STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 27 of the Environmental Conservation Law; Article 12 of the Navigation Law; and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

DEC File No. R2-20070405-162

- by -

GRAMERCY WRECKING AND ENVIRONMENTAL CONTRACTORS, INC.,

Respondent.

Appearances:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (John K. Urda of counsel), for the Department of Environmental Conservation

–- DL Rothberg & Associates, P.C. (Deborah L. Rothberg of counsel), for respondent

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Gramercy Wrecking and Environmental Contractors, Inc., by service of a notice of hearing and complaint, both dated October 18, 2007. The complaint alleges that respondent violated provisions of articles 17 and 27 of the Environmental Conservation Law ("ECL"), article 12 of the Navigation Law and titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR" and "17 NYCRR," respectively). The violations alleged by staff include, inter alia, operation of an unauthorized solid waste disposal facility, illegal discharge of petroleum into the waters of the State and failure to register a petroleum bulk storage facility. The complaint alleges that the violations occurred at 55-02 2nd Street, Long Island City (the "site").

Respondent filed an answer, dated November 7, 2007, wherein respondent generally denies the allegations set forth in the complaint, or denies having sufficient knowledge or information to form a belief as to the allegations, and asserts six affirmative defenses. By notice and affirmation ("staff affirmation"), both dated November 16, Department staff filed a motion "for an order striking, or directing clarification of, the affirmative defenses raised by the respondent" (staff affirmation, ¶ 1). Respondent opposed the motion by affirmation ("respondent affirmation"), dated November 26 and enclosed therewith a first amended answer.[1]

For the reasons set forth below, Department staff's motion to strike or clarify respondent's affirmative defenses is granted in part and denied in part.

DISCUSSION

Section 622.4(c) of 6 NYCRR provides that a respondent "must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted." Section 622.4(f) of 6 NYCRR provides that Department staff may move for clarification if an affirmative defense is so "vague or ambiguous . . . that staff is not thereby placed on notice of the facts or legal theory" of the defense.

Department staff argues that "each of the respondent's six affirmative defenses is improperly pled - whether failing to include the requisite factual and legal grounds, or sufficient clarity - and should be clarified or stricken" (staff affirmation, ¶ 8). Respondent argues that "each of Respondent's Affirmative Defenses more than meets the minimal threshold of putting the Department on notice, especially when reasonably read in the proper context as related and responsive to the Department's causes of action, and/or the Department's own investigation of the alleged contamination of the Site" (respondent affirmation, ¶ 4). Additionally, respondent argues that staff's motion has been rendered moot by respondent's submission of the first amended answer (id. ¶ 2). The parties'

[1] Unless otherwise noted, all references to a particular affirmative defense refer to such defense as set forth in respondent's first amended answer.

specific arguments relative to each of the affirmative defenses, as amended, are discussed below.

Department staff, as the movant, bears the burden of proof on the instant motion (6 NYCRR 622.11[b][3]).

Mootness

Respondent's first amended answer does not fully address the issues raised by staff's motion to strike or clarify the affirmative defenses. Accordingly, staff's motion has not been rendered moot and will be considered on its merits.

First Affirmative Defense

Respondent's first affirmative defense states that the complaint "fails to state any causes of action upon which relief can be granted. As indicated [in the first amended answer], Respondent denies liability in connection with each cause of action and as arising from the facts alleged by the Department in its Complaint and, as such, alleges that each of the Department's claims against Respondent is defective" (first amended answer, ¶ 65). Staff argues that the complaint "provides detail as to the time and nature of the respondent's violations and articulates the applicable statutory and regulatory provisions" (staff affirmation, ¶ 11 [citation omitted]).

It is axiomatic that, to properly charge a particular cause of action, staff must allege facts that establish each element of such cause of action. Because Department staff bears the burden of proof with regard to "all charges" set forth in the complaint (6 NYCRR 622.11[b][1]), staff cannot prevail where it has failed to state a claim upon which relief may be granted, absent amendment of staff's pleading.[2] Accordingly, respondent has no burden to plead and prove that staff has failed to state a claim and respondent's first affirmative defense serves no purpose (cf. 6 NYCRR 622.11[b][2] [stating that respondent bears the burden of proof on all of its affirmative defenses]).

[2] In accordance with 622.5(b), "a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or commissioner and absent prejudice to the ability of any party to respond."

In civil practice, New York appellate courts have consistently held that failure to state a claim is not properly pleaded as an affirmative defense. Rather, under the Civil Practice Law and Rules ("CPLR"), failure to state a claim is a ground for a motion to dismiss. Where a plaintiff moves to strike such a defense, the courts have either declined to do so on the basis that the defense is mere surplusage, not warranting motion practice, or have granted the motion to strike.[3]

Where a respondent asserts an affirmative defense that serves no purpose, it is surplusage and Department staff is free to ignore it. However, where staff moves to strike such a defense, the motion should be granted.

