STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law ("ECL") and Part 360 of Title 6 of the official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and of Department Order on Consent No. R1-20080514-150

DEC Case No.
CO 1-2104-0507-159

-by-

ECOLOGY SANITATION CORP., ECOLOGY TRANSPORTATION CORP., and ERNEST DEMATTEO, INDIVIDUALLY AND AS OWNER AND OPERATOR OF ECOLOGY SANITATION CORP. and ECOLOGY TRANSPORTATION CORP.,

Respondents.

RULINGS ON STAFF MOTION TO CLARIFY OR DISMISS DEFENSES AND MOTION TO STRIKE

I. Background

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Ecology Sanitation Corp. ("Ecology Sanitation"), Ecology Transportation Corp. ("Ecology Transportation"), and Ernest DeMatteo ("DeMatteo"), individually and as owner and operator of Ecology Sanitation and Ecology Transportation (collectively "respondents") by service of a notice of hearing and complaint, both dated October 26, 2015. The complaint asserts two causes of action, alleging that (i) respondents operated a solid waste management facility without the required part 360 permit, in violation of 6 NYCRR §§ 360-1.5(a)(2), 360-1.7 and 360-16.1(c); and (ii) respondents DeMatteo and Ecology Sanitation violated a consent order entered into in 2008 ("2008 Consent Order"), by failing since April 2014 to make payments for environmental monitoring of respondents' solid waste operations as required by the schedule of compliance in that consent order. See generally Complaint ¶¶ 28-65.

Department staff seeks an order of the Commissioner: (i) finding that respondents violated the 2008 Consent Order and the cited statutes and regulations; (ii) directing respondents to submit the overdue annual environmental monitor fees in the amount of $13,100; (iii) finding that respondents own and/or operate a construction and demolition ("C&D") processing facility;

(iv) enjoining respondents from continued operation of a C&D processing facility without a permit; (v) assessing a civil penalty in the amount of $85,000 for violating the 2008 Consent Order, for operating a C&D processing facility without a permit, and for failing to submit the annual environmental monitor fees; and (vi) granting such other relief as the Commissioner may deem just and proper. See Complaint at eighth and ninth unnumbered pages, Wherefore Clause ¶¶ I-VI.

In their answer, respondents have asserted six of what they refer to as "affirmative defenses," each comprised of one paragraph, summarized below:

- First Affirmative Defense: Failure to state a claim for which relief may be granted.

- Second Affirmative Defense: Staff's claims are barred in whole or in part due to the actions of the Department, "which arbitrarily and without any substantive basis demanded that a Part 360 Permit was or is required for the handling of railroad ties by Respondents Ecology Sanitation and/or Ecology Transportation."

- Third Affirmative Defense: Staff's claims are moot because Part 360 does not apply to respondents' handling of railroad ties, "as explained to Respondents" in an April 6, 2010 "guidance letter" from the Department's Office of General Counsel.

- Fourth Affirmative Defense: Staff's claims are moot because Part 360 does not apply to respondents' handling of railroad ties, "as 'clarified' by a memorandum" dated May 27, 2015 from the Department's Office of General Counsel.

- Fifth Affirmative Defense: Staff's claims are barred by equitable estoppel and the Department's "wrongful and arbitrary conduct in requiring a Part 360 permit for the handling of railroad ties by Respondents Ecology Sanitation and/or Ecology Transportation where DEC did not require that any other entity was required to obtain a Part 360 permit for like activities."

- Sixth Affirmative Defense: Staff's claims are barred in whole or in part by the doctrine of unclean hands.

See Answer dated December 21, 2015, at ¶¶ 66-71.

Currently pending before me are: (i) Department staff's Motion for Clarification or Dismissal of Affirmative Defenses dated January 4, 2016 ("Motion to Clarify"); and (ii) Department staff's motion to strike portions of respondents' opposition to the Motion to Clarify to the extent it includes discussions of settlement negotiations between the parties. See Sur-Reply to Respondents' Opposition to DEC Motion for Clarification or Dismissal of Affirmative Defenses, dated December 15, 2016 ("Staff Reply").[1]

[1] Staff's response to respondents' opposition to the motion is more properly considered a "reply" than a "sur-reply." A complete list of the papers submitted by the parties with respect to staff's motions is set forth in Appendix A attached hereto.

