**STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of Article 27 of the Environmental Conservation Law of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), by:

RULING
DEC Case No. R3-20031007-129

ANTHONY M. ADINOLFI and
DIRTMAN ENTERPRISES, INC.

Respondents

---

## Procedural Background

By motion dated September 7, 2004, staff of the Department of Environmental Conservation (DEC or Department Staff) moved for dismissal or clarification of affirmative defenses raised by Anthony M. Adinolfi and Dirt Man Enterprises, Inc. (respondents) in the August 23, 2004 answer served in response to the Department's July 23, 2004 complaint. The complaint alleges respondents violated Article 27 of the Environmental Conservation Law (ECL) and Title 6 New York Code of Rules and Regulations (6 NYCRR) Part 360. The answer denies the allegations of the Department's complaint and raises 18 affirmative defenses. The motion was served on the DEC's Office of Hearings and Mediation Services and has been assigned to Administrative Law Judge Molly T. McBride for handling. The affirmation of Jennifer David Hesse, Esq., Assistant Regional Attorney was submitted in support of the motion. Respondents opposed the motion by affirmation of their attorney Patrick Sullivan, Esq., of Sullivan, Chester and Gardner.

Section 622.4 of 6 NYCRR governs the format and requirements for an answer. Section 622.4 states, in part, "The respondent's answer must explicitly assert any affirmative defense together with a statement of facts which constitute the grounds for each affirmative defense asserted". A respondent is barred at hearing from raising any defenses not pled in the answer, unless allowed to by the ALJ. Therefore, a respondent has the burden of

putting the Department on notice of the defenses it intends to raise at the hearing or risk being precluded at hearing from raising them. The Department may move for a clarification of any affirmative defenses within ten days of the service of the answer on the grounds that the affirmative defense is vague or ambiguous and that Department Staff is not placed on notice of the facts or legal theory upon which respondent's defense is based. (6 NYCRR 622.4(f)). CPLR 3211(b) allows a party to move to dismiss a defense if it "is not stated or has no merit." Such a motion can be used to avoid proceeding to trial on matters that have no merit. In ruling on a motion to dismiss a defense, the courts apply the standards used to evaluate a motion to dismiss a complaint for failure to state a cause of action. The truth of the factual allegations of the defense is assumed but whether there are grounds for the defense is the question. *Rule 3211(a)(7) of the CPLR.*

**Discussion**

The Department's complaint alleges that the respondents violated 6 NYCRR 360-1.5(a) and 360-1.7(a)(1)(I) by disposing of construction and demolition © & D) waste at a non-exempt site and constructing and operating a solid waste management facility without a permit from the Department. The respondents' answer asserts 18 affirmative defenses. DEC Staff alleges that all of the defenses are vague and ambiguous in violation of 6 NYCRR 622.4. The Department further asserts that it is not placed on notice of any of the facts supporting the legal theories upon which the defenses are based. I will address the affirmative defenses in the order that they are presented in the answer

1) First affirmative defense: alleges that the complaint fails to state a cause of action. The First Department says in *Riland v. Frederick S. Todman & Co., 56 A.D.2d 350, 393 N.Y.S.2d 4 (1977)*, that no motion by the plaintiff lies under CPLR 3211(b) to strike this defense. "It amounts to an endeavor by the plaintiff to test the sufficiency of her own claim", said the court, and "needlessly expands the pleading stage of an action". The court found it harmless to let it stand and therefore bars the plaintiff from moving against it under CPLR 3211(b). The Third Department examined this question in *Pump v. Anchor Motor Freight, Inc., 138 A.D.2d 849, 525 N.Y.S.2d 959 (1988)*, and adopted the First Department's position, holding that the pleaded defense of failure to state a cause of action is harmless surplusage and a motion to strike it should be denied as unnecessary. The Second Department ruled in *Glenesk v. Guidance*

*Realty Corp., 36 A.D.2d 852, 321 N.Y.S.2d 685 (1971*), that the defense can be raised at any time and should not even be pled in an answer. **RULING**: The motion to clarify or strike is denied with respect to the first affirmative defense.

2) Second affirmative defense: alleges that the materials described in the complaint do not constitute solid waste as defined by law. This defense was clarified in the Sullivan affirmation sufficiently to put the Department on notice as to the facts or legal theory that respondents are relying on in asserting this defense. The defense is relevant and appears to have merit and should not be stricken. **RULING**: The motion is denied with respect to the second affirmative defense.

3) Third - Fifth affirmative defenses: The third defense alleges that the waste described by the Department does not constitute C & D waste, the fourth states that the operations described by the Department do not constitute "solid waste disposal facilities" and the fifth defense states that the operations described by the Department do not constitute solid waste management facilities as defined by law. The Sullivan affirmation provides clarification as to these defenses so as to put the Department on notice of the facts and or legal theory that respondents are relying on in asserting these defenses. As to the motion to strike, these defenses have merit and should stand. **RULING**: The motion is denied with respect to the third, fourth and fifth affirmative defenses.

4) Sixth affirmative defense: alleges that the operations described by the Department do not constitute a C & D debris processing facility. The Department objects to this defense as the complaint does not allege that the respondents were engaged in a C & D processing facility. **RULING**: A review of the complaint confirms the Department's arguments and this defense is stricken because it has no merit.

5) Seventh affirmative defense: alleges that "the actions described by DEC are exempt from permitting requirement under DEC policy and law". The Department seeks the dismissal of this defense as the respondents fail to identify the alleged policy and provide no facts or legal theory upon which to rest this defense. The Sullivan affirmation states that this defense should not be dismissed as there is no harm to the Department in retaining the defense and it is too soon to dismiss it. The Department has outlined in its complaint what actions are alleged violations. This defense goes beyond a denial of the violations

alleged. Respondents are stating that their actions do not require a permit pursuant to DEC policy or law. However, no reference has been made to any specific policy or law. RULING: Respondents shall identify the specific policy or law within 30 days of this order or the defense is stricken.

