

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Violations of Articles 27 and 71 of the
Environmental Conservation Law and Parts 370 et seq. of Title 6
of the New York Codes, Rules and Regulations

- by -

**RULING ON
MOTIONS TO
DISMISS**

File No.: 17-11
R9-20170214-15

**MORGAN MATERIALS INC. (f/k/a Morgan Chemicals,
Inc.),
MORGAN CHEMICAL, INC. (a/k/a Morgan Chemical, Inc.
and Morgan Chemicals, Inc.),
MORGAN GLOBEX, INC., NORTH SEA MINING &
MATERIALS, LTD.,
ORCHARD MECHANICS, INC.,
DONALD SADKIN, as Chief Executive Officer of Morgan
Materials, Inc., Morgan Chemicals, Inc., Morgan Globex,
Inc. and North Sea Mining & Minerals, Ltd.,
DONALD SADKIN, Individually,
and
JONATHAN SADKIN, Individually,**

Respondents.

Appearances on Motion:

- Thomas S. Berkman, General Counsel (Jennifer Dougherty, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Lippes & Lippes (Richard J. Lippes of counsel), for respondents Morgan Materials, Inc., Morgan Chemical, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd.¹, Orchard Mechanics, Inc., and Donald Sadkin, individually and as chief executive officer of Morgan Materials, Inc., Morgan Chemicals, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd.
- No appearance for Jonathan Sadkin, respondent

¹ Morgan Globex, Ltd. and North Sea Mining & Minerals, Ltd. are frequently cited by the parties as North Sea Mining & Minerals, LTD. The suffix "Ltd." is used throughout this ruling.

RULING ON MOTIONS TO DISMISS

Proceedings

Staff of the Department of Environmental Conservation (Department) commenced this enforcement proceeding against the above-named respondents,² by a notice of hearing and complaint dated December 29, 2017, alleging violations of articles 27 and 71 of the Environmental Conservation Law (ECL) and parts 370 et seq. of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) (*see* Notice of Hearing and Complaint dated December 29, 2017 [Complaint]).³ This ruling address two motions to dismiss the complaint filed with the Office of Hearings and Mediation Services (OHMS) by Richard Lippes, Esq. on behalf of respondents Orchard Mechanics, Inc. (Orchard Mechanics), Morgan Globex, Inc. (Morgan Globex) and North Sea Mining & Minerals, Ltd. (NSMM) (collectively, “Movants” and the “Motion”). The papers considered on this Motion are listed in Appendix A (attached).

For the reasons that follow, I deny the Motion. On my own motion, I direct Department staff to provide a more definite statement of the pleadings to clarify the alleged bases of liability for each of respondents in order to address the ambiguities in the Complaint, as described below (*see* 6 NYCRR 622.4[e]; 6 NYCRR 622.10[b][1][x]).

The Complaint and Department staff’s papers opposing the Motion allege that respondents violated ECL article 27 and the Department’s regulations implementing the Resource Conservation and Recovery Act (RCRA), 42 USC 6901 *et seq.*, in connection with their ownership and operation of a facility in Tonawanda, New York.⁴ The facility consists of several buildings with a street address of 380 Vulcan Street, Tonawanda, New York, in Erie County (“Facility”). The Facility is the subject of a summary abatement proceeding for which the Commissioner issued a summary abatement order and, after a hearing, an order continuing the summary abatement order (*see* affirmation of Jennifer Dougherty dated February 1, 2018 [Dougherty Aff], ¶ 17; *Matter of Morgan Materials, Inc.*, Summary Abatement Order of the Commissioner, November 17, 2016 [“SAO”] and Order of the Commissioner, February 6, 2017

² The entity name Morgan Chemical is as spelled in the caption of this proceeding and in the related summary abatement proceeding. *See Matter of Morgan Materials, Inc.*, Order of the Commissioner, February 6, 2018. As noted by Department staff, the spelling “Chemical” is the spelling found on the records of the Secretary of State (*see* Complaint at 2 n 1).

³ *See* affidavit of service of Pamela Frasier sworn to January 10, 2018 (Frasier Aff.) (service on respondent Jonathan Sadkin); affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 3, 2018 (service on Orchard Mechanics, Inc.); affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 26, 2018 (service on respondents Morgan Materials Inc., Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., and Donald Sadkin).