As discussed below, Department staff's motion for clarification is granted in part and denied in part, and staff's motion to strike respondents' discussion of settlement negotiations is denied.

II. Discussion

A. Motion to Clarify or Dismiss Affirmative Defenses

In Departmental enforcement proceedings, a respondent's answer:

> must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.

6 NYCRR § 622.4(c). Department staff may move for clarification of affirmative defenses:

> on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based.

6 NYCRR § 622.4(f).

Department staff seeks dismissal of all of respondents' affirmative defenses with prejudice or, in the alternative, clarification "based upon the vague and ambiguous nature" of the defenses. See e.g. Motion to Clarify ¶¶ 19, 26, 31, 37. Motions to clarify are addressed to the sufficiency of the notice provided by respondents' pleading. See Matter of Truisi, Ruling on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 4. Motions to dismiss defenses are addressed to the substance of the defenses, and are analyzed using the standards applicable to motions to dismiss defenses under CPLR 3211(b). See id. at 10. "On a motion to dismiss affirmative defenses, the answer is liberally construed, the facts alleged are accepted as true, and the pleader is afforded every possible inference." Matter of Grout, Ruling of the Chief Administrative Law Judge on Motions, December 12, 2014, at 14 (citing cases).

In support of its motion to clarify or dismiss respondents' affirmative defenses, Department staff argues generally that the defenses (i) fail to "provide a statement of facts which constitute the grounds of each affirmative defense," as required by 6 NYCRR § 622.4(c); (ii) are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which the defenses are based; and (iii) include equitable defenses that are not available against a governmental agency. See Motion to Clarify at ¶¶ 4-8.

1. First Affirmative Defense – Failure to State a Claim

Staff initially sought dismissal of respondents' first affirmative defense, which asserts that the complaint fails to state a claim for which relief may be granted. Staff has now

withdrawn its motion with respect to this defense, acknowledging that "failure to state a claim" is not properly pleaded as an affirmative defense; rather, it is more properly a ground for a motion to dismiss the complaint. See Staff Reply at ¶¶ 7-9; see also Matter of Truisi, at 7-8, 12 (the "defense" of failure to state a claim may be safely ignored; a motion to dismiss the defense does not lie).

2. Second Affirmative Defense – Part 360 Permit Not Required

Respondents' second affirmative defense asserts that staff's claims are barred in whole or in part because the Department "arbitrarily and without any substantive basis demanded that a Part 360 Permit was or is required for the handling of railroad ties by Respondents Ecology Sanitation and/or Ecology Transportation." Answer ¶ 67. Seeking dismissal of the second affirmative defense with prejudice, Department staff argues that respondents have failed "to provide any specific factual or legal support for the general allegation that the Department's claims are barred due to the actions of DEC." Motion to Clarify at ¶ 18.

Respondents argue in opposition that staff's motion "is wholly undermined by the history of the underlying events in question, which the DEC knows only too well and is set forth at length" in a verified complaint filed by two respondents in Supreme Court, Suffolk County naming as defendants the Long Island Rail Road Company, the Department, and Commissioner Seggos. Respondents' Opposition to DEC Motion to Clarify or Dismiss Respondents' Affirmative Defenses, dated November 17, 2016 ("Resp. Opp."), at 5. Respondents argue that the verified complaints from the Supreme Court action may serve as a supporting affidavit here, and that the facts set forth in the complaint serve to provide sufficient notice of the facts supporting respondents' second affirmative defense so that staff's motion should be denied. See id. at 5-6. Respondents then provide a seven page "factual history," citing paragraphs from the proposed verified first amended complaint, and argue that this "history "provides ample notice of respondents' claims." Id. at 13.

