

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 27 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 360,

**RULING ON MOTION TO
DISMISS AFFIRMATIVE
DEFENSES**

-by-

DEC Case Nos.
R4-2015-1215-140
R4-2015-1215-140(C)

JOHN McCASHION,

Respondent.

I. Background

These consolidated matters concern respondent's unlawful disposal of solid waste at property in the Albany Pine Bush Preserve, one of the largest of approximately only 20 inland pine barrens worldwide, located in the Town of Colonie, Albany County, New York ("site"). By order dated April 24, 2017 in Case No. R4-2015-1215-140, the Commissioner granted, in part, Department staff's motion for a default judgment, and found respondent liable for violating NYCRR 360-1.5(a) by disposing of solid waste at site. See Matter of McCashion, Order of the Commissioner, April 24, 2017 ("Commissioner Order"), at 4-5.

The Commissioner directed respondent to (i) seek permission from the Albany Pine Bush Preserve Commission ("Commission") to access the site to remove all solid waste from the site; (ii) submit to the Department and the Commission an approvable written solid waste removal plan; (iii) remove all solid waste from the site; and (iv) provide written proof of proper disposal or legal reuse. Id. The Commissioner remanded the matter to the Office of Hearings and Mediation Services for further proceedings relating to the civil penalty to be assessed for the violation. See id. at 5.

Department staff thereafter prepared a notice of hearing and complaint in Case No. R4-2015-1215-140(C) dated November 29, 2017, and served them by certified mail on respondent's counsel, who agreed to accept service on respondent's behalf. See Dusty Renee Tinsley's Affirmation in Support of Department's Motion to Dismiss Affirmative Defenses dated December 27, 2017 ("Tinsley Aff.") Exhibits ("Exs.") 1-5. On December 20, 2017, Respondent served an answer to the complaint. See id. Ex. 6. Staff filed a motion to consolidate Case Nos. R4-2015-1215-140 and R4-2015-1215-140(C) dated December 7, 2017, to which respondent had no objection, and which was granted by Chief Administrative Law Judge McClymonds on December 22, 2017. See Tinsley Aff. ¶ 8, and Ex. 7.

In its complaint in Case No. R4-2015-1215-140(C), Department staff asserts one cause of action, alleging that respondent has failed to complete remediation of the site as required by the

Commissioner Order. See Tinsley Aff. Ex. 2, Complaint, ¶¶ 15-23. Department staff seeks an order of the Commissioner: (i) finding that respondent violated the Commissioner Order; (ii) directing respondent to complete the remedial action required by the Commissioner Order; (iii) impose a civil penalty of \$7,500 for a violation and an additional penalty of \$1,500 for each day during which such violation continues; and (iv) such other and further relief as the Commissioner deems appropriate. See id. at fifth and sixth unnumbered pages, Wherefore clause ¶¶ (a)-(d).

In his answer, respondent has asserted eight of what he refers to as “affirmative defenses,” summarized below:

- First Affirmative Defense: Failure to state a claim for which relief can be granted.
- Second Affirmative Defense: Statute of limitations.
- Third Affirmative Defense: Staff’s claims are barred, in whole or in part, by the doctrine of waiver, estoppel, release and/or laches.
- Fourth Affirmative Defense: Lack of jurisdiction because of improper service of the complaint.
- Fifth Affirmative Defense: “Respondent could not safely remediate the site due to the extremely heavy presence of ticks.”
- Sixth Affirmative Defense: The Department failed to satisfy a “condition precedent” to respondent’s remediation, described as the Department’s “obligation to provide a work environment to respondent which is free from heightened seasonal health hazards.” Because of the Department’s alleged failure, “[r]espondent could not safely remediate the site at issue due to the extremely heavy presence of ticks.”
- Seventh Affirmative Defense: Respondent could not complete the remediation “without impairing and/or breaching existing contractual obligations to perform construction work.”
- Eighth Affirmative Defense: Respondent reserves the right to assert other affirmative defenses as well as counterclaims.

See Answer dated December 20, 2017 (“Answer”), at 2-3, ¶¶ 8-21.

