

ILLINOIS POLLUTION CONTROL BOARD
February 18, 1999

LIONEL P. TREPANIER, WES WAGER,)
MAUREEN COLE, LORENZ JOSEPH,)
MAXWORKS GARDEN COOPERATIVE,)
and AVI PANDYA,)
)
)
)
Complainants,)
)
v.) PCB 97-50
) (Enforcement - Air, Land, Citizens)
SPEEDWAY WRECKING COMPANY and)
BOARD OF TRUSTEES OF THE)
UNIVERSITY OF ILLINOIS,)
)
)
Respondents.)

ORDER OF THE BOARD (by K.M. Hennessey):

The University of Illinois (University) demolished a building at 1261 S. Halsted, Chicago, Illinois. Complainants Lionel Trepanier (Trepanier), Wes Wager (Wager), Maureen Cole (Cole), Lorenz Joseph (Joseph), Avi Pandya (Pandya), and the Maxworks Garden Cooperative (Maxworks) allege that in carrying out this demolition, the University violated the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996). In particular, complainants allege that in carrying out this demolition, the University violated the Act's prohibition against air pollution and against dumping or depositing waste onto public property. See 415 ILCS 5/9(a), 21(b) (1996).

The University moves the Board to sanction complainants Wager, Cole, Joseph, and Pandya on the grounds that they refused to be deposed. The University also moves to dismiss complainant Maxworks because Maxworks has not participated in this case. The Board denies the motions.¹

PROCEDURAL MATTERS

On March 23, 1998, the University sent notices of deposition to complainants Wager, Cole, Joseph, and Pandya, scheduling the depositions for April 7 and 8, 1998. Mot. 1, Exh. A at 2, Att. B. On March 30, 1998, the hearing officer ordered Trepanier's deposition for April 10, 1998, and established a deadline of April 30, 1998, to complete depositions. Mot.

¹ The University's motion for sanctions, filed January 21, 1999, is cited as "Mot. 1 at _." The University's motion to dismiss Maxworks, filed January 25, 1999, is cited as "Mot. 2 at _."

1, Exh A. at 2, Att. C. In an April 1, 1998 letter to the other four complainants, the University stated that it would schedule their depositions as needed after Trepanier's deposition and that the dates included in the March 23, 1998 notices of deposition no longer applied. Mot. 1, Exh. A at 2, Att. D.

The University states that on April 15, 1998, it began to telephone the other complainants, with the exception of Pandya, to schedule depositions. The University states that it spoke with complainant Wager on two occasions but he never provided a date to be deposed. The University states that it was unable to reach by telephone, or leave a message for, complainant Cole. The University states that it was unable to reach complainant Joseph by telephone, but that it left messages. Mot. 1, Exh. A at 3; University's April 30, 1998 Motion to Compel at 1, Exh. A. The University states that on April 24, 1998, it sent letters to complainants asking that complainants contact the University by April 28, 1998, to schedule the depositions. Mot. 1, Exh. A at 3; University's April 30, 1998 Motion to Compel at 1, Exh. B.²

On April 30, 1998, the University filed a motion to compel the depositions of complainants Wager, Cole, Joseph, and Pandya, citing its alleged efforts to schedule complainants' depositions. On June 8, 1998, the hearing officer denied the University's motion to compel and closed discovery.

On October 15, 1998, the Board granted respondents' motion for summary judgment in part and denied it in part. The Board directed the matter to hearing on complainants' claims under Sections 9(a) and 21(b) of the Act regarding the demolition of 1261 S. Halsted. See Lionel P. Trepanier, Wes Wager, Maureen Cole, Lorenz Joseph, Maxworks Garden Cooperative, and Avi Pandya v. Speedway Wrecking Company and Board of Trustees of the University of Illinois (October 15, 1998), PCB 97-50, slip op. at 15.

On December 9, 1998, the hearing officer reconsidered the June 8, 1998 order. The hearing officer reopened discovery for 30 days to allow the University to depose complainants Wager, Cole, Joseph, and Pandya. The hearing officer limited the depositions to the issues that remain in this case under the Board's October 15, 1998 order.

The University states that on January 4, 1999, it delivered letters to the four complainants by messenger, asking them to call to arrange times for depositions.³ Mot. 1 at 2, Exh D, Att. The University states that it then attempted to contact complainants by telephone to arrange depositions, but was able to reach only complainant Cole. The University states that it spoke with complainant Cole on January 5 and 12, 1999, but Cole was unable to provide a time for deposition. Mot. 1 at 3, Exh. D. The University states that it left telephone messages for the other complainants. Mot. 1, Exh. D

² The University's March 23, 1998 notice of deposition and its letters of April 1 and 15, 1998, are directed to "Lorenz Lopez," not Lorenz Joseph.

³ The University's January 4, 1999 letter is directed to "Lorenz Lopez," not Lorenz Joseph.

The University states that complainant Joseph informed University counsel that he would be available for a deposition at 5:30 p.m. on January 12, 1999. The University states that it ordered a court reporter for the deposition, but that complainant Joseph did not appear.⁴ Mot. 1 at 3, Exh. D at 2.

University's Motion for Sanctions

On January 21, 1999, the University filed a motion for sanctions. The University claims that it has been attempting to depose complainants Wager, Cole, Joseph, and Pandya for almost ten months. Mot. 1 at 1. The University alleges that the four complainants refused to be deposed despite the University's best efforts to schedule depositions. The University also alleges that complainant Joseph induced the University to expend fees and incur costs for a deposition and then failed to appear. Mot. 1 at 2. The University maintains that the only way it can assess the complainants' claims and prepare a defense is to take complainants' depositions. Mot. 1 at 2. The University alleges that the four complainants have abused the discovery process and that the University has been prejudiced. Mot. 1 at 3.