Staff's first cause of action alleges that respondents required, but did not obtain, a Part 360 permit. Respondents' second affirmative defense claims that staff "arbitrarily and without any substantive basis demanded that a Part 360 Permit was or is required." Respondents' assertion that the permit requirement alleged by staff is inapplicable to respondents' circumstance brings this defense squarely within the scope of 6 NYCRR § 622.4(c) and, liberally construed, when considering other allegations in the answer, e.g., the letter and memorandum cited in the third and fourth affirmative defenses, apprises staff of the facts or legal theory upon which respondents' defense is based. Respondents have the burden at hearing to establish by a preponderance of the evidence specific facts supporting respondents' assertions in this affirmative defense that the Part 360 requirements are not applicable to respondents' activities. See Answer ¶ 67; see also 6 NYCRR § 622.11(b), (c).

Department staff's motion to clarify or dismiss the second affirmative defense is denied. [2]

3. Third and Fourth Affirmative Defenses – Mootness

Respondents' third and fourth affirmative defenses assert that staff's claims are "moot" based upon the contents of an April 6, 2010 "guidance letter" from the Department's Office of General Counsel ("OGC") and an OGC memorandum dated May 27, 2015. Respondents assert that these OGC documents establish that 6 NYCRR Part 360 did and does not apply to respondents' handling of railroad ties. See Answer ¶¶ 68-69. In its initial papers, Department staff argues that the two documents cited by respondents do not "constitute a determination by the Department that Respondents were not required to obtain a Part 360 permit that would render this proceeding moot." Motion to Clarify ¶ 19.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" and "only when it is impossible for a court to grant any effectual relief whatever to a prevailing party." Chafin v. Chafin, 133 S.Ct. 1017, 1023 (2013) (internal quotations omitted). Thus, so long as the parties have a concrete interest in the outcome of the proceeding, it is not moot. See id. (citing Knox v. Service Employees, 132 S.Ct. 2277 (2012)); see also New York State Correctional Officers and Police Benevolent Ass'n, Inc. v. New York State Office of Mental Health, 138 A.D.3d 1205, 1206 (3d Dep't 2016) (proceeding not moot when rights of parties will be directly affected by determination and the interest of the parties is an immediate consequence of the judgment) (citing Hearst Corp. v. Clyne, 50 N.Y.2d, 707, 714 (1980).

Although not entirely clear, respondents appear to argue in opposition to staff's motion that this matter is moot because respondents "shut down the allegedly offending entity" and the Department's actions "forced Respondents out of business." Resp. Opp. at 13-14. In reply, staff states that respondents' arguments "do not in fact relate to mootness at all." Staff Reply ¶ 24.

With respect to the mootness, issue, the parties to this proceeding continue to have an interest in the outcome of this proceeding. As stated above, the wherefore clause in the complaint seeks a Commissioner's order finding respondents liable for the alleged violations, directing respondents to pay environmental monitor fees in the amount of $13,100, enjoining respondents from operating a C&D facility without a permit, and imposing on respondents a civil penalty of $85,000. See Complaint Wherefore Clause ¶¶ I-VI. Whether respondents have "shut down the allegedly offending entity" or are "out of business" does not eliminate the parties' interest in the outcome of this proceeding; nor does it therefore bear on whether this matter remains "live" for purposes of mootness analysis.

In light of the foregoing, Department staff's motion to dismiss the third and fourth affirmative defenses is granted.

[2] Given the denial of staff's motion with respect to this defense, I need not address respondents' assertion that the verified complaint submitted by respondents serves the same function as an affidavit when submitted to amplify factual allegations in an affirmative defense. See Resp. Opp. at 6, ¶¶ 11-12; see also Matter of Grout at 14 (affidavits submitted in response to a motion to dismiss affirmative defenses "may be used to save an inartfully pleaded, but potentially meritorious, defense" (citing cases)).

4. Fifth Affirmative Defense – Equitable Estoppel

Respondents assert in their fifth affirmative defense that staff's claims are barred by equitable estoppel "and the DEC's wrongful and arbitrary conduct … where the DEC did not require that any other entity was required to obtain a Part 360 permit for like activities." Answer ¶ 70.