⁴ RCRA governs the generation, management, storage, treatment and disposal of hazardous waste (*see* ECL 27-0900). New York's program to enforce RCRA's requirements has been authorized by the federal Environmental Protection Agency (*see e.g.* <http://www.dec.ny.gov/chemical/60828.html>).

[“Order” or “Commissioner’s Order”]).⁵ All of the respondents named in this enforcement proceeding are also respondents, and were represented by counsel, in the summary abatement proceeding (the “SAO respondents”), except Orchard Mechanics.

The SAO stated that the SAO respondents have accumulated an estimated 18 million pounds of chemicals,⁶ substantial quantities of hazardous and non-hazardous waste, 2,000 drums and larger bulk containers filled with flammable material (*see* Order at 1, citing SAO ¶ 16). The SAO further stated that the material at the Facility “presents an imminent danger to the health or welfare of the People of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State” (Order at 1, citing SAO ¶ 17). The SAO required respondents to, among other things, take steps to secure the Facility, cease business activities of any kind pertaining to the handling, processing and storage of any chemicals, materials or waste except for activities required by the SAO, and provide access, documents and records to the Department and United States Environmental Protection Agency to facilitate facility inspection and oversight activities (*see* Order at 1-2, citing SAO ¶¶ II-VIII).

Following a hearing, the Commissioner issued the Order continuing the SAO (Commissioner’s Order at 8, ¶¶ I-V). The Commissioner held that the evidence in the record “confirmed the SAO’s conclusion that the conditions at the Facility present an imminent danger to the health or welfare of the people of the State and are likely to result in irreversible or irreparable damage to the natural resources of the State,” and “establishes respondents’ long-standing and continuing failures [sic] to comply with relevant environmental statutes and regulations at the Facility” (Order at 3-4). The Commissioner ordered in relevant part:

- I. Respondents Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.), Morgan Chemical, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), **Morgan Globex, Inc., North Sea Mining & Minerals, Ltd.**, Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemicals, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually (respondents), have violated ECL article 27 and implementing regulations, as a result of their ownership and operations at the various buildings located on four separate tax parcels including 380 Vulcan Street, 400 Vulcan Street, 408 Vulcan Street, and 416 Vulcan Street in Tonawanda, New York (collectively, the Facility). The Facility presents an imminent danger to the health or welfare of the people of the State and is likely to result in irreversible or irreparable damage to the natural resources of the State.

⁵ The SAO respondents include Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.), Morgan Chemical, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemicals, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually.

⁶ At the summary abatement hearing, Peter Reuben, an Environmental Chemist in the Department’s Region 9 office, clarified that the total amount of waste at the Facility was 13 million pounds, not 18 million pounds as stated in his affidavit and the SAO, and that the latter number represents the total amount of waste that “Morgan Materials is in control of [as a total], at all facilities” (Hearing Transcript at 27, lines 4-8).

- II. The summary abatement order dated November 17, 2016 is continued.
- III. The matter is remanded to Department staff for further action pursuant to this order.

(Order at 8, ¶¶ I-III [emphasis added to indicate the Movants]).

Department staff subsequently commenced this enforcement proceeding against the SAO respondents as well as Orchard Mechanics (*see* affidavit of service of Pamela Frasier sworn to January 10, 2018 [Frasier Aff.] [service on respondent Jonathan Sadkin]; affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 3, 2018 [service on Orchard Mechanics, Inc.]; affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 26, 2018 [service on respondents Morgan Materials Inc., Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., and Donald Sadkin]).

By notice of motion dated January 15, 2018, Richard Lippes, Esq. moved to dismiss the Complaint against Orchard Mechanics (*see* notice of motion to dismiss the complaint against Orchard Mechanics and affirmation of Richard J. Lippes Esq. dated January 15, 2018 [Lippes Aff 1]). By notice of motion dated February 20, 2018, Movants' counsel moved to dismiss the Complaint against Morgan Globex and NSMM (*see* notice of motion to dismiss the Complaint against Morgan Globex, Inc. and North Sea Mining & Minerals, LTD and affirmation of Richard J. Lippes Esq. dated February 20, 2018 [Lippes Aff 2]). Mr. Lippes represents all of the respondents in this proceeding (*see* notice of appearance of Richard Lippes, Esq. dated February 20, 2018), with the exception of Jonathan Sadkin, Donald Sadkin's son, who is represented by Kevin Cross, Esq. (Lippes Mathias Wexler Friedman LLP).

