

ILLINOIS POLLUTION CONTROL BOARD
February 18, 1999

EDWARD MALINA,)	
)	
Complainant,)	
)	
v.)	PCB 98-54
)	(Enforcement - UST, Citizens)
JEAN DAY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is before the Board on cross motions for summary judgment filed October 30, 1998, by complainant, Edward Malina (Malina), and December 7, 1998, by respondent, Jean Day (Day).¹ Malina brought this action pursuant to Section 31(b) of the Environmental Protection Act (Act) (415 ILCS 5/31(b) (1996)), asserting Day violated Sections 21(a) and 21(d)(2) of the Act (415 ILCS 5/21(a), 21(d)(2) (1996)) by causing or allowing open dumping of waste and by conducting a waste-storage, waste-treatment, or waste-disposal operation. Malina seeks recovery of costs incurred in remediating environmental damage resulting from leaking underground storage tanks (USTs) located at 101 East Washington, West Chicago, DuPage County, Illinois (site). Contained within Day's December 7, 1998 filing was a response to Malina's motion for summary judgment. On December 17, 1998, pursuant to leave granted by the hearing officer, Malina filed a reply to Day's response to Malina's motion for summary judgment. For the reasons set forth below, the Board denies both motions for summary judgment.

BACKGROUND

On October 16, 1997, Malina filed a two-count complaint (Comp. at __) against Day alleging violations of Sections 21(a) and 21(d)(2) of the Act and requesting damages for costs Malina incurred in remediating the contaminated soil on the site. Malina alleges that Day owned the site from 1931 until 1981, and operated the site as a gasoline station. Comp. at 1. Malina asserts that a release of gasoline at the site occurred while Day owned and operated the site. Comp. at 2. Malina asserts that a Phase II environmental site assessment conducted in August 1992, confirmed contamination in the soil near the USTs on the site. Comp. at 2.

¹ Malina's motion for summary judgment will be referred to as Malina Mot. at __; Malina's memorandum of law in support of his motion for summary judgment will be referred to as Malina Memo. at __; Day's response and motion for summary judgment will be referred to as Day Resp. and Mot. at __; Malina's reply to Day's response to Malina's motion for summary judgment will be referred to as Malina Rep. at __.

In count I of the complaint, Malina asserts that Day violated Section 21(a) of the Act (415 ILCS 5/21(a) (1996)) by causing or allowing open dumping of waste onto the site. Comp. at 2-3. In count II, Malina alleges that Day violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1996)) by conducting a waste-storage, waste-treatment, or a waste-disposal operation in violation of the Act or Board regulations. Comp. at 4-5. Therefore, Malina requests that the Board find Day in violation of the Act and order Day to remediate the gasoline-contaminated soil, reimburse Malina for costs incurred due to contamination of the site, and grant any further relief the Board deems appropriate. Comp. at 3-4, 6. On December 17, 1998, Day filed an amended answer to Malina's complaint (Ans. at ___) denying the aforementioned allegations. Ans. at 1-3.

RELEVANT STATUTES

Section 3.24 of the Act defines "open dumping" as follows:

the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. 415 ILCS 5/3.24 (1996).

Section 3.31 of the Act defines "refuse" as waste. 415 ILCS 5/3.31 (1996).

Section 3.53 of the Act defines "waste" as follows:

any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities 415 ILCS 5/3.53 (1996).

Sections 21(a) and 21(d)(2) of the Act provide, in pertinent part:

No person shall:

- (a) Cause or allow the open dumping of any waste.
* * *
- (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

 - (2) in violation of any regulations or standards adopted by the Board under this Act. 415 ILCS 5/21(a), (d)(2) (1996).

ARGUMENT OF THE PARTIES

Malina argues that all facts show Day caused the pollution at the site by allowing the gasoline to contaminate the soil at the site and therefore summary judgment should be granted in Malina's favor. Malina Mot. at 2. Malina also alleges that Day and her husband owned and operated the site as a gasoline station from 1942 until 1981, when Malina bought the site.

Malina Memo. at 1-2. Malina states that he became the owner of the site on April 7, 1981. *Id.* In an affidavit attached to the motion (Malina Affidavit), Malina argues he never operated or stored gasoline or any other liquid in the USTs on the site. Malina Affidavit at par. 3. Malina also maintains that he was never aware of the existence of any problem with USTs on the site until he received a notice of violation from the City of West Chicago six months after the sale of the site. Malina Affidavit at par. 4. Malina alleges he was not fully aware of the soil contamination from the USTs on the site until 1992, when a Phase II environmental site assessment was conducted and contamination was confirmed near the USTs. Malina Memo. at 2.

In her response and cross motion for summary judgment, Day denies Malina's allegations and asks that the Board grant her summary judgment. Day Resp. and Mot. at 10-11, 13-14. With regard to count I of the complaint, Day maintains Malina has not demonstrated that Day caused or allowed contamination as required to prove a violation of Section 21(a) of the Act. Day Resp. and Mot. at 7. Rather, Day asserts, if the leaking occurred during the time she owned the site, she was unaware of it, and therefore not liable under Section 21(a) of the Act. Day Resp. and Mot. at 7. Day alleges Malina's responses to interrogatories confirm that Day did not intentionally or knowingly cause or allow contamination at the site and thus Day is not liable for the contamination. Day Resp. and Mot. at 5.

