

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT

MCDONOUGH COUNTY, ILLINOIS

FILED

MAY 09 2003

Julia A. Vestal
Circuit Clerk

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. JAMES E. RYAN, Attorney General)
of the State of Illinois, and WILLIAM PONCIN,)
McDonough County State's Attorney,)

Plaintiffs,)

v.)

EMMETT UTILITIES, INC.,)
an Illinois corporation, and)
RUSSELL D. THORELL, individually and)
as president of EMMETT UTILITIES, INC.)

Defendants.)

NO. 01-CH-2

JUDGMENT ORDER

This cause came before the court for an evidentiary hearing on July 22, 2002.

The plaintiff was present by a representative of the Illinois Environmental Protection Agency and the Office of the Illinois Attorney General. The Defendant corporation was present by counsel John Myers. Defendant Russell Thorell was present individually and as president of Emmett Utilities, Inc., and by counsel John Myers.

This action was commenced on behalf of the PEOPLE OF THE STATE OF ILLINOIS, by the Attorney General of the State of Illinois, on the Attorney General's own motion and at the request of the Illinois Environmental Protection Agency.

A. FINDINGS

The court heard testimony and received documentary evidence and makes the following findings:

1. The Illinois EPA is an agency of the State of Illinois created pursuant to Section 4 of the Environmental Protection Act, 415 ILCS 5/4 (1996), and is charged, *inter alia*, with the duty of enforcing the Act.
2. The Defendant, Emmett Utilities, Inc., is an Illinois corporation which, by the time

EXHIBIT

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of the hearing in this cause, was qualified to do business in Illinois.

3. The Defendant Russell Thorell is president of Emmett Utilities, Inc. At the time of trial, Mr. Thorell was before the court in his capacity as president of Emmett Utilities, Inc. and in his capacity as an individual.

4. The court finds that it has jurisdiction over the parties and the subject matter of the complaint.

5. At all times relevant to this Complaint, Emmett Utilities, Inc. has owned and operated a public water supply and sewer system in McDonough County, Illinois, which serves approximately 22 direct service connections from one drilled well.

6. The court makes the following findings:

Count I

7. The Plaintiff has proven that on August 13, 1997 and April 20, 1999:

a. No monthly operating reports had been submitted, in violation of 415 ILCS 5/18(a)(1) and (2), as well as 34 Ill. Adm. Code Sections 611.831, 653.605 and 653.704.

b. No master flow meter had been installed in the well pump discharge line, in violation of 415 ILCS 5/18(a)(1) and (2), as well as 35 Ill. Adm. Code Sections 601.101, 653.106 and Section 3.2.7.3 (a)(4) of the Recommended Standards for Water Works.

c. No hydro pneumatic storage tank sight-glass tubes had been installed, in violation of 415 ILCS 5/18(a)(1) and (2), as well as 35 Ill. Adm. Code Sections 601.101, 653.109 and section 7.2.4 of the Recommended Standards for Water Works.

8. The Court finds that Defendant Emmett Utilities, Inc. failed to prepare and distribute and failed to submit certification of distribution of a 1999 Consumer Confidence Report, in violation of 415 ILCS 5/18(a)(2) AND 35 Ill. Adm. Code 611.882

and 611.885.

9. The remaining allegations of Count I were not stipulated to by the parties. No evidence was presented by the Plaintiff as to the condition of Defendant's facilities on the dates in question. The Plaintiff has failed to meet its burden as to the remaining allegations of Count I.

10. As a result of the findings indicated above, Defendant Emmett Utilities is permanently enjoined from further violations of Illinois' Public Water Supply Regulations. In addition, based upon the standard set forth in People ex. rel Ryan v. McHenry Shores Water Co., 295 Ill.App.3d 628 (1998), Defendant is assessed a monetary penalty of \$10,000. This amount is also based upon the Defendant's reported operating revenues and is intended as an inducement to correct the conditions which have threatened the health of Defendant's customers. This penalty shall be paid by January 31, 2004 and is subject to remittur provided Defendant Emmett Utilities, by that date, has corrected the conditions resulting in the violations found to exist.

11. The Plaintiff presented no evidence in support of its request pursuant to 415 ILCS 5/42(f) that it be awarded its costs in this matter. Therefore, that request is denied.

