

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION**

PRESTIGE FEED PRODUCTS, LLC, an Illinois
limited liability company,

Plaintiff/Counter-Defendant,

v.

VILLAGE OF MOUNT PROSPECT, an Illinois
municipal corporation, et. al.,

Defendants/Counter-Plaintiffs.

Case No. 2023 CH 05147

Judge Clare J. Quish
Cal. 14
Courtroom 2301

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PRESTIGE REPLY IN SUPPORT OF ITS 2-619.1 MOTION TO DISMISS

The Plaintiff/Counter-Defendant, Prestige Feed Products, LLC ("Prestige"), submits the following reply in opposition to the Village of Mount Prospect's response and states as follows:

INTRODUCTION

In its response to the 2-615 motion, the Village admits that it has no allegations to show that Prestige is releasing odorous matter in concentrations exceeding the odor threshold level. Also, under a 2-619(9) analysis or a 2-1005 summary judgment analysis, the Village admits that it has no objective test results showing that Prestige is releasing odorous matter exceeding the odor threshold levels specified by the Village Code and the Illinois Administrative Code. Therefore, whether the Court applies a 2-615 analysis, a 2-619(9) analysis, or a 2-1005 analysis, the Court should enter judgment in favor of Prestige and against the Village on the question of whether Prestige is releasing odorous matter above odorous matter limitations.

Implicitly acknowledging that it cannot win on the question of objective measurements of odor concentrations, the Village cites to other ordinances to support its contention that Prestige's business operation is a nuisance.

In its response, the Village argues that even though it cannot prove that Prestige is

exceeding legally defined odor thresholds, it has the right to rely upon subjective tests contained in other ordinances. However, the evidence will show that Prestige is not and cannot create a nuisance so long as it is releasing odors which are non-detectable or well below legal odor threshold levels.

Therefore, on the Village's claim that Prestige is creating a nuisance based on the release of odorous matter exceeding concentrations above the odor threshold level, Prestige is entitled to judgment dismissing the Village's claim pursuant to 2-615, 2-619, and summary judgment pursuant to 2-1005. The other issues are addressed below.

ARGUMENT

I. The Court should grant Prestige's §2-615 Motion because the Village admits it fails to allege that Prestige is emitting odors over and above the threshold levels in the Village Code and the Illinois Administrative Code.

The question raised by Prestige's §2-615 Motion is whether the Village's Counterclaim states a cause of action for releasing odors above legal threshold levels. The Village admits it fails to allege release of odorous matter above legally defined thresholds even though it had five years to collect the data. The Village has not performed a single objective, measurable, scientific test of the ambient air it complains about. There is not a single allegation in the Village's Counterclaim that Prestige is releasing odors above threshold levels specified by Illinois Administrative Code ("IAC") or the Village Code. Indeed, the Village cannot do so because the only objective, measurable, and scientific evidence collected in this case shows that Prestige is emitting odors which are either Not-Detectable (0) or at levels well below legal thresholds. (See Ryan Hartley Affidavit ¶¶ 26-35 and its Exhibits 2, 3, and 4). While this affidavit may not be considered under a 2-615 analysis, it highlights the Village's lack of objective scientific and measurable evidence. In other words, the Village has not, and cannot, allege in particular terms any manner in which the

Village, or its constituents, may be injured because Prestige has not violated the Village Code or its ordinance(s). For these reasons, Prestige is entitled to judgment in its favor on the issue that it is not releasing odorous matter above legally defined thresholds.

II. The Court should grant Prestige's §2-619 Motion because the Village admits it has no evidence to prove that Prestige is emitting odors over and above odor threshold levels under the Village Code and the Illinois Administrative Code.

In its response, the Village admits that it has no studies or reports objectively and scientifically reflecting that Prestige is emitting odors above legal thresholds. During the five years that Prestige has been operating, the Village has failed to perform or commission a single study that would reflect odor concentrations at the Facility. In fact, the only information collected and reported over the past five years has been Prestige's three reports from 2021, 2022, and 2024 which objectively and scientifically show that Prestige generates odors which are "non-detectable" (non odors) and well below threshold levels at the Facility's borders. Therefore, the affirmative matter defeating the Village's Counterclaim requires a judgment in favor of Prestige on this point. The Village has not pleaded and cannot prove that Prestige is emitting odors over and above threshold levels mandated by the IAC and the Village Code.

