuineness of Documents, and the Request to Admit.” Mot. at 3; *see Mot.*, Exh B (affidavit of respondent’s attorney). Specifically, Halat states that “[n]o response to the Request to Admit has been received by the Attorney for the Respondent.” Mot. at 2-3.

Halat argues that “[n]o just cause has been provided by the Complainant for his failure to comply with the discovery requests and rules.” Mot. at 3. Halat further argues that “all paragraphs of the request are required to be deemed admitted.” *Id.*, citing 35 Ill. Adm. Code 101.618(f), (i). Halat claims that, having been admitted, these facts negate the allegations in the complaint. Mot. at 3. Halat concludes by requesting that the Board enter summary judgment in his favor. Mot. at 3, citing 735 ILCS 5/2-1005 (2004).

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that 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). 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.” *Id.* 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.” *Id.*, citing *Purtill v. Hess*, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986) “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis which would arguably entitle [it] to a judgment.” *Sutter Sanitation, Inc. et al. v. IEPA*, PCB 04-187, slip op. at 9 (Sept. 16, 2004), citing *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

### **BOARD ANALYSIS**

Section 101.500(d) of the Board’s procedural rules provides that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

Since filing his complaint with the Board, Stanhibel has twice failed to file a response to a dispositive motion. The record in this case is not sufficient for the Board’s full consideration of the motion for summary judgment and does not provide an adequate basis for the Board to determine that there exists no genuine issue of material fact and that Halat is entitled to judgment as a matter of law. However, the record clearly shows that Stanhibel was informed of the deadline for filing a response to the motion for summary judgment and that he was determining

whether to file one. Stanhibel v. Halat, PCB 07-17 (Apr. 26, 2007) (Hearing Officer Order). Furthermore, by operation of the Board's procedural rules, Stanhibel is deemed to have waived objection to the granting of Halat's motion. *See* 35 Ill. Adm. Code 101.500(d). Based on these circumstances, the Board construes Halat's motion for summary judgment as an unopposed motion to dismiss. The Board grants Halat's unopposed motion to dismiss with prejudice without addressing the substance of the arguments in the motion for summary judgment.

### **CONCLUSION**

Under the circumstances of this case, the Board today construes Halat's motion for summary judgment as an unopposed motion to dismiss and grants the unopposed motion to dismiss with prejudice.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 7, 2007, by a vote of 4-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board