Department staff opposed the Motion (*see* opposition to motion to dismiss dated March 12, 2018, affirmation of Jennifer Dougherty, Esq. in opposition to motion to dismiss dated March 12, 2018, and affidavit of service of Pamela Fraiser sworn to March 12, 2018; opposition to motion to dismiss dated February 1, 2018, affirmation of Jennifer Dougherty, Esq. in opposition to motion to dismiss dated February 1, 2018, and affidavit of service of Pamela Fraiser sworn to February 1, 2018). Jonathan Sadkin did not respond to the Motion. Mr. Lippes submitted a sur-reply to Department staff's opposition papers without seeking prior authorization from the undersigned administrative law judge ("ALJ") (*see* 6 NYCRR 622.7[c][3]).

Positions of the Parties

Movants' counsel argues that nothing in the Complaint implicates Movants with any activities that constitute a violation of law, regulation, or consent decree, or provides a factual basis that Movants participated in any of the operations staff alleges were unlawful (*see* Lippes Aff 1 and Lippes Aff 2). According to counsel, respondents are only mentioned as owners of certain real property on Vulcan Street, and the Complaint fails to assert that respondents were carrying out any unlawful activities (*see* affirmations of Richard J. Lippes Esq. dated January 15, 2018 and February 20, 2018).

Ms. Dougherty, counsel for Department staff, argues that respondents conduct business activities at 380 Vulcan Street, Tonawanda, New York “which consists of various buildings on four separate tax parcels including 380 Vulcan, 400 Vulcan, 408 Vulcan and 416 Vulcan Street, Tonawanda, New York” (collectively the ‘Facility’)” (Dougherty Aff ¶ 11). Staff asserts that the public records show that respondent Orchard Mechanics owned 400 Vulcan Street, the real property which housed part of the Facility during the time period when the violations alleged in the Complaint occurred (Dougherty Aff ¶¶ 25-26). Ms. Dougherty further states that “[a]ccording to publicly available tax maps and geographic information systems a portion of the Facility’s main building and two ancillary buildings are located within the boundaries of the parcels owned by Morgan Globex, Inc. and NSMM, Ltd.” (affirmation of Jennifer Dougherty, Esq. dated March 12, 2018 [Dougherty Aff 2], ¶ 6)). Ms. Dougherty asserts that the violations at the Facility extend over a 20-year period, which includes the time period during which respondents Morgan Globex and NSMM owned the real property that housed the Facility (Dougherty Aff 2 ¶¶ 22-24). According to Ms. Dougherty, ownership of the Facility is sufficient to find liability under RCRA (Dougherty Aff 2 ¶ 25).

In his unauthorized sur-reply, Mr. Lippes states that Department staff misinterpreted the Motion as an admission by Movants that they owned the land on Vulcan Street where the alleged violations took place (*see* sur-reply affirmation of Richard Lippes dated March 20, 2018 [Lippes Aff 3], ¶ 3). Movants’ counsel further contends that a close reading of the Complaint indicates that the causes of action only allege wrongdoing by “Operating Respondents,” Donald Sadkin, Jonathan Sadkin and Morgan Chemicals, Inc. (*see* Lippes Aff 3 ¶ 4).

Discussion

On a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the tribunal must liberally construe the pleadings, accept the facts alleged in the complaint as true, give the non-moving party the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Company*, 5 NY3d 582, 591 [2005]). Affidavits submitted in response to a motion to dismiss “may be used freely to preserve inartfully pleaded, but potentially meritorious, claims” (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [internal citations omitted]). The issue is whether the proponent of the pleading has a cause of action, not whether the complaint states one inasmuch as deficient pleadings can be cured through supplemental pleadings and other evidence (*see Leon v Martinez*, 84 NY2d at 88 [internal quotations omitted]; *see also Chanko v American Broadcasting Companies, Inc.*, 27 NY3d 46, 52 [2016]).

Movants’ counsel filed the Motion, prior to submitting an answer, on the grounds that the Complaint fails to state a cause of action against Movants (*see* Lippes Aff 1 and Lippes Aff 2). Pursuant to the well-settled standards of review for CPLR 3211(a)(7) motions to dismiss discussed above, I must broadly construe and accept as true Department staff’s pleadings, and can consider Department staff’s papers submitted in opposition to determine whether staff has a cognizable claim (*see Chanko v American Broadcasting Companies, Inc.* 27 NY3d at 52). In this cases, I will also take into account the findings of fact and conclusions of law set forth in the

Commissioner's Order in the summary abatement proceeding, which involves the same respondents, with one exception, the same facility, and common legal issues arising from the same alleged conduct. Based on my review, I conclude that Department staff has a cognizable claim against Movants and, therefore, deny the Motion.