III. The Court should enter summary judgment in favor of Prestige because there is no genuine issue of material fact that Prestige is not emitting odors over and above threshold levels provided in the Illinois Administrative Code and in the Village Code.

In its response, the Village raises no genuine issue of material fact to prevent summary judgment in favor of Prestige. In fact, the Village has offered no evidence to support the proposition that Prestige is emitting odors matter above and beyond legal threshold levels. Moreover, the Village does not argue that Prestige is emitting odors above legal thresholds. Simply stated, the Village has no evidence to support the proposition that Prestige is emitting odors above legal thresholds and summary judgment should be entered.

IV. The Other Code Sections Cited by the Village Do Not Necessarily Help the Village.

In its response, the Village cites to Village Code §11.102B which define the terms “NUISANCE,” “NUISANCE IN FACT” and “NUISANCE PER SE”. It also cites to §11.205 “NUISANCES” for the proposition that a nuisance is prohibited. However, these Code sections do not help the Village because there is no dispute between the parties that a nuisance is by definition, wrong and illegal. Prestige has never argued that it is permissible to be a nuisance and Prestige would readily agree that a nuisance constitutes a legal wrong. Instead, the question here is whether the Prestige business operation constitutes a nuisance and that is the dispute between the parties, not whether nuisances are legally wrong.

In its response, the Village also argues that other sections of the Code may justify a subjective finding of nuisance even if the odorous matter limitations are not being exceeded. For example, in §14.2104 “BULK REGULATIONS,” G(6), the final sentence of ¶ (6) states, “Further, the release of odorous matter across lot lines shall not become a nuisance or a source of discomfort to neighboring uses.” However, this sentence does not define the term “nuisance” or a source of discomfort to neighboring uses. Since it appears in the same paragraph with odorous matter threshold limitations, the question for the Court would be how an industrial user would become a nuisance or a source of discomfort if its odors were either non-detectable or well below odor threshold levels. Is it possible to be a nuisance or a source of discomfort if the measurable odors are non-detectable or well below threshold levels? This is not an issue raised or briefed by the parties.

The Village likewise cites to §23.1403 ENUMERATION OF NUISANCES; which states, “to use any premises to create an offensive smell which taints the air and renders it

unwholesome or unreasonably disagreeable to other persons.” This sentence appears to be written before a time when science had progressed to the point that odors could be objectively measured. However, the question remains whether the Prestige operation creates an offensive smell which taints the air and renders it unwholesome or unreasonably disagreeable to other persons when the objective scientific measurements reflect that odors are either non-detectable or well below legal threshold levels. Again, this issue has not been briefed.

These subjective standards made sense at a time when science had not progressed to the point where odors could be objectively and scientifically measured. However, now that the Village Code has adopted bulk regulations which set forth odor threshold limitations, it makes sense to follow the objective standards. Moreover, neither of the subjective standards contained in ¶G(6) of 14.2104 Bulk Regulations or ¶F of 23.1403 Enumeration of Nuisances, support the proposition that Prestige is releasing odors above legal threshold levels. Therefore, Prestige remains entitled to a judgment in its favor that it is not exceeding odor threshold levels as defined by applicable law, and the Village’s Code of Ordinances.

V. The Village’s Reference to the Gross Number of Complaints is Unavailing.

The Village points to the large number of complaints it allegedly received since February 1st. However, the number of complaints received by the Village is irrelevant to the question of whether Prestige is creating a nuisance. First, we have a documented five-year history of complaints on dates and times when Prestige is not even operating. Secondly, it is undisputed that on February 1, 2024, a class action attorney notified everyone within a one-mile radius of Prestige that Prestige was creating “odor problems” in their neighborhood. As a result of this communication and the class action lawsuit that was subsequently filed, the number of complaints have exponentially multiplied. For example, the Montessori School

began complaining for the very first time during February 2024, five years after Prestige opened for business. Third, not a single allegation or affidavit from Village officials, Police officers, or third parties have stated they are complaining about odors above and beyond legal thresholds specified by the Village ordinance. Neither the Village, its officials, nor the complainants have conducted any scientific studies to measure the odors which are allegedly being released by Prestige. Therefore, complaints in and of themselves are not evidence that Prestige is emitting odors above legally permissible thresholds, nor that Prestige is a nuisance. Prestige can only control its business operation, it cannot control what other people say about its business operation.