As a general rule, equitable estoppel is not applicable to a state agency acting in a governmental capacity in the discharge of its statutory responsibilities. See Matter of Grout, at 14 (citing cases). The assertion of estoppel against a governmental entity foreclosed "in all but the rarest cases." Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 282 (1988). To properly plead an equitable estoppel defense, a respondent must allege facts of "wrongful or negligent acts or omissions by the agency that induced reliance by a respondent entitled to rely and who changes its position to its determent or prejudice." Id. Respondent must allege facts showing the manner and extent of its reliance and the prejudice it is alleged to have suffered thereby. See id.

In its motion, Department staff first argues that the asserted defense is unavailable because the Department is merely seeking to enforce its regulations and the 2008 Consent Order. See Motion to Clarify ¶¶ 29 and 31. In addition, staff argues that any failure by the Department to enforce its regulations against other facilities is not a valid defense to staff's claims here and, in any event, respondents have not provided specific factual or legal support for the allegation that the Department failed to enforce against other facilities. See id. ¶¶ 30 and 31.

Respondents argue in response that equitable estoppel is available here because the Department "expressed its interpretation and position regarding the precise circumstances, i.e., parameters under which a party would not be subject to a permitting requirement" and "[r]espondents complied with those parameters, but DEC never examined whether those parameters were met, but simply said a permit was required, without explaining why this was so." Resp. Opp. at 15. Respondents also state that "no other party" has been required to obtain such a permit. See id. Finally, respondents assert that the Department "is seeking to impose regularity [sic – likely "regulatory"] authority where none exists," thereby questioning whether it is accurate to assert that the agency is seeking to enforce a regulation designed for the protection of the public. See id.

In their sur-reply, respondents further clarify the defense, stating that respondents relied upon "letter guidance provided by the DEC's Office of General Counsel on April 6, 2010" which, according to respondents, "confirmed that no Part 360 permit was required for the operation of a facility that accepts used wooden railroad ties for sale to out of state end users." Respondents' Sur-Reply to DEC Motion to Clarify or Dismiss Respondents' Affirmative Defenses, dated January 6, 2017 ("Resp. Sur-Reply"), at 6, ¶ 14. Moreover, respondents assert that they "complied with those parameters, but DEC never examined whether those parameters

were met, but simply said a permit was required, without explaining why this was so." Id. at 6-7, ¶ 15. Respondents also assert that the Long Island Rail Road ("LIRR") terminated its contract with respondents to take used railroad ties as a result of the Department's notification to the LIRR that respondents needed, but did not have, a Part 360 permit with respect to the railroad ties. See Resp. Opp. at 7-8, ¶¶ 14-18.

I find that respondents' submissions do not demonstrate that this matter presents one of those "rarest of cases" in which estoppel may be asserted against a governmental entity. Even construing respondents' papers liberally, staff's alleged actions are not of the character such that respondents could claim detrimental reliance.

Staff's motion to dismiss the fifth affirmative defense is granted.[3]

5. Sixth Affirmative Defense – Unclean Hands

Respondents assert in their one-sentence sixth affirmative defense that "[t]he claims stated in the Complaint are barred in whole or in part by the doctrine of unclean hands." Answer ¶ 71. In order to establish a defense of unclean hands, respondents must prove that the Department is guilty of "immoral, unconscionable conduct" directly related to the subject matter of the litigation, that respondents relied upon such conduct, and respondents were injured by such conduct. See National Distillers and Chemical Corp. v. Seyopp Corp., 17 N.Y.2d 12, 15-16 (1966). The affirmative defense pleads no facts to support the defense.

In its motion, Department staff argues that such equitable defense is only available in the rarest of cases, and is not available here where the Department has acted "in its governmental capacity in the discharge of its statutory responsibilities." Motion to Clarify ¶¶ 34-35. Department staff also states that, even were the defense available, respondents "have failed to cite any specific affirmative unconscionable act or omission by the Department, or any resulting harm to Respondents from such acts or omissions." Id. ¶ 36.

In response to staff's motion, respondents state that there are exceptions to the general rule that such a defense is unavailable against an agency, and that "this exception applies under the facts in this case." Resp. Opp. at 16, ¶¶ 44-45. Respondents do not identify any purported "immoral, unconscionable conduct" on the part of the Department.

