5/3/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
FOUNTAIN FOUNDRY CORPORATION	:	Dkt. No. CAA-V-005-94
	:	Judge Greene
Respondent	:	

ORDER UPON MOTION FOR SUMMARY DECISION AS TO LIABILITY

This matter arises under sections 113(a) and (d) of the Clean Air Act, 42 U.S.C. § 7413(a), (d). The complaint charges that Respondent's smokestack emissions violated applicable opacity limits of title 325 of the Indiana Administrative Code on two occasions in May, 1993.

Complainant moved for summary decision as to liability on the grounds that (1) no material facts remain to be determined with respect to the charges of the complaint, and (2) Complainant is entitled to judgment as to liability as a matter of law.[1] The

[1] Motion for Accelerated Decision, May 13, 1994. The motion goes only to the issue of liability.

principal submissions in support of the motion are affidavits from the two inspectors [the U. S. Environmental Protection Agency (EPA) inspector and the State of Indiana inspector] whose observations form the basis of the charges in the complaint. The affidavits purport to set forth what the inspectors saw and when, and under what conditions. They support the charges in the complaint, so that there is no question Complainant has carried its burden of showing a prima facie case. Complainant argues that neither Respondent's answer to the complaint nor the affidavits in response to the motion demonstrated the presence of a genuine issue of material fact remaining to be determined.

Respondent's response challenges the observations as set forth in the inspectors' affidavits in several respects. It is argued that: (1) the emissions observed by the inspectors were not smoke, but rather steam resulting from the continuous injection of thirty-five gallons of water per minute into the emissions stack under weather conditions (sufficiently low temperatures) where such injection could have produced steam;[2] (2) the diagram of the EPA inspector's observation point reveals that his line of sight was not perpendicular to the emissions, "in violation of the required methods to determine opacity;"[3] (3) the inspection diagrams show

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[2] Respondent's Memorandum of Law in Opposition to Complainant's Motion for Accelerated Decision, at 4-6; affidavits of Mr. Donald Craft and Mr. George Craft (Exhibits A and B).

[3] Id. at 7.

that both inspectors were looking through the emissions of two stacks, whereas Indiana law requires that the observer's line of sight "'should not include more than one plume at a time;'"[4] (4) one inspector stated that the emissions "appeared to be" white smoke, thus showing doubt in the inspector's own mind as to what he saw on the occasion of his inspection;[5] and that both inspectors' field reports contain no evidence that they complied with certain requirements for making emissions observations as set forth in the Indiana Administrative Code.[6] Aside from these questions raised by Respondent about Complainant's evidence, the principal material offered in opposition to the motion are affidavits from Respondent's President and Vice-President[7] to the effect that (1) the temperature at a weather station located about twenty-five miles from the observation point was sufficiently low that the formation of steam in the emissions stream upon the injection of water into the stack was possible; (2) Respondent's process injects thirty-five gallons of water into the stack per minute; and (3) the emissions which result from such infusion are steam, not smoke. No credible evidence of the temperature at the observation site was

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[4] Id. at 7, 8.

[5] Id. at 8.

[6] Id. at 7, 8.

[7] Affidavits of Mr. Donald Craft and Mr. George Craft, Exhibits A and B to Respondent's response to the motion.

offered by Respondent, and no evidence has been produced to show that the inspectors' observations were or were likely to have been erroneous as a result of a failure to follow proper observation procedures.

The standard for granting summary judgment was set forth clearly in Hahn v. Sargent, 523 F. 2d 461, 464 (1st Cir. 1975) as follows:

> The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both 'genuine' and 'material'. A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes, a material issue must be established by sufficient evidence supporting the claimed factural dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.' First National Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253, 289 (1968). The evidence manifesting the dispute must be 'substantial,' Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co., Inc., 149 F. 2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. Beal v. Lindsay, 468 F. 2d 287, 291 (2d Cir. 1972).

Rule 56(e) delineates the defense required of the party opposing summary judgment:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or otherwise as provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. [Emphasis supplied]

To defeat a motion for summary judgment, then, the opposing

party must produce substantial evidence of a genuine dispute of material fact. A material dispute is one that "affects the outcome of the litigation." Id. for such an issue to be considered genuine, there must be "sufficient evidence supporting the claimed factual dispute...to require a jury or judge to resolve the parties differing versions of the truth at trial." Id. (quoting First National Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253, 289 (1968).

Rule 56(e) does not permit an adverse party to rest upon mere allegations or denials of the pleadings. The response must set forth specific facts to show that there is a genuine issue for trial. Thus, "rule 56 requires that the opposing party be diligent in countering a motion for summary judgment . . . mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." Liberty Leasing Co. v. Hillsum sales Corp., 380 F. 2d 1013, 1051 (5th Cir. 1967) (citations omitted).

Anderson v. Liberty Lobby, cited by Respondent, states that

> When determing if a genuine factual issue . . . exists . . ., a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability . . . . For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact [to find in the non-movant's favor]. . . .
>
> [T]he judge must ask himself . . . whether a fair minded jury could return a verdict for

> the plaintiff on the evidence presented . . . there must be evidence on which the jury could could reasonably find for the plaintiff.[8]

Respondent's response to the motion suggests that the parties do not agree upon certain facts, but it does not raise a *genuine* issue of *material* fact. For instance, Respondent states that the inspectors did not position themselves with their line of vision approximately perpendicular to the emissions plume under observation.[9] Assuming for purposes of this motion that Respondent's statement is true and Complainant's affiant's statements are untrue, no genuine issue of material fact results. Respondent has not shown that the observations were inaccurate as a consequence of the observations having been (i. e. assumed to have been) made improperly. At most, Respondent demonstrates that, given the opportunity, it would pursue the matter of how the observations were made, because such information would have significant probative value. But the summary judgment standard is far more strict. While it is true that observation procedures are encoded in order to make the results as accurate as possible, speculation is not enough to counter a well-supported summary judgment motion.