Count II

As to Count II, the court finds:

12. Plaintiff has proven that Emmett Utilities failed to submit coliform sample results in violation of 415 ILCS 5/18 and 5/19 and 35 Ill. Admin. Code section 611 521 for the following periods:

- a. November 1, 1998 to November 30, 1998
- b. December 1, 1998 to December 31, 1998
- c. January 1, 1999 to January 31, 1999
- d. April 1, 1999 to April 30, 1999
- e. May 1, 1999 to May 31, 1999

13. Emmett Utilities failed to submit nitrate sample results for the period from January 1, 1999 to March 31, 1999 in violation of 415 ILCS 5/18 and 5/19 and 35 Ill. Admin. Code 611.604(a)(1)(A).

14. Emmett Utilities failed to submit lead and copper sample results for the time period from June 1, 1998 to September 30, 1998, in violation of 415 ILCS 5/18 and 5/19 and 35 Ill. Admin. Code 611.356(d)(4)(B).

15. Emmett Utilities failed to provide fluoridation to the water being discharged to the distribution system in violation of 415 ILCS 40/7a and 35 Ill. Admin. Code 611.125.

16. As a result of these findings, Defendant Emmett Utilities is permanently enjoined from further violation of the Illinois Pollution Control Board's Public Water Supply Rules. In addition, based upon the standard set forth in People ex. rel Ryan v. McHenry Shores Water Co., 295 Ill.App.3d 628 (1998), Emmett Utilities is assessed a monetary penalty of \$10,000. This penalty shall be paid by January 31, 2004 and is subject to remittur provided Defendant Emmett Utilities, by that date has corrected the conditions resulting in these violations.

17. The Plaintiff presented no evidence in support of its request pursuant to 415 ILCS 5/42(f) that it be awarded its costs in this matter. Therefore, that request is denied.

Count III

18. The court finds that on or about March 21, 2000, April 17, 2000, May 18, 2000, June 21, 2000, July 26, 2000, August 23, 2000, October 10, 2000, and November 28, 2000 Defendant Emmett Utilities allowed the discharge of raw sewage such as to threaten pollution of water in violation of 415 ILCS 5/12(a). No evidence was presented as to either the environmental effects of these actions or the cost of any cleanup that took place.

19. As a result of this finding, Defendant Emmett Utilities is permanently enjoined from further unauthorized discharge of raw sewage from its facility and is directed to correct the circumstances which resulted in these violations.

20. The Plaintiff presented no evidence in support of its request pursuant to 415 ILCS 5/42(f) that it be awarded its costs in this matter. Therefore that request is denied.

Count IV

21. The Plaintiff seeks to hold Defendant Russell Thorell personally liable for the acts of Emmett Utilities. The burden is on the Plaintiff to make a substantial showing that the corporation is really a sham for another dominating entity. In re Estate of Wallen, 262 Ill.App.3d 61 (1994).

22. In order to pierce the corporate veil a Plaintiff must show: (1) such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and, (2) circumstances must be such that an adherence to the fiction of a separate corporate existence would promote injustice or inequitable consequences. Pederson v. Paragon Pool Enterprises, 214 Ill.App.3d 815 (1991).

23. Factors to be considered in determining whether a sufficient unity of interest exists between a corporation and an individual to warrant piercing the corporate veil include: 1) inadequate capitalization; 2) failure to issue stock; 3) failure to observe corporate formalities; 4) nonpayment of dividends; 5) insolvency of the debtor corporation at the time; 6) non-functioning of other officers or directors; 7) absence of corporate records; 8) whether the corporation is a mere facade for the operation of dominant stockholders. Ted Harrison Oil Co. v. Dokka, 247 Ill.App.3d 791 (1993).

24. The capitalization of a corporation is a major factor in assessing whether a legitimate separate corporate entity existed. McCracken v. Olson Co., 149 Ill.App.3d 104 (1986). In determining whether a corporation is adequately capitalized it is necessary to compare the amount of capital to the amount of business to be conducted

and obligations to be fulfilled. Jacobson v. Buffalo Rock Shooters Supply, 278 Ill.App.3d 1084 (1996). In the instant case the evidence has shown that Emmett Utilities has been adequately capitalized to serve the purposes for which the corporation was established.

25. The evidence in the instant case showed that 10 shares of stock were issued when the corporation was formed. Those shares remain outstanding.

26. Corporate formalities are sufficiently observed where the corporation completed required documents for its formation, issued shares of stock and filed the appropriate corporate tax returns. Jacobson v. Buffalo Rock Shooters Supply, 278 Ill.App.3d 1084 (1996). The Plaintiff has failed to show that these corporate formalities were not observed in the instant case.

27. There was no evidence in the instant case that any dividends were paid. There was no evidence that Emmett Utilities was insolvent at any time relevant to the allegations in the complaint. The evidence established that the only functioning officer or director was Defendant Thorell. Evidence was presented that corporate records were maintained.

