06405-R7018
KEF/dkl



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---|---|---|
| SCOTT MAYER, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| vs. | ) | PCB 2011-022 |
| | ) | |
| LINCOLN PRAIRIE WATER COMPANY, | ) | |
| KORTE & LUITJOHAN CONTRACTORS, INC., | ) | |
| and MILANO & GRUNLOH ENGINEERS, LLC. | ) | |
| | ) | |
| Respondents. | ) | |



**RESPONSE TO MOTION FOR LEAVE**

NOW COMES the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., by its attorney, KEITH E. FRUEHLING of HEYL, ROYSTER, VOELKER & ALLEN, and hereby provides its formal response/objection to the Motion for Leave to File An Amended Complaint by the Complainant, SCOTT MAYER, and in further support thereof, states as follows:

1. Over two years ago on November 15, 2010, Complainant filed his Petition with the Illinois Pollution Control Board. At that time, it consisted of three Counts against three Respondents and included a total of seventeen pages.

2. The prayer for relief in each Count (with the only difference being the name of the Defendant to whom the specific count was directed) stated as follows:

> "Wherefore, Complainant, Scott Mayer, respectfully requests that the Board grant the following relief:
>
> A. Find that the Respondent, Korte & Luitjohan Contractors, Inc., has violated the Act as herein alleged;

B. Order the Respondent to pay to the Complainant, the amounts as follows: $647,000.00 to put the real estate in the condition it was prior to contamination;

C. Award the Complainant its costs and reasonable attorney fees; and,

D. Grant such other relief as the Board may deem appropriate.

3. By the first week of June, 2011, all Respondents had answered the Complainant's Petition by denying the allegations of wrongdoing under the Act as alleged and asked that the Board deny the Complainant the matters sought in his prayer for relief.

4. Once at issue, time was afforded the parties to inspect the subject property given the allegations of the then-existing allegations in the Petition. Thereafter, Hearing Officer Webb and the parties conducted a hearing for the purpose of establishing a pre-hearing discovery schedule. That conference was conducted on January 11, 2012.

5. On January 11, 2012, Hearing Officer Webb established the following schedule:

(a) All written discovery requests to be served by February 16, 2012;

(b) The complainant's disclosure of all hearing witnesses, including experts, and subject matter of anticipated testimony, opinions and conclusions due March 16, 2012;

(c) The respondents' disclosure of all hearing witnesses, including experts, and subject matter of anticipated testimony, opinions and conclusions due June 16, 2012;

6. After the Complainant's disclosure deadline had expired but before The respondents' disclosure deadline had arrived, the parties disagreed about the relevance of certain supplemental discovery that was served by the Complainant upon Respondents. The Complainant filed a Motion to Compel and the Respondents objected. On August 20, 2012, Hearing officer Webb granted the motion over objection. Respondent complied with the Order.

7. To allow that discovery dispute to play out, the parties agreed and Hearing Officer Webb ordered a change in some of the remaining pre-hearing discovery deadlines. Specifically, on July 17, 2012, this Court entered an Order revising the schedule as to the Respondents' disclosures. The new deadlines established were as follows:

(a) The respondents' disclosure of all hearing witnesses including experts and subject matter of anticipated testimony, their opinions and conclusions due August 16, 2012;

(b) The complainant's deposition of respondents' witnesses due October 16, 2012;

(c) Any and all rebuttal disclosures by November 16, 2012;

(d) All discovery closed by December 17, 2012.

8. The Respondents disclosed and the deadlines set forth in subsections 7(a), (b) and (c) all expired.

9. On January 7, 2013, Hearing Officer Webb conducted a status hearing. At that time, the Complainant sought leave to file an Amended Petition. Specifically, the Complainant sought leave to amend his Petition by introducing an addition to his prayer for damages relating to the subject of the discovery dispute, namely: the cost associated with replacing a water line. No other request was made at that time.

10. Given the timing and nature of the request, Hearing Officer Webb ordered Complainant to place the request in writing. Said motion was to be on file no later than January 28, 2013.