6) Eighth affirmative defense: alleges that "DEC has violated its policies, acted arbitrarily and capriciously, and engaged in selective enforcement in bringing its enforcement action against respondents." The Sullivan affirmation states that there is no harm to the Department in retaining this defense and that it is too soon to dismiss it. Respondents have offered no other clarification despite being faced with a motion to clarify or dismiss the defense. This defense does require some particularity to put the Department on notice adequately to proceed in this action. The respondents have not identified what policies have been violated or provided any detail in the answer or the Sullivan affirmation as to what they are referring to in alleging selective enforcement or how the Department acted in an arbitrary and capricious manner. I find that the answer does not "explicitly assert any affirmative defense together with a statement of facts which constitute the grounds for each affirmative defense asserted." **RULING**: Respondents shall identify the specific policy or law within 30 days of this order or the defense is stricken.

7) Ninth affirmative defense: alleges that the Department "improperly alleges facts that cannot both be true in that DEC alleges that respondents disposed of solid waste at the same time that DEC alleges that respondents accepted solid waste without acknowledging that factual allegations are upon information and belief or as alleged as alternative truths." I agree with Department staff's argument in its motion that both allegations in the complaint can be proven and do not have to be alternate truths and therefore the defense has no merit. **RULING:** The ninth affirmative defense is stricken.

8) Tenth affirmative defense: states "DEC improperly failed to include other entities as respondents." This defense is unclear in that the respondents do not identify any other party who should have been included. The respondents were provided with an opportunity to clarify this defense in the opposing papers and again they did not. Instead respondents argue in the Sullivan affirmation that the defense can only be supported at the completion of discovery. I do not agree and I take this argument to mean that respondents can not clarify it at this

time. Without some identification of a party that should have been included, the defense is without merit. The respondents did have an opportunity to clarify this defense when they opposed the motion and they were not able to do that and have acknowledged that they can not do so at this time. It would be pointless to request clarification based upon the respondents papers. To proceed with this defense, it must put the Department on notice as to who "the other entities" might be. Also, there are insufficient facts put forward to demonstrate that this defense has any merit. **RULING**: This defense is stricken.

9) Eleventh affirmative defense: alleges "DEC improperly alleged violations upon information and belief." Respondents objection to the use of "upon information and belief" is repeated in the Sullivan affirmation, without providing legal support for the objection. DEC Staff cited *In the Matter of Bradley Corporate Park*, Ruling on Motion, DEC File No. 3-20011031-139, March 21, 2002 wherein Administrative Law Judge P. Nicholas Garlick held that use of the term "upon information and belief" did not render the complaint vague or ambiguous in the context of those paragraphs. *Bradley Park* is a fact specific ruling. Each pleading must be examined individually.

DEC Staff alleged two violations based upon facts couched in terms of "upon information and belief". Using that term to preface the allegation does not make the allegation vague or ambiguous and puts respondents on notice of the facts and legal basis for the alleged violation. Respondents have objected to this terminology as being "improper" but no legal authority has been provided to support that claim. However, at this stage in the proceeding, the defenses does not have to be proven, merely articulated sufficiently to put the Department on notice of the defense and it must have some basis in law. Both of those criteria have been met. **RULING**: The motion to strike and clarify is denied with respect to this defense.

10) Twelfth affirmative defense: alleges the Department did not properly plead a violation. This defense is pled sufficiently to put the Department on notice and no further clarification is needed. Also, the defense has sufficient merit to proceed. **RULING:** The motion is denied with respect to this defense.

11) Thirteenth & Fourteenth affirmative defenses: These defenses have specific denials included in them. The thirteenth denies that the respondents were the cause of the contamination

and the fourteenth states that Mr. Adinolfi is an improper party. These are both specific enough to put the Department on notice of the defenses. Also, if we assume the facts to be true, both have merit. **RULING**: The motion to clarify or strike is denied with respect to this defense.

12) Fifteenth affirmative defense: alleges the respondents' actions are exempt under public policy considerations. This is quite vague and does require some specificity. The respondents had an opportunity to elaborate on this defense in the opposing papers and failed. There are no facts stated in the answer that can be assumed to be true to establish that this defense has merit. In respondents opposing papers they refer to a general denial that the complaint is contradictory and ambiguous and there is no harm to the Department in retaining the defense. This is insufficient to support the defense. **RULING**: Respondents shall identify with specificity the public policy within 30 days of this order or the defense is stricken.

13) Sixteenth and seventeenth affirmative defenses: alleges the work was undertaken to protect property from flooding and erosion. This provides adequate notice to the Department as to the defenses and they appear on their face to have some legal basis. **RULING**: The motion to clarify and to strike are denied with respect to these two defenses.

14) Eighteenth affirmative defense: alleges the work was undertaken "in accordance with the criteria set forth in the law". While this is quite vague, it is a defense that would not need to be pled in an answer to be raised at hearing, as compliance with the applicable law is always a defense. **RULING:** The motion to clarify and to strike are denied with respect to this defense.

## Ruling

The motion is granted in part and denied in part as detailed above.

Molly T. McBride
Administrative Law Judge

Albany, New York
March 15, 2005

To: Jennifer David Hesse, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 3, Division of Legal Affairs
South Putt Corners Road
New Paltz, New York 12561-1696

Sullivan, Chester and Gardner P.C.
475 Park Avenue So., 30th Floor
New York, N.Y. 10016