Ruling: Department staff's motion to strike the first affirmative defense is granted.

Second Affirmative Defense

Respondent's second affirmative defense states that "[t]he Department's claims are barred, in whole or in part, by the applicable statute of limitations or by the doctrine of laches" (first amended answer, ¶ 66). Staff asserts that this affirmative defense "contains no factual or legal support for the assertion that there is an 'applicable statute of limitations' or any ground for a laches defense, and lacks a statement of facts" (staff affirmation, ¶ 15).

Respondent argues that "the discovery process may reveal that the contamination at issue took place, and the Department's claims arose therefrom, beyond the applicable statutes of limitation, and similarly, discovery may show that the date on which the Department became aware of the conditions

[3] Compare e.g. Salerno v Leica, Inc., 258 AD2d 896 (4th Dept 1999) (holding that "[s]uch a 'defense' is mere surplusage which serves no purpose in an answer, belonging more properly in a motion to dismiss under CPLR 3211[a][7]" but declining to strike the defense)(citation omitted), with Bentivegna v Meenan Oil Co., Inc., 126 AD2d 506, 508 (2d Dept 1987) (holding that the defense "cannot be interposed in an answer" and granting plaintiff's motion to strike) (citation omitted).

at the Site would bar its claim under the doctrine of laches" (first amended complaint, ¶ 67).

Respondent's affirmative defense of laches is unavailing in this proceeding. As the Court of Appeals has noted "[i]t is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest" (Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [citations omitted]).

Furthermore, no statute of limitations is applicable to this administrative enforcement proceeding. Rather, the determinative factor is whether the Department has brought the action within a reasonable time (see State Administrative Procedure Act ["SAPA"] § 301[1] [stating that, "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time"]). In 1985, the Court of Appeals elaborated on this standard, holding that the determination of "whether a period of delay is reasonable within the meaning of State Administrative Procedure Act § 301(1), an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (Cortlandt, 66 NY2d at 178).

Although respondent did not assert unreasonable delay within the context of SAPA, respondent has placed staff on notice that it intends to challenge this action as untimely. Respondent has not, however, alleged any facts that would give rise to a finding that staff failed to commence this proceeding within a reasonable time. Of particular note is respondent's failure to assert that it has suffered actual prejudice. I note also that the allegations in the complaint date back only to March 2007. Thus, it is unlikely that there has been an unreasonable delay in bringing this action.

Ruling: Department staff's motion to strike respondent's second affirmative defense is denied. Staff's motion for clarification is granted. Respondent must provide clarification of this defense by pleading facts consistent with the provisions of SAPA and the holding in Cortlandt.

Third Affirmative Defense

The third affirmative defense states that respondent's "activities at the Queens West Development Project are not subject to the permit requirements as specified by the Department with regard to solid waste treatment and disposal" (respondent affirmation, ¶ 68). By its terms, this defense is limited to staff's allegations concerning the failure of respondent to obtain solid waste management permits for its activities at the site. Staff states that this affirmative defense "fails to place staff on notice of any facts or legal theory upon which it is based" (staff affirmation, ¶ 19).

Respondent argues that its activities at the site do not require solid waste management permits "as Respondent denies the allegations in the Complaint constituting the basis for the allegations that the respective permits are required for the activities at issue" (first amended answer, ¶ 68). As stated, this defense appears to be premised on respondent's denials of the factual allegations that form the basis of the alleged violation. If so, the third affirmative defense is merely a reiteration of denials made by respondent elsewhere in its answer. As such, respondent's assertions do not constitute an affirmative defense (see Black's Law Dictionary 451 [8th ed 2004] [defining an affirmative defense as an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true"]; see also Siegel, NY Prac § 223 [3d ed] [stating that "[t]he defendant's rule of thumb should be to treat as an affirmative defense – pleading it and being prepared to prove it – anything she is not sure of being able to introduce pursuant to her denials"]).

The phrasing of the third affirmative defense is, however, sufficiently ambiguous to allow for the possibility that respondent intends to argue that the subject permit requirement is inapplicable to the activities alleged in the complaint. If so, this is appropriately pleaded as an affirmative defense (see 6 NYCRR 622.4[c] ["a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense"]). Accordingly, respondent should be afforded the opportunity to clarify the basis for its assertion of this defense.

Ruling: Department staff's motion to strike respondent's third affirmative defense is denied. Staff's motion for clarification is granted and respondent must provide clarification of this defense consistent with the discussion above.

Fourth Affirmative Defense

Respondent's fourth affirmative defense states that "[t]he Department has failed to join all the parties necessary and indispensable to a just adjudication of this action, including but not limited to Queens West Development Corp ('Queens West'), the owner of the Site" (first amended answer, ¶ 69). Respondent argues that Queens West, and possibly others, "are responsible for the activities giving rise to this action" (id. ¶¶ 69, 70). Department Staff argues that respondent has failed to provide factual or legal support for the assertion that any "unnamed third parties are indispensable, or that Department staff would have an obligation to join any such parties if they existed" (staff affirmation, ¶ 21). Moreover, staff argues that respondent has failed to demonstrate that "third party liability is a defense for the violations set forth in the Complaint" (id. ¶ 22).