11. On January 28, 2013, Complainant filed the Motion for Leave to Amend his Petition.

12. Complainant's Motion for Leave to Amend does include (in paragraphs 2 and 3) a request to amend the prayer for relief in the three original Counts to his Petition by adding the following language (emphasized in **BOLD** and Underlined font) to Paragraph "B." of his prayer for Counts I, II and III, namely:

"B. Order the Respondent to pay to the Complainant, the amounts as follows: $647,000.00 to put the real estate in the condition it was prior to contamination; **and, $7,100.00 for replacement cost of the damaged water line**."

13. The Respondent objects to the Complainant's motion requesting leave to amend the Petition and, in particular, his prayer for relief as described above because it is untimely. It is untimely because the Complainant knew or should have known about this alleged need well before he filed the original Petition. Moreover, it is untimely because the Complainant's request comes after the parties have completed the discovery process, including the expert/opinion witness component of the discovery process.

14. The Complainant was apparently concerned about the replacement cost of the water line when he sought the Supplemental Interrogatories from Respondent on February 6, 2012. Complainant did not formally seek to address the Respondent's objection to those interrogatories until September 17, 2012.

15. There are no written disclosures by Complainant reflecting anything about the alleged need for or the replacement cost of the subject water line. Specifically, there was no disclosure made by the Complainant from any expert/opinion witness disclosed by him prior to his March 16, 2012 disclosure deadline (or at any time thereafter) that addresses the issue of the water line in any way.

16. Complainant offers no explanation for why the information regarding the water line was not contained in any timely lay, expert or opinion witness disclosure given that this matter had been pending for almost a year with this Board and since **January, 2008** in State Court where the case was fully discovered before Complainant instituted his original Petition in this case. It has been Complainant's position all along that the only way to remedy the alleged problem was to remove all of the earth's soil to a significant depth and replace the same with new soil.

17. Thus, if there was an alleged need for the replacement of the water line, that alleged need has been in existence since the time of the subject work (ie. – prior to January, 2008). That opinion, along with any factual basis and /or opinion relating to the cost of that endeavor could and should have been discovered and asserted by Complainant in his original Petition. He chose not to do so. The alleged need for the work (and any related concern for what that might cost) is not something that was "recently discovered"; rather, it was (or certainly should have been) known to Complainant and included in his original Petition. At the very least, the Complainant was charged with disclosing the opinion regarding the need for the work by March 16, 2012 and did not. Assuming that such a prayer is even sound (which this Respondent disputes), arguably the latest in time that the Complainant's Motion for Leave seeking this amendment could have been timely brought was back in March, 2012 at the time of his expert/opinion disclosures. It was not pursued at that time.

18. Since March 16, 2012, all of the Respondents in this case have developed their defense of the case based on the allegations of the original Petition and on the Complainant's expert/opinion disclosures. The type of witnesses interviewed; expert's retained; the substance of what was addressed by the experts; the substance of the expert's opinions and conclusions;

decisions on what discovery to pursue and what not to pursue; and a host of other defense decisions were based on the allegations and prayers of the original Petition as supported by the Complainant's expert/opinion disclosures.

19. The Respondents made their lay, opinion and expert witness disclosures in August, 2012. Other than the final discovery deadline closing fact discovery, there were no other deadlines open at the time that the Complainant first announced his intent to pursue leave to amend. In other words, the vast majority of the work on the case has been completed.

20. Complainant's motion is untimely and should not now be allowed. To allow said request, the Hearing Officer and/or Board must look past the fact that if the need existed, Complainant has known about it since at least January, 2008; that Complainant failed to include the alleged need for it in his original Petition; that all of the Complainant's lay, opinion and or expert hearing witnesses were to have been disclosed by March 16, 2012 under the pre-hearing discovery deadlines; that Complainant failed to disclose any opinion witness (expert or otherwise) that held the position that the water-line must be removed and replaced; that all lay, opinion and expert discovery ended in mid-October, 2012; and, that the first time that leave was sought was virtually the entire case was fully discovered and essentially ready for hearing.