Moreover, in the affidavit attached to the motion (Day Affidavit), Day argues that she did not have an ownership interest in the site until 1970, when the site was transferred into a trust in which she had a beneficial interest. Day Affidavit at par. 3. Day states that the site was operated as a gasoline station from 1931, until approximately the time she sold the site in 1981. Day Affidavit at par. 4. Day asserts her husband died in 1973, and for about two years thereafter, she worked on the site. Day Affidavit at par. 5. Day alleges Malina cannot confirm when, over the fifty years during which the site was a gasoline station, the release of contaminants occurred. Day Resp. and Mot. at 3. Day alleges that from 1970 to 1981, during the time she was the owner of the property, she was not aware of leaks from the USTs on the site and thus she did not cause or allow open dumping in accordance with Section 21(a) of the Act. Day Affidavit at par. 6. In fact, Day argues that she was not made aware of leaks from the USTs on the site until she received a letter from counsel for Malina on July 22, 1996. *Id.*

In addition, Day alleges leaking of contamination from the USTs does not constitute "open dumping," in accordance with Section 3.24 of the Act (415 ILCS 5/3.24 (1996)) because leaking of gasoline from USTs is not "consolidation." Day Resp. and Mot. at 8. Moreover, Day asserts that leakage from USTs does not meet the definition of "waste" under Section 3.53 of the Act (415 ILCS 5/3.53 (1996)) as the leakage is not "discarded." Day Resp. and Mot. at 8. Moreover, Day contends Malina satisfies the definition of "owner" as set forth in Section 732.103 (35 Ill. Adm. Code 732.103) and therefore Malina is liable for the contamination. Day Resp. and Mot. at 6.

Contrary to Malina's assertions that he did not receive the notice of violation from the City of West Chicago until six months after the sale, Day states that in the sale of the site to

Malina, she attached a rider which included the notice of violation. Day Affidavit at par. 8. In addition, despite Malina's claims that the notice of violation provided notice of contamination from the USTs on the site, Day argues the notice of violation simply outlined the ordinances of the City of West Chicago as they pertained to unused gasoline stations, and the removal of tanks and buildings. *Id.*

As to count II of Malina's complaint, Day asserts she did not "conduct" a waste-disposal operation in accordance with Section 21(d)(2) of the Act. Day Resp. and Mot. at 11-12. In addition, Day maintains Malina does not establish that Day was made aware of a "confirmed release," in accordance with 35 Ill. Adm. Code 732.200 and therefore she did not violate Section 21(d)(2) of the Act. Day Resp. and Mot. at 12-13.

In his reply, Malina contends that Day's lack of knowledge of the site's contamination is not a defense. Malina Rep. at 1. Day further argues that the contamination occurred when Day had a legal interest in the site, either when her husband owned it, or from 1970 until 1981, when Day herself owned and operated the site. Malina Rep. at 3. Finally, Malina maintains that Board case law supports the interpretation that the leakage of contaminants from the USTs constitutes "discarded" material. Malina Rep. at 2-3, see Illinois Power Company v. IEPA (January 23, 1997), PCB 97-35.

ANALYSIS

A motion for summary judgment is to be granted only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See 735 ILCS 5/2-1005(c). Summary judgment is appropriate when there are no genuine issues of material fact for the trier of fact to consider and the movant is entitled to judgment as a matter of law. Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 633 N.E.2d 627 (1994).

A review of the uncontested facts shows that Day, in some capacity prior to 1981, owned the site, and that the USTs were located on the property during that time. The facts also confirm that Malina purchased the property sometime in 1981. The question now before the Board is whether these facts are sufficient to establish violations of Sections 21(a) and 21(d)(2) of the Act. In summary, in support of his motion, Malina asserts Day was the owner of the USTs at the site while the tanks were in operation and when the releases occurred; therefore Malina argues that Day is responsible for the releases of gasoline into the soil on the site. Day, however, argues that Malina has not established when precisely the contamination from the USTs to the soil occurred; therefore, Day asks that the Board find her not in violation of Sections 21(a) and 21(d)(2) of the Act.

The Board finds that questions of material fact exist which preclude summary judgment in favor of either Malina or Day. Dispute exists about the specific timeframe that Day owned and/or operated the USTs on the site. In addition, genuine issues of material fact exist as to when the alleged release occurred, and whether Day was the owner and/or operator when the

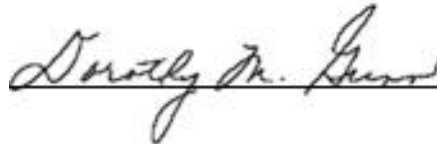
alleged release occurred. Conversely, Day has not established that the release did not occur during her ownership and/or operation of the site. Finally, the facts do not demonstrate when or if the site was finally remediated.

For the foregoing reasons, the motions for summary judgment are denied, and the parties are directed to proceed to hearing on both counts of the complaint. The Board's ruling today does not preclude either party from filing any appropriate motions at a future time.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of February 1999 by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board