Construing liberally respondents' bare-bones sixth affirmative defense, and the papers submitted on staff's motion, there are insufficient facts alleged or otherwise offered to support the defense that the Department's conduct was "immoral" or "unconscionable."

Department staff's motion to dismiss the sixth affirmative defense is granted.

[3] Staff also argues that respondents' allegation that "DEC did not require that any other entity was required to obtain a Part 360 permit for like activities" is more in the nature of a selective enforcement claim than an equitable estoppel claim. See Staff Reply ¶ 35. I agree. In the context of an estoppel defense, such allegation does not relate to alleged wrongful acts of the Department, or to respondents' reliance thereon. In their sur-reply, respondents state that "have never made such a claim" of selective enforcement. Resp. Sur-Reply at 5, ¶ 12.

B. Staff Motion to Strike Discussion of Settlement Negotiations

Staff move to strike all discussion of settlement negotiations from respondents' papers served in opposition to staff's motion to clarify or dismiss affirmative defenses. See generally Staff Reply at ¶ 2 (seeking to strike paragraphs 28-34 and 38 of respondents' opposition papers, as well as paragraphs 26-38 of Exhibit 1 to respondents' opposition). Staff argues that respondents have included such discussion "to challenge the validity of Department staff's claim that Respondents were required to obtain a Part 360" permit, see id. ¶ 5, and that evidence of settlement discussions is irrelevant and inadmissible. See id. ¶¶ 3 (quoting CPLR 4547) and 6.

CPLR 4547, entitled "Compromise and offers to compromise," is a rule of evidence which states that communications and conduct during compromise negotiations are not admissible as proof of liability for or invalidity of a claim or amount of damages. The provision does not state that such communications or conduct are "confidential" or "privileged." Indeed, although it generally precludes the admission into evidence of communications and conduct made during settlement negotiations, CPLR 4547 expressly allows for such evidence to be admissible "for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution." CPLR 4547; see also Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation, 77 A.D.3d 224, 233 (3d Dep't 2010), modified on other grounds 18 N.Y.3d 652 (2012); Matter of Route 52 Property, LLC, Decision of the Chief Administrative Law Judge, March 14, 2012, at 5-6.

I decline to grant staff's motion to strike. In the current context of a motion to clarify or dismiss affirmative defenses, information regarding settlement-related communications and conduct is not precluded. Whether any such information would be admissible at hearing will be determined if and when a party seeks to admit such information into evidence at hearing.

III. Conclusion

A. Staff's motion to dismiss respondents' second affirmative defense is DENIED.

B. Staff's motion to dismiss respondents' third, fourth, fifth and sixth affirmative defenses is GRANTED.

C. Staff's motion to strike is DENIED.

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

Dated: Albany, New York
March 21, 2017

APPENDIX A

Matter of Ecology Sanitation Corp., Ecology Transportation Corp. and Ernest DeMatteo, Individually and as Owner and Operator of Ecology Sanitation Corp. and Ecology Transportation Corp., Case No. CO 1-2014-0507-159

Papers Submitted with Respect to Department Staff's Motion to Clarify or Dismiss Affirmative Defenses, and Department Staff's Motion to Strike Certain Portions of Respondents' Motion papers

1. Department Staff's Notice of Motion for Clarification or Dismissal of Affirmative Defenses, dated January 4, 2016
2. Motion for Clarification or Dismissal of Affirmative Defenses, dated January 4, 2016, attaching (A) Complaint; (B) Answer; (C) Letter from M. Caruso, Esq. to E. DeMatteo, dated April 6, 2010; and (D) Memorandum from J. Andaloro to S. Ervolina, dated May 27, 2015
3. Respondents' Opposition to DEC Motion to Clarify or Dismiss Respondents' Affirmative Defenses, dated November 17, 2016, attaching (1) Summons and Verified Complaint dated January 5, 2016; and (2) proposed Verified First Amended Complaint dated June 23, 2016
4. Sur-Reply to Respondents' Opposition to DEC Motion for Clarification or Dismissal of Affirmative Defenses, dated December 15, 2016
5. Respondents' Sur-Reply to DEC Motion to Clarify or Dismiss Respondents' Affirmative Defenses, dated January 6, 2017