21. Given the foregoing, allowing Complainant's motion would significantly prejudice the Respondents and would eviscerate the significance of the requirement that the Complainant place the Respondents on notice of the Complainant's allegations in the Petition, the factual basis for those claims, the expert/opinion witnesses/testimony necessary to support those claims and the pre-hearing discovery schedule meant to provide reasonable expectations for the parties as they develop the case for the Board and its Hearing Officer. It must be disallowed.

The Appellate Court in *Freedberg v. Ohio National*, 2012 IL App (1st) 110 938 (2012) establishes the appropriate standard as follows:

> "The decision whether to allow a party to amend its pleadings is within the sound discretion of the trial court; such a decision will not be disturbed without a showing of an abuse of that discretion. [Citation.] The right to amend pleadings is not absolute, and the timeliness of such a request may be considered by the court in its discretion. [Citation.] The court should exercise its power to permit amendment with a view toward allowing a party to present fully his causes of action. [Citation.] Id.
>
> **Ordinarily, amendment should not be allowed where the matters asserted were known by the moving party at the time the original pleading was drafted and for which no excuse is offered in explanation of the initial failure. Id. at 39.** (Emphasis added).
>
> In determining whether to allow an amendment to the pleadings, the trial court considers the following factors: (1) whether the proposed amendment would cure a defect in the pleadings; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleading. *Id* at 45.

The facts that the *Freeburg* Court evaluated under the foregoing four factors analysis are analogous to the facts of our case. In the case at hand, the facts of this matter have not changed since the time that Complainant filed this Petition. Factors #2, 3 and 4 weigh in favor of disallowing the motion for obvious reasons. Any factual basis supporting the alleged claim for removal and replacement of the water line has been known to this Complainant well before this Petition was filed.

22. In addition to the request to amend the Complainant's Original Petition as is set forth in Paragraph 12 above, Complainant asks for more.

23. At no time prior to the receipt of the Complainant's Motion for Leave, was anyone involved in the case aware that Complainant intended to seek leave to amend his Complaint to add three entirely new counts involving new allegations and new prayers seeking new damages against all Respondents. This was never discussed privately amongst counsel for

the Respondents and counsel for the Complainant. Moreover, it was not raised at the status hearing where the Hearing Officer gave the Complainant additional time to file his Leave to Amend.

24. For the first time in the history of this (almost) two year old case, Complainant seeks to introduce three new counts and their corresponding new prayers for new damages. Counts IV, V and VI each introduce novel allegations to the case that lay claim to a factual basis for an economic damages claim.

25. First, for all of the reasons set forth above in the Freeburg case, this Board/Hearing Officer should deny the motion for leave. To the extent that the claim is even legitimate to pursue as a component of Complainant's Petition before this Board (which these Respondents deny), this Complainant was aware of the facts necessary to introduce the claim at the time the Petition was filed. To the extent the alleged damages continued on an annual basis, Complainant had an opportunity to amend at any time before March of 2012 and did not. Thus, these allegations are entirely new to the case, have not been fully subject to the entire course of discovery and allowing Complainant leave to introduce them to the case will be prejudicial to the Respondents. Given the facts, including the fact that the subject incident has been fully discovered in the Shelby County Circuit Court in a case fled in January, 2008, this request is not timely. Finally, nothing prevented the Complainant from including this originally and/or seeking to amend along the way. Under *Freeburg*, this Board/Hearing Officer should not allow the Complainant the leave he seeks at this juncture of the case.

26. Second, the three new brand new counts, Counts IV, V and VI of the proposed Amended Petition seek economic damages. The Complainant has already sought these damages in Illinois State Circuit Court, namely: the Circuit Court of Shelby County. That Court

has already issued an Order suggesting that to the extent that he might be entitled to recover compensatory damages, that he is limited to the diminution in value of the fair market value of the land itself – not the loss of income on an annual basis. That Court has already ruled that the diminution in the fair market value of the subject land contemplates any alleged loss in the agricultural productivity of the subject land. Complainant now attempts to introduce this damage claim (that he has already pursued in State Court and heretofore been denied) to this case and pursue at the last moment. Again, the Freeburg factors #2, 3 and 4 weigh in favor of the Respondents.