Finally, the Village concedes by its ordinance and in its response that odors are objectively and scientifically measurable, just like sound, speed, height and weight. There is nothing in the Village Code or Village ordinances which define a nuisance by the number of complaints the Village receives. In fact, nowhere in the Village Code does it specify the number of complaints it takes to constitute a nuisance. In fact, the complaints, in and of themselves, do not assist the Court to determine whether Prestige is emitting odors over and above legal threshold levels.

VI. The Cases Cited by the Village's Response are Clearly Distinguishable From the facts in the instant case and do not help the Village in defeating Prestige's Motions under §§ 2-615, 2-619, and 2-1005.

The Response relies heavily on *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill.App.3d 669, 694 (2d Dist. 2010), and *Wells Manufacturing Company v. Illinois Environmental Protection Agency*, 1987 WL 55965 (Ill.Pol.Control.Bd.) to argue that it is entirely possible for Prestige to operate a nuisance *and* operate under legally defined limits. *Response*, p. 5. However, these cases are factually and legally different from our case in more ways than one.

The Village incompletely cited *Bos*, which ultimately held that that the “[...] plaintiffs’ testimony regarding odors was based on small-scale dairies and did not take into account the manner in which Bos planned to process the animal waste, including use of an anaerobic digester and holding ponds, or Bos’s odor control plan, which included planting trees. Accordingly, the trial court’s denial of an injunction based on odors was also not against the manifest weight of the evidence.” 406 Ill.App.3d at 694.

Plaintiffs sued Bos and the Department of Agriculture and obtained a preliminary injunction against Bos, effectively halting construction of the livestock facility. *Id.*, at 671. Bos filed a motion to dissolve the preliminary injunction, arguing that the Plaintiffs’ experts’ claims were unsupported by fact and rose only to the level of speculation and conjecture. *Id.*, at 677. A two-week trial was held on the permanent injunction, which was denied as to the Plaintiffs. *Id.* The Appellate Court affirmed this ruling and held that Plaintiffs failed to demonstrate high probability of groundwater contamination as required to obtain a permanent injunction, or to establish prospective odor nuisance. *Id.*, at 693.

Further, *Wells*, is an administrative decision by the Illinois Pollution Control Board (“Board”) over a licensing dispute and this case is not binding upon this Court. *See City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill.2d 191, 205, 692 N.E.2d 295, 302, 229 Ill.Dec. 522, 529 (Ill. 1998); *Moore v. State Department of Human Services*, 474 N.E.3d 1173, 1176, 412 Ill.Dec. 250, 253 (4th Dist. 2017); and *Van Dyke v. White*, 60 N.E.3d 1009, 1015, 406 Ill.Dec. 458, 464 (4th Dist. 2017) (all holding that an administrative agency’s decision on a question of law is not binding on a reviewing court). That matter came before the Pollution Control Board upon a Permit Appeal filed by Wells Manufacturing Company (“Wells”). 1987 WL 55965 at *1. Wells contended that it was improperly denied renewal of an air operating permit by

the Illinois Environmental Protection Agency ("Agency") and asked the Board for entry of an order requiring that the Agency issue the permit. *Id.*

Although the Board concluded that Wells had not met its burden of proving that no violation of the Act or air pollution regulations would result if the Agency issued the permit, the Board also held that its decision would not in and of itself force Wells to cease its otherwise valuable activities and close its doors. *Id.*, at *15. The Agency had left open the possibility of reevaluating Wells' permit upon submission of certain information, which was requested by the Agency for the purpose of allowing Wells to make its case that its emissions were not causing a violation of the Act and air pollution regulations, and which may be sufficient to overcome the Agency's determination that Wells' emissions may be currently causing a nuisance violation. *Id.*

As mentioned above, the Wells case is not binding upon this court. Further, in our case the burden is upon the Village to allege and then prove that Prestige is in violation of the Village Code, while in Wells, the burden was upon the license applicant. Even then, the Board did not shut down the facility but allowed Wells to provide additional information to the Agency to fulfill its burden.

The Village cites *Bos* and *Wells* again, together with three other cases, for the proposition that there is ample case law where courts weigh objective evidence against subjective, layperson testimony. *Response*, p. 7. Again, Prestige is not claiming that the Court should not give any consideration or weight whatsoever to the complaints that the Village has received. However, as stated above, these layperson complaints are not sufficient to state a cause of action against Prestige because the Village Code requires allegations that Prestige emits odors that exceed legally defined odorous matter thresholds and the Village fails to plead and prove that Prestige does so.