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[8] Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 254 (1986).

[9] Complainant counters that both inspectors' affidavits state that their "observations were made with their line of vision approximately perpendicular to the plume direction, as prescribed by section 4 of Rule 5-1." Complainant's Reply, at 8-9.

Similarly, Respondent states that the inspectors' reports contain no evidence that they complied with certain requirements for making emissions observations. Assuming this to be true, and leaving aside Complainant's response to the point, there is still no showing of a genuine issue of material fact.

Complainant's inspectors' initial and responding affidavits state squarely that the procedures in the Indiana Code were followed, that the temperature at the observation site was in the 60's -- too warm for the formation of steam --, and that they were observing only one stack because the second stack was capped. The EPA inspector has sixteen years of experience in making emissions observations. The State of Indiana inspector has fourteen years of experience in making observations. If the sole issue here turned upon this type of allegation without evidentiary suupport, Complainant would be entitled to judgment as a matter of law in connection with the violations alleged.

However, to grant the motion at this time would violate the concept of basic procedural fairness: there has been no pretrial exchange and no relevant discovery. Summary judgment, useful and efficient as it is on an adequate record, cannot be granted where, as here, the procedures used and observations made by the inspectors are the foundation for the complaint, and where no opportunity has been given Respondent to examine the inspectors regarding these matters. Complete though the inspectors' four

affidavits appear to be, and qualified though the inspectors appear to be, Complainant's motion is premature. The leading summary judgment cases have in common the fact[10] (or the assumption[11]) that adequate opportunity[12] for the non-moving party to discover evidence

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[10] Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). The court stated that:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

See also In re ICC Industries, TSCA Appeal No. 91-4, 1991 Lexis 61 at 7 (slip opinion at 12), where the denial of further discovery was upheld because Respondent ICC Industries had not demonstrated "any reasonable basis for concluding that *further discovery* may establish that [Respondent] filed the Form . . . at issue." [Emphasis added]

And see Perma Research and Developoment Co. v. Singer, 410 F. 2d 572, 578 (2d Cir. 1969).

[11] Anderson v. Liberty Lobby, supra, note 8, at 250 (1986). The court stated that "the adverse party must set forth specific facts showing that there is a genuine issue for trial," and, in note 5, that:

> This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[12] See Gossett v. Du-Ra-Kel Corp., 569 F. 2d 869, 873 (5th Cir. 1978), where the court noted that the non-moving party could have requested discovery.

essential to its defense has been afforded.[13] Failure to provide this opportunity may constitute reversible error.[14]

Respondent has moved for an order permitting "depositions upon oral questions,"[15] and it is determined that Respondent must be given the opportunity to depose the inspectors regarding their observations. This is not a matter of a "vague hope that something may turn up at trial," which would not be permitted to defeat a properly supported motion for summary liability decision; neither is it an "instance where summary judgment is too blunt a procedural device"[16] for deciding a difficult case. It is a simple matter of fairness,[17] and is well within the discretion of the presiding judge.

It is further determined that the opportunity provided herein must not consume an inordinate amount of time. Accordingly, the dates set forth in the following Order are to be observed strictly,

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[13] See **Federal Rules of Civil Procedure**, Rule 56(c) and 56(f). While the Federal Rules are not strictly applicable to these proceedings, the guidance they afford is valuable and the fairness they ensure, particularly in the area of summary judgment, cannot be ignored.

[14] WSB-TV v. Lee, 852 F. 2d 1266, 1269-1270 (5th Cir. 1988).

[15] Respondent's Request for Depositions upon Oral Questions, May 25, 1994. Complainant responded on June 9, 1994.

[16] Perma Research and Development Company, supra, note 10

[17] The Freedom of Information Act request, which has apparently been acted upon (Complainant's Reply, at 10), is not a substitute for the specific information which may be elicited from the inspectors at depositions.

unless leave is given in advance to depart from them for good cause shown.

ORDER

It is ordered that Complainant's motion must be, and it is hereby, denied at this time as premature.

It is FURTHER ORDERED that Respondent's motion for depositions upon oral questions shall be, and it is hereby granted, to the extent consistent with this opinion and Order.

It is FURTHER ORDERED that the parties shall confer for the purpose of arranging depositions of the inspectors by Respondent, according to the usual procedure. Such examination shall be completed **no later than June 20, 1996.**

And it is FURTHER ORDERED that:

(1) The parties shall, during the week ending **May 24, 1996**, advise what progress they have made toward carrying out the depositions;

(2) The parties shall, **no later than June 28, 1996**, confer for the purpose of attempting to settle this matter;

(4) The parties shall, **during the week ending July 12, 1996**, advise this office as to their progress toward settlement.

J. F. Greene
Administrative Law Judge

Washington, D. C.
May 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER**, was filed with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on May 3, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: Fountain Foundry Corporation
DOCKET NUMBER: CAA-005-94

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