Whether Department staff may be required to join a potentially liable party to an ongoing enforcement action is an open question (see Matter of Huntington and Kildare, Inc., Ruling of the Chief Administrative Law Judge, November 15, 2006, at 4). The current version of the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 ["Part 622"], effective Jan. 9, 1994, as amended) makes no provision for a respondent to require joinder of a potentially liable party.[4] Where the Department's hearings regulations are silent on a particular

[4] The former version of Part 622 authorized the ALJ to add or drop parties "upon such terms as may be just" and provided that nonjoinder of a necessary party was a ground for dismissal, without prejudice, unless the ALJ determined that the hearing should proceed "in the interest of justice" (former 6 NYCRR 622.12[c][2] and [3], effective Sept. 21, 1978). The current Part 622 makes no such provision. A search of Department rulings and determinations under the current Part 622 revealed no instance where staff was required to join a party over staff's objection.

issue presented, the CPLR may be consulted (see e.g. Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2 [noting that, in the absence of notice requirements in the default procedures under NYCRR part 622, the CPLR should be consulted for the appropriate procedure]).

Under CPLR 1001(a), "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." The failure of a plaintiff to join a person who ought to be a party "is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of [CPLR 1001]" (CPLR 1003). Accordingly, a civil court may allow an action to proceed regardless of nonjoinder of a necessary party and, even where the court determines that the action should be dismissed, the dismissal is without prejudice, thereby allowing the action to be recommenced with all necessary parties joined.

Thus, assuming, for example, that respondent was able to make a successful showing that Queens West ought to be a party to this proceeding, the likely remedy would be to either have staff amend the complaint to add Queens West as an additional respondent or to allow the proceeding to continue without Queens West. Therefore, failure to join Queens West, or some other as yet unknown party, to this action would not serve to defeat staff's claim.

Ruling: Department staff's motion to strike respondent's fourth affirmative defense is granted. This ruling does not preclude respondent from filing a motion to add a party to this action in the event that respondent determines that such is warranted under the circumstances presented.

Fifth Affirmative Defense

Respondent's fifth affirmative defense states that "the violations properly asserted by the Department, if any, have been caused in whole or in part by the acts of others, including but not limited to, Queens West" (first amended complaint, ¶ 71). Staff argues that this defense "fails to place staff on notice of any facts or legal theory upon which it is based; it should be stricken" (staff affirmation, ¶ 27).

This affirmative defense is little more than a reiteration of respondent's general denial of staff's allegations. By its denials, respondent has asserted it did not commit the violations alleged by staff. It necessary follows, therefore, that the violations, "if any, have been caused . . . by the acts of others."

As previously noted, Department staff bears the burden of proof with regard to "all charges and matters which they affirmatively assert" in the complaint (6 NYCRR 622.11[b][1]). Furthermore, "[w]henever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence" (6 NYCRR 622.11[c]). Respondent is free to proffer evidence concerning the liability of other parties, or any other evidence that respondent believes may refute staff's allegations. However, respondent is under no burden to plead and prove that another party is liable (cf. 6 NYCRR 622.11[b][2] [stating that respondent bears the burden of proof on all of its affirmative defenses]). If staff fails to meet its burden of proof, no violation by respondent is established.

Ruling: Department staff's motion to strike respondent's fifth affirmative defense is granted.

Sixth Affirmative Defense

Respondent's sixth affirmative defense is not an affirmative defense, but rather states that respondent "hereby reserves the right to amend its Answer to assert additional affirmative defenses as may be appropriate following investigation and discovery" (first amended complaint, ¶ 72). Department staff argues that "[t]he only rights the respondent may have with regard to asserting additional affirmative defenses are set forth in . . . 6 NYCRR 622.4, et seq." (staff affirmation, ¶ 30).

Pursuant to 6 NYCRR 622.4(d), an affirmative defense that is not raised in the answer may not be raised in the hearing, unless allowed by the ALJ. Moreover, the ALJ may allow such a defense only where the criteria established in section 622.4(d) are satisfied. Accordingly, respondent's right to raise an affirmative defense that was not set forth in its answer is controlled by the express terms of section 622.4(d) and the sixth affirmative defense is superfluous.

Ruling: Department staff's motion to strike respondent's sixth affirmative defense is granted.

CONCLUSION

For the reasons set forth herein, Department staff's motion to strike respondent's first, fourth, fifth, and sixth affirmative defenses is granted. Additionally, staff's motion to clarify respondent's second and third affirmative defenses is granted. The remainder of staff's motion is denied.

Respondent shall file an amended answer, consistent with this ruling, within 14 days of its receipt of this ruling.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: January 14, 2008
Albany, New York

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