27. The prayers for relief to Counts IV, V and VI pursue economic damages. The Moorman Doctrine prevents the pursuit of said damages. Under Illinois law, "plaintiff[s] cannot recover for solely economic loss under the tort theories of strict liability, negligence, and innocent misrepresentation." I*n re Ill. Bell Switching Station Litig.*, 161 Ill.2d 233, 241, 204 Ill.Dec. 216, 641 N.E.2d 440, 444 (1994); see also 91 Ill.2d 69, 91–92, 61 Ill.Dec. 746, 435 N.E.2d 443, 453 (1982). The court defined "economic loss" as " 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property.' " *Moorman Manufacturing v. National Tank*, 91 Ill.2d 69 at 82; See also, 61 Ill.Dec. 746, 435 N.E.2d at 449 (citation omitted). The rationale underlying this rule is that tort law affords the proper remedy for losses arising from personal injuries or damage to one's property, whereas contract law and the Uniform Commercial Code provide the proper remedy for economic losses stemming from diminished commercial expectations without related injuries to persons or property. Id. Here, Complainant is seeking to pursue damages with this Board that the State Court and common law say he is not entitled to pursue. Again, this Board and this Hearing Officer should deny Complainant's motion even if

it believes it has the authority to allow them in general in such a Petition by a citizen complainant.

28. Next, the Hearing Officer and Board must deny the Complainant's Motion For Leave to add the three new Counts and their prayers because the Board has already ruled in its Order on these Respondent's Motion to Dismiss that there can be no award for attorneys fees in this case. To the extent that the Complainant seeks to re-introduce the prayer for attorney's fees to the case, it must be denied.

WHEREFORE, the Respondent, KORTE & LUITJOHAN CONTRACTORS, INC., respectfully request that the Board and / or Hearing Officer deny the Complainant, SCOTT MAYER's, Motion for Leave to Amend his Petition at this late stage of the case for the foregoing reasons, and any other relief that this Board/Hearing Officer deems fit.

Respectfully submitted,

KORTE & LUITJOHAN CONTRACTORS, INC.,
Respondent

BY:_____
HEYL, ROYSTER, VOELKER & ALLEN
Keith E. Fruehling
ARDC #: 6216098

HEYL, ROYSTER, VOELKER & ALLEN
Suite 300, 102 East Main Street
P.O. Box 129
Urbana, IL 61803-0129
Telephone 217.344.0060
Facsimile 217.344.9295

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing **RESPONSE TO MOTION FOR LEAVE** was served upon the attorneys of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Box in Urbana, Illinois, on the 18th day of February, 2013.

Mr. F. James Roytek, III
Law Office of Roytek, Ltd.
921 Broadway Avenue
P.O. Box 746
Mattoon, IL 61938-0746

Mr. Jerome E. McDonald
Campbell, Black, Carnine, Hedin, Ballard & McDonald, P.C.
108 S. 9th Street
P.O. Drawer C
Mt. Vernon, IL 62864

Mr. Kirk A. Holman
Livingston, Barger, Brandt & Schroeder
115 West Jefferson Street, Suite 400
Bloomington, IL 61701

Keith E. Fruehling

20611754_1

February 18, 2013



Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, IL 60601

ORIGINAL

IN RE: Our File No. 06405-R7018
Case No. PCB 2011-022
Scott Mayer v. Lincoln Prairie Water Company, Korte & Luitjohan Contractors, Inc., and Milano & Grunloh Engineers, LLC

Dear Clerk:

HEYL ROYSTER

Enclosed you will find the original and 11 copies of our **Response to Motion for Leave to File an Amended Complaint by the Complainant**; we ask that you place the original on file. Please acknowledge receipt and filing by stamping the extra copy of the document with a file stamp showing date filed and return it in the enclosed, self-addressed, stamped envelope.

Thank you for your cooperation.

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

BY:
Keith E. Fruehling
P.O. Box 129
Urbana, IL 61803-0129
Telephone 217.344.0060, Ext. 224
Facsimile 217.344.9295
kfruehling@heylroyster.com
KEF/dkl

Enclosure: As Indicated

cc: Mr. F. James Roytek, III
Mr. Kirk A. Holman
Mr. Jerome E. McDonald

20615523_1