The Village cites *City of Chicago v. Spaulding*, 15 Ill.App.2d 407, 413 (1st Dist. 1957) for the proposition that lay witness testimony was proper to evaluate the existence of the odor. *Id.* In

Spaulding, the City of Chicago cited defendant operator of animal feed processing plant for failure to abate nuisance of odors. 15 Ill.App.2d at 410. At the trial, the witnesses on behalf of the City were its ventilating inspector and five additional lay witnesses who resided nearby. *Id.* at 411. On defendant's behalf, two men, both of whom were its tenants, testified that they smelled the odor but that it was not offensive. *Id.* No other expert witnesses or reports were produced by the defendant. Hence, that Court considered the testimony of the lay witnesses in equal footing. However, even then, the court said that it found it proper for lay witnesses to testify as to nausea and inability to eat meals; but could not maintain that the testimony of these lay witnesses was competent to prove that the odor endangered the public health. *Id.*, at 412. Applying the same analysis to the facts in our case, the Village cannot allege complaints by the neighbors as substitutions for allegations that Prestige's activities violate odor provisions in the Village Code.

The Village cites *City of Girard v. Girard Egg Corp.*, 87 Ill.App.2d 74, 76 (4th Dist. 1967) for the proposition that the trial court had found the testimony "of plaintiff's witnesses worthy of belief". *Response*, p. 7. However in *Girard*, the appellate court makes no reference to testimony on behalf of defendant, whether layperson or expert. That case differs significantly from the case at hand because Prestige has already produced expert reports and affidavits which support its position that it is not causing odors in excess of legally mandated thresholds.

Finally, the Village cites *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 20 (1981) for the admission by defendant in that case that, "it [could not] prove that 13 persons did not smell odors" from its site. *Response*, p. 7. This Illinois Supreme Court opinion is fairly complicated factually and procedurally. The plaintiffs there included the Village of Wilsonville, Macoupin County, the Macoupin County Farm Bureau, and the Attorney General of Illinois, who sued defendant alleging that its chemical-waste-disposal site presented a public nuisance and a hazard

to the health of the citizens of the village, the county, and the State. 86 Ill.2d at 6. The trial lasted 104 days and the trial court rendered a judgment for the plaintiff. *Id.* The trial court's order concluded that the site constituted a nuisance and enjoined the defendant from operating its hazardous-chemical-waste landfill in Wilsonville. *Id.* It ordered the defendant to remove all toxic and carcinogenic waste buried there, along with all contaminated soil found at the disposal site from the operation of the landfill, and ordered the defendant to restore and reclaim the site. *Id.* The Plaintiffs and Defendant presented their own expert testimony, and the testimony of laypersons was only but a fraction of the 13,000 pages long record in this matter. *Id.* at 7 - 14.

The *SCA Services* case is clearly distinguishable from our case. Prestige has no poisonous emissions or toxins here. Prestige has already produced expert reports and affidavits that support its position that it is not causing odors in excess of legally mandated thresholds. None of Prestige's activities constitute a public nuisance or endanger public health and safety. At this phase of the litigation, the Village has failed to meet its burden to allege and prove that Prestige's odors exceed the threshold levels provided for in the Village Code. The Village relies solely upon complaints as substitutions for objective scientific and measurable evidence that Prestige is emitting odors above legally defined thresholds.

CONCLUSION

Pursuant to to §2-615, to §2-619(9) and to §2-1005, the Village has not alleged and cannot prove that Prestige is emitting odorous matter in excess of legal threshold limits. In fact, the only evidence submitted is that Prestige's odors are either non-detectable or well below legal thresholds. Prestige is entitled to a judgment in its favor based on the objective standard contained in §14.2104G(6) of the ordinance.

WHEREFORE, Plaintiff/Counter-Defendant, Prestige Feed Products, LLC respectfully requests that the Court dismiss the Village of Mount Prospect's Second Amended Verified Counterclaim for Injunctive Relief pursuant to §2-619.1 of the Civil Practice Law, and for any further relief the Court deems just.

Respectfully submitted,

Prestige Feed Products, LLC

/s/ Riccardo A. DiMonte

By: _____
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