28. After weighing all of the above factors, the court finds that the Plaintiff has not made the substantial showing necessary to impose individual liability upon Defendant Thorell. Therefore, Count IV is dismissed.

Count V

For the reasons stated above, Count V is dismissed.

Count VI

For the reasons stated above, Count VI is dismissed.

B. PAYMENT OF PENALTY

1. Subject to the terms of this order, in the event Emmett Utilities, Inc. is obligated to make the penalty payment of twenty thousand dollars (\$20,000.00) as set forth in this order, payment shall be made to the Environmental Protection Trust Fund by Jan. 31,

2004. As set forth above, this amount is subject to remittur provided Defendant Emmett Utilities, Inc., by that date, has corrected the conditions resulting in the violations found to exist. In the event Emmett Utilities, Inc. is obligated under the terms of this order to pay the penalty assessed, this amount shall be paid by certified check or money order, payable to: "Treasurer of the State of Illinois, for deposit in the Environmental Protection Trust Fund," and be delivered to:

Illinois Environmental Protection Agency
Fiscal Services Section
1021 North Grand Avenue East, P.O. Box 19276
Springfield, Illinois 62794-9276

A copy of the penalty transmittal and check shall be simultaneously submitted to:

Illinois Attorney General's Office
c/o Donna Lutes, Environmental Bureau
500 South Second Street
Springfield, Illinois 62706

The name and court number of this case and the Federal Employer Identification Number ("FEIN") of the Defendant shall appear on the certified check or money order. For purposes of payment and collection, the Defendant may be reached at the following address:

Emmett Utilities, Inc.____
c/o Russell D. Thorell, President
RR 2 Box 58N
Oquawka, IL 61469

2. In the event the penalty is not paid in a timely fashion, interest shall accrue and be paid by the Defendant at the rate set forth in Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003(a) (1996), pursuant to Section 42(g) of the Act, 415 ILCS 5/42(g) (1996).

C. COMPLIANCE

1. The Defendant shall diligently comply with, and shall cease and desist from violation of the Act, 415 ILCS 5/1 *et seq.* (1996), the Board's rules and regulations

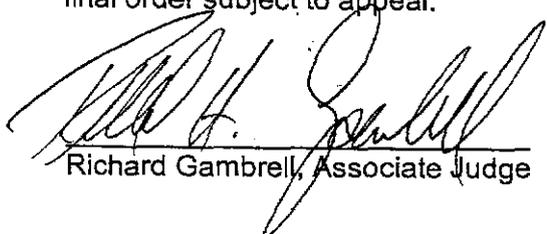
(35 Ill. Adm. Code Subtitles A through H (1994)) and any and all federal laws and regulations.

2. The Defendant shall implement corrective action and shall completely abate the violations set forth herein on or before January 31, 2004. ~~In the alternative, R#6 Defendant shall secure, from the Illinois Commerce Commission, an Order allowing it to R#6 terminate or abandon service pursuant to Section 8-508 of the Public Utilities Act. R#6~~

3. ~~Any petition to terminate or abandon service shall be filed with the Illinois R#6 Commerce Commission within 60 days of the date of this Order. A copy of any such R#6 petition, and all other motions and papers filed by the Defendant in the Commission, R#6 shall be served upon the Attorney General, Environmental Bureau. R#6~~

D. JURISDICTION

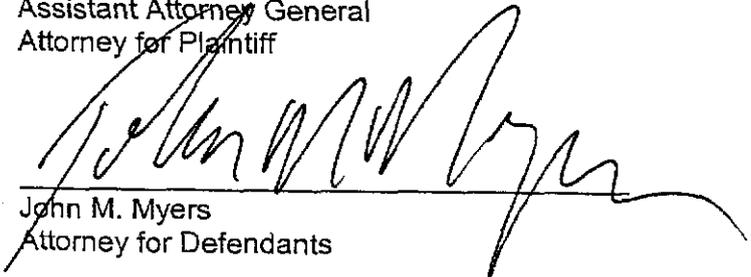
This Court shall retain jurisdiction of this matter for the purpose of enforcing this order and for the purpose of adjudicating all matters of dispute among the parties. The Defendant agrees that notice of any subsequent proceeding to enforce this Consent Order may be made by mail and waives any requirement of service of process. This is a final order subject to appeal.


Richard Gambrell, Associate Judge

4/29/03

Agreed only as to form:


Deborah L. Barnes
Assistant Attorney General
Attorney for Plaintiff


John M. Myers
Attorney for Defendants