Morgan Globex as an Operating Respondent

The Complaint asserts twenty-one causes of action against respondents alleging violations of article 27 of the ECL and the Department's solid and hazardous waste regulations. Twenty of the twenty-one causes of action allege unlawful acts or omissions committed by "Operating Respondents" (*see* Complaint at 13-20 [causes of action 2-21]). The Complaint identifies Morgan Globex, along with Morgan Materials, Inc., Morgan Chemical, Inc., Donald Sadkin as chief executive officer of the corporate entities, Donald Sadkin, individually, and Jonathan Sadkin, individually, as "Operating Respondents" (Complaint ¶ 7 ["Operating Respondent" in the singular]). NSMM and Orchard Mechanics are not identified as Operating Respondents.

The Complaint alleges that Morgan Globex is "engaged in the business and/or commercial operations consisting of the purchasing, processing, sale and/or resale of chemical substances and chemical materials" (Complaint ¶ 5), and that Operating Respondents "currently operate and store solid and hazardous waste, chemicals and materials at 380 Vulcan, 400 Vulcan, 408 Vulcan and 416 Vulcan Street, Tonawanda, New York" (*id.* ¶ 7). Contrary to the assertions of Movants' counsel that nothing in the Complaint implicates Morgan Globex with any activities that constitute a violation of law, regulation, or consent decree, or provides a factual basis that Morgan Globex participated in any of the operations that staff alleges were unlawful (*see* Lippes Aff 2), the Complaint contains sufficient allegations charging Morgan Globex, an Operating Respondent, with the operation of the Facility and involvement in the activities and omissions giving rise to the violations alleged in twenty causes of action.

I conclude that the Complaint states viable causes of action against Morgan Globex as a facility operator. Accordingly, the Motion to dismiss the Complaint as against Morgan Globex is denied.

Movants as Facility Owners

The Complaint and Department staff's opposition papers also establish the existence of a potential claim against Movants as owners of the real property associated with the Facility and its operations. The term *facility* is defined under the Department's regulations to include "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste," and "may consist of several treatment, storage or disposal operational units" (6 NYCRR 370.2[b][70]). Thus, a person who owns the real property, land and other structures where solid and hazardous waste is treated, stored or disposed can be deemed to be an owner of the facility under the Department's regulations. The Complaint alleges that NSMM is the owner of real property at 380 and 416 Vulcan Street where Operating Respondents operate (*see* Complaint ¶ 8). The Complaint and Department staff's

opposition papers assert that Orchard Mechanics is the owner of real property at 400 Vulcan Street where part of the Facility was located at the time the violations alleged in the Complaint occurred (*see* Complaint ¶ 10; Dougherty Aff ¶¶ 25-26). With respect to all the Movants, Department staff states that the violations alleged in the Complaint occurred over a twenty-year period during which time Morgan Globex, NSMM, and Orchard Mechanics owned the real property which housed part of the facility (*see* Dougherty Aff 2 ¶ 26). Accordingly, Department staff has a cognizable claim, based on the pleadings and its opposition papers, that Movants are owners of the Facility.

Thirteen causes of action pleaded in the Complaint involve alleged violations of regulations that are expressly applicable to facility owners, including the third, fourth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and nineteenth causes of action. Even though the pleadings do not expressly state a claim under these causes of actions against Movants as the owners of the Facility, Department staff has a cognizable claim against them in that capacity under a reasonable reading of the Complaint, the regulations cited therein, and Department staff's opposition papers. More specifically, it is not necessary for the Complaint to expressly state a claim against respondent facility owners for the Complaint to withstand a motion to dismiss because the mere existence of a claim is all that is necessary for the Complaint to survive. (*See Leon v Martinez*, 84 NY2d at 88; *Chanko v American Broadcasting Companies, Inc.*, 27 NY3d at 52.) I have already denied the Motion with respect to Morgan Globex. I now deny the Motion with respect to NSMM and Orchard Mechanics.