In its motion, the University asks the Board to: (1) dismiss this case as to complainants Wager, Cole, Joseph, and Pandya, with costs and fees awarded to respondents; (2) hold the four complainants jointly and severally liable for the University's alleged costs and fees of \$2,850.50 and order these complainants to pay the University that sum of money before allowing the case to proceed to hearing; and (3) bar the testimony of the four complainants at hearing. Mot. 1 at 6.

On February 5, 1999, complainant Wager filed a response to the University's motion for sanctions. On February 10, 1999, complainants Joseph and Pandya filed separate responses to the University's motion for sanctions. On February 10, 1999, the University filed a motion for leave to file a reply to these responses. None of complainants' responses were timely filed and the Board will not consider them. See 35 Ill. Adm. Code 101.241(b). The University's motion for leave to file a reply is therefore denied as moot.

University's Motion to Dismiss Maxworks Garden Cooperative

On January 25, 1999, the University filed a motion to dismiss complainant Maxworks. The University asserts that Maxworks has not participated in this litigation since this enforcement action was filed. The University also states that no attorney has filed an appearance on behalf of Maxworks. The University argues that as a result, Maxworks has waived whatever interest it may have had in this litigation. Mot. 2 at 2. The University asks the Board to dismiss Maxworks from this case under Section 2-615(a) of the Illinois Code of Civil Procedure:

⁴ The University states that the deposition was scheduled for January 12 (Mot. 1, Exh. D at 2), but elsewhere states that it was scheduled for January 11 (Mot. 1 at 3). The University also states that it was Lorenz Joseph who was to be deposed (Mot. 1 at 3), but elsewhere refers to its attempts to depose "Lorenz Lopez" (Mot. 1, Exh. D at 2).

Motions with respect to pleadings. (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth. Mot. 2 at 2; 735 ILCS 5/2-615(a).

Maxworks has not responded to the University's motion to dismiss.

DISCUSSION

The Board addresses the University's motion for sanctions against complainants Wager, Cole, Joseph, and Pandya. The Board then addresses the University's motion to dismiss Maxworks.

University's Motion for Sanctions

Section 101.280(a) of the Board's procedural rules provides as follows:

If a party or any person unreasonably refuses to comply with any provision of 35 Ill. Adm. Code 101 through 120 or fails to comply with any order entered by the Board or the hearing officer, including any subpoena issued by the Board or hearing officer, the Board will order sanctions. 35 Ill. Adm. Code 101.280(a).

For this provision to apply, the party or person to be sanctioned must have failed to comply with a Board procedural rule, a Board order, or a hearing officer order.

The University fails to identify any rule or order that complainants have violated. At best, the University implies that the four complainants violated the hearing officer's order of December 9, 1998. Mot. 1 at 2. However, that order merely reopened discovery for 30 days. The hearing officer did not order these complainants to appear for depositions.

Furthermore, the record reveals that the University did not properly notice the depositions of the four complainants. While the University served the four complainants with notices of deposition that scheduled the depositions for April 7 and 8, 1998, the University canceled those depositions on April 1, 1998. The University never issued new notices of deposition with new times for the depositions.

Absent new notices of deposition, the four complainants were under no obligation to appear for a deposition. Illinois Supreme Court Rule 206(a)⁵ provides in pertinent part as follows:

(a) Notice of Examination; Time and Place. A party desiring to take the deposition of any person upon oral examination shall serve notice in writing a reasonable time in advance on the other parties. The notice shall state the time and place for taking the deposition 166 Ill. 2d R. 206(a).

Accordingly, notices of deposition must state the time and place of the deposition. As the Illinois Supreme Court stated:

An insufficient notice is the same as if none were given, and no authority exists but that contained in the statute, to take a deposition in a case at law, and to render it available, the requirements of the statute must be complied with in every essential part. Hankinson v. Lombard, 25 Ill. 572, 574 (1861).

Because the University failed to prove that any of the four complainants violated a Board procedural rule, a Board order, or a hearing officer order, Section 101.280(a) does not apply. The Board therefore denies the motion for sanctions.

University's Motion to Dismiss Maxworks Garden Cooperative

The University asks the Board to dismiss Maxworks from this case under Section 2-615(a) of the Illinois Code of Civil Procedure. That section provides:

Motions with respect to pleadings. (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth. 735 ILCS 5/2-615(a).

While the Board may look to provisions of the Illinois Code of Civil Procedure for guidance (see 35 Ill. Adm. Code 101.100(b)), the University does not explain which provision of Section 2-615(a) applies to its motion. The Board assumes that the University considers Maxworks a "misjoined" party. However, the University cites no case law that suggests that Maxworks should be considered misjoined because it has not participated in this litigation. The Board denies the motion.

⁵ The Board may look to the Illinois Supreme Court Rules for guidance in the "absence of a specific provision in [the Board's] procedural rules to govern a particular situation" 35 Ill. Adm. Code 101.100(b). Such is the case with the contents of notices of deposition.

CONCLUSION

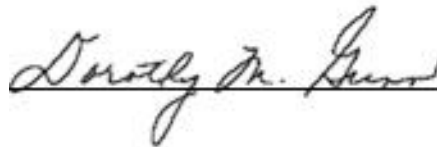
For the reasons set forth above, the Board denies the University's motion for sanctions and its motion to dismiss.

ORDER

1. The Board denies the University's motion for sanctions against complainants Wager, Cole, Joseph, and Pandya.
2. The Board denies the University's motion to dismiss Maxworks.

IT IS SO ORDERED.

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 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board