Currently pending before me is Department staff’s Motion to Dismiss Affirmative Defenses dated December 27, 2017 (“Staff Motion”). In response to the Staff Motion, respondent filed an Affirmation in Opposition to Motion to Dismiss Affirmative Defenses dated January 2, 2018 (“Respondent’s Opposition”).

II. Discussion

Although the Staff Motion addresses seven of the eight “affirmative defenses” contained in respondent’s answer, see Tinsley Aff. ¶¶ 13-66,¹ Respondent’s Opposition addresses only the fifth, sixth and seventh “affirmative defenses.” See Respondent’s Opposition at 1-2, ¶¶ 3-11. Respondent has therefore not opposed staff’s motion with respect to the first four affirmative defenses asserted in respondent’s answer. As discussed briefly below, staff is also entitled to dismissal of the first four affirmative defenses on the merits.

A. First Affirmative Defense – Failure to State a Claim

Respondent’s first “affirmative defense,” alleging that staff has failed to state a claim for which relief can be granted, is not properly pleaded as an affirmative defense. Matter of Truisci, Ruling on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 7. The defense merely puts staff on notice that respondent may move for dismissal in the future. See Matter of Oldcastle, Inc., Oldcastle Materials, Inc., and Tilcon New York, Inc., Ruling, February 29, 2016, at 5. Department staff may ignore the defense unless and until respondent moves to dismiss the complaint for failure to state a cause of action. See id. at 12; see also Matter of Truisci, at 12.

B. Second Affirmative Defense – Statute of Limitations

Respondent’s second affirmative defense asserts that, “[t]o the extent the Complaint is barred by the applicable statute of limitations, it must be dismissed.” Answer at 2, ¶ 9. Respondent cites no statute of limitations in his answer, and fails to address staff’s motion to dismiss this affirmative defense. As staff correctly points out, it is well settled that CPLR statute of limitations provisions are not applicable to this administrative proceeding. See e.g. Oldcastle, at 13. Staff’s motion to dismiss the second affirmative defense is granted.

C. Third Affirmative Defense – Waiver, Estoppel, Release or Laches

Respondent’s third affirmative defense merely cites several defenses, but provides no statement of facts which constitute the grounds of each affirmative defense. See 6 NYCRR § 622.4(c). Respondent has therefore failed to satisfy the regulatory requirement applicable to the assertion of affirmative defenses, and has failed to provide sufficient notice regarding the facts underlying any of the purported defenses. Staff’s motion to dismiss the third affirmative defense is granted.

D. Fourth Affirmative Defense – Improper Service

Although this defense asserts that staff failed to properly serve the complaint, staff’s motion and supporting papers demonstrate that respondent’s counsel agreed to accept service of

¹ In what he has denominated an eighth “affirmative defense,” respondent seeks only to reserve a right to assert other affirmative defenses or counterclaims. See Answer at 3, ¶ 21. Amendment of pleadings is governed by 6 NYCRR § 622.5, and Part 622 makes no provision for the assertion of counterclaims in this administrative enforcement proceeding. See Matter of Franco, Ruling on Pre-Hearing Motions, June 18, 2008, at 3. Respondent’s “eighth affirmative defense” is not an affirmative defense at all, and is dismissed.

the notice of hearing and complaint, see Tinsley Aff. Ex. 1, and the notice of hearing and complaint were served by certified mail and received by respondent's counsel. See id. Exs. 3-5. Staff's motion to dismiss the fourth affirmative defense is granted.

E. Fifth Affirmative Defense – Inability to Safely Remediate

Respondent claims that he “could not safely remediate the site at issue due to the extremely heavy presence of ticks.” Answer at 2, ¶ 12. He claims further that he hired “at least one laborer” on at least thirteen separate days for the remediation but that the laborers would not return to the site because of ticks. See id. at 3, ¶¶ 13-14. Respondent claims that he is “unable to locate and hire laborers who are willing to jeopardize their health in the course of remediating the site.” Id. ¶ 16.