Commissioner's Order

In further support of the denial of the Motion, I note that the Commissioner issued an order continuing the SAO based on his determination that the Facility presents an imminent danger to the health and welfare of the people of the State and is likely to result in irreversible and irreparable damage to natural resources (*see* Order at 2-3, 8, ¶ 1; Hearing Report at 29, Findings of Fact no. 22). This determination was based in part on the findings of the ALJ that the evidence in the SAO proceeding established "significant violations of the ECL and the Department's regulations" at the Facility, including "Article 27, title 9 and Parts 360, 370 through 374, and 376 of 6 NYCRR" (Hearing Report, Finding of Fact no. 21). Morgan Globex and NSMM were respondents in the summary abatement proceeding and represented by counsel (*see* Hearing Report at 3). Although the Commissioner's Order is not dispositive of Morgan Globex's and NSMM's liability for the charges pleaded in the Complaint, under the circumstances, it would be premature to dismiss the Complaint against them.

Amendment of the Complaint

The Department's hearing regulations allow a respondent to move for a more definite statement of the complaint on the grounds that the complaint "is so vague or ambiguous that respondent cannot reasonably be required to frame an answer" (6 NYCRR 622.4[c]). The regulations also permit an ALJ to rule on motions (6 NYCRR 622.6[c][4]) and "do all acts and

take all measures necessary for the maintenance of order and efficient conduct of the hearing” (6 NYCRR 622.10[b][1][x]). Although the Complaint is not so vague or ambiguous that respondents could not be expected to frame an answer with respect to all the pleadings, the Complaint is not free from ambiguity. Accordingly, I am directing Department staff, *sua sponte*, to amend the Complaint to provide a more definite statement of the basis or bases on which staff seeks to hold respondents liable.

This is a complex enforcement proceeding involving twenty-one causes of action and seven respondents. Every cause of action, with the exception of the first which is plead against Donald Sadkin and Morgan Materials for violation of the 2005 consent order, is pleaded against Operating Respondents. Causes of action 2 through 8 include Operating Respondents in the caption of the cause of action and set forth specific allegations concerning unlawful acts or omissions committed by Operating Respondents. Causes of action 9 through 21 refer generally to “Respondents” in the caption, but allege unlawful acts or omissions committed by Operating Respondents in the supporting paragraphs. Two of the Movants, Orchard Mechanics and NSMM, are not identified as Operating Respondents. All the Movants are alleged to be owners of real property associated with the Facility and its operations. While it can be reasonably inferred that Movants are potentially liable as Facility owners, the Complaint does not expressly assert a cause of action against Facility owners. Accordingly, Department staff should amend the Complaint to clarify the theory or theories of liability staff is asserting against each respondent and how the theories apply to the causes of action pleaded in the Complaint. While the Complaint is sufficient to withstand a pre-answer motion to dismiss, Department staff’s clarification of the pleadings will ensure that respondents and this tribunal understand the scope of respondents’ potential liability and that this matter proceeds in an efficient manner (*see* 6 NYCRR 622.10).

Conclusion

The Complaint, Department staff’s submissions, and the summary abatement record establish that Department staff has viable claims against Movants for failing to comply with applicable environmental laws and regulations. Morgan Globex is potentially liable as an operator of the Facility, and all Movants are potentially liable under the Department’s regulations as owners of the Facility. As discussed herein, the Complaint should be amended to clarify the theories of liability that Department staff intends to assert against each of the respondents. Department staff is directed to submit an amended complaint that addresses the issues raised in this ruling on or before August 1, 2018. Respondents are directed to submit an answer to the amended complaint on or before September 4, 2018.

Ruling

Based upon the foregoing, my ruling on the Motion is as follows:

1. The motions to dismiss the Complaint are denied;

2. Department staff is directed to amend the Complaint consistent with this Ruling and serve an amended complaint on or before August 1, 2018; and
3. Respondents are directed to serve an answer to the amended Complaint on or before September 4, 2018.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: Albany, New York
June 11, 2018

APPENDIX A
In the Matter of Morgan Materials, et al.
DEC Case No. R9-2-170214-15
Motion papers and papers submitted in opposition to Motion

1. *In the Matter of Morgan Materials, et al.*, notice of hearing and complaint dated December 29, 2017
2. Notice of motion to dismiss and affirmation of Richard J. Lippes, Esq. dated January 15, 2018
3. Department staff opposition to motion to dismiss and affirmation of Jennifer Dougherty. Esq. dated February 1, 2018
4. Notice of motion to dismiss and affirmation of Richard J. Lippes, Esq. dated February 20, 2018
5. Department staff opposition to motion to dismiss and affirmation of Jennifer Dougherty. Esq. dated March 12, 2018
6. Reply affirmation of Richard J. Lippes, Esq. dated March 20, 2018