Staff argues that respondent has failed to provide sufficient facts to support this defense, and that any concern could be addressed through a proper worker protection plan and equipment. See Tinsley Aff. ¶¶ 41-45. Staff also states in effect that ticks were apparently no impediment to respondent when he unlawfully disposed of the solid waste at the site. See Tinsley Aff. ¶¶ 41-48. In opposition, respondent argues that staff has offered factual arguments to support its motion, “which are properly suited for resolution at the hearing.” Respondent's Opposition at 2, ¶ 7.

Construing respondent's defense liberally, it appears that he is attempting to assert an “impossibility” defense; that is, that the presence of ticks at the site made it impossible for him to complete the remediation. Such defense is most commonly raised in contract cases, in which a party asserts that it was impossible to perform its contractual duty. In such cases:

Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902 (1987).

This matter arises from respondent's failure to comply with the Commissioner's Order; this is not a contract case. Moreover, as a matter of law, the presence of ticks could not render respondent's remediation impossible. As staff makes clear, a proper worker protection plan including, if necessary, requirements for protective apparel and equipment, would address any risk posed by ticks.

Staff's motion to dismiss the fifth affirmative defense is granted.

Respondent also states that the Commissioner's Order was based on a default judgment, and that respondent “has had no opportunity to contest any liability or factual findings in this matter.” Id. ¶ 10. Respondent's liability under the Commissioner's Order is not at issue in this proceeding, and respondent will not be allowed to contest the “liability or factual findings” found

in the Commissioner's order in Case No. R4-2015-1215-140. The only issue remaining in that case after the Commissioner's Order was rendered is the issue of an appropriate civil penalty, which has now been consolidated with Case No. R4-2015-1215-140(C).

The only liability at issue in this consolidated proceeding relates to the cause of action asserted in this proceeding. See Complaint dated November 29, 2017 at ¶¶ 15-23. Factual matters in this proceeding relate to both the cause of action asserted in this proceeding and the issue of an appropriate penalty to be assessed in both Case No. R4-2015-1215-140(C) and Case No. R4-2015-1215-140.

F. Sixth Affirmative Defense – Failure to Provide Safe Work Environment

In his sixth affirmative defense, respondent claims that the Department (i) “failed to satisfy a condition precedent to Respondent’s remediation,” and (ii) “has an obligation to provide a work environment to Respondent which is free from heightened seasonal health hazards.” Answer at 3, ¶¶ 17-18. Respondent also restates his claim that he “could not safely remediate the site at issue due to the extremely heavy presence of ticks.” Id. ¶ 19.

Respondent provides no factual statements to support his claim that there exists a “condition precedent” to his remediation of the site. The remediation is required pursuant to an Order of the Commissioner, which contains no condition precedent to respondent’s obligation to remove the solid waste that he disposed of unlawfully at the site. Moreover, respondent alleges no specific facts or any legal authority to support his assertion that the Department has an obligation to provide respondent with a particular type of work environment at the site.

Staff’s motion to dismiss the sixth affirmative defense is granted.

G. Seventh Affirmative Defense – Conflict with Contractual Obligations

In his seventh affirmative defense, respondent claims that he “was unable to complete the remediation without impairing and/or breaching existing contractual obligations to perform construction work.” Answer at 3, ¶ 19. This does not state an affirmative defense to liability. As staff states in support of its motion, respondent admits that he hired laborers to perform the remediation at the site. He does not allege any facts to support a claim that he could not hire laborers for both the remediation and the unspecified “construction work” to which this affirmative defense refers. Moreover, even if respondent claimed that remediation was impossible because he could not afford to pay laborers for both tasks, such claim would not be allowed to support a defense of impossibility. Cf. 407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corp., 23 N.Y.2d 275, 281-282 (1968) (financial difficulty or economic hardship, “even to the extent of insolvency or bankruptcy,” insufficient to support a claim of impossibility and excuse performance).

Staff’s motion to dismiss the seventh affirmative defense is granted.

III. Conclusion

With respect to the first “affirmative defense,” Department staff may ignore such “defense” unless and until respondent files a motion to dismiss based upon an alleged failure to state a claim.

Department staff’s motion to dismiss the second, third, fourth, fifth, sixth, and seventh affirmative defenses is GRANTED.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: January 10, 2018
Albany, New York