STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law ("ECL") and Title 6, Part 608 et seq. of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ALAN GROUT,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR LEAVE TO REARGUE

DEC File No. R4-2009-1120-176

August 14, 2015

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Karen S. Lavery of counsel), for staff of the Department of Environmental Conservation

-- Tooher & Barone, LLP (Meave M. Tooher of counsel), for respondent Alan Grout

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) moves for leave to reargue a prior ruling dated December 12, 2014, in which, among other rulings, I denied staff's motion to strike respondent Alan Grout's third affirmative defense of equitable estoppel. For the reasons that follow, Department staff's motion is denied.

I. PROCEEDINGS

The full procedural posture of this matter is described in detail in the December 12, 2014 Ruling on Motions and will not be repeated here. A summary of the proceedings relevant to this motion is as follows.

This proceeding concerns agricultural property owned by respondent on Fordham Road, Valatie, Town of Kinderhook, Columbia County, and the development of an agricultural pond on

that property. In its June 25, 2014 complaint, as corrected by the December 12, 2014 ruling, Department staff alleges that respondent violated 6 NYCRR 608.2(a) by burying a protected stream known as Stuyvesant Brook (stream identification number H-209-1), a Class C(T) stream, within a 500-foot pipe without a permit. Staff seeks a civil penalty in the amount of $1,200, and the submission of a plan to restore the stream to its natural condition.

In his July 7, 2014 answer, respondent pleaded four affirmative defenses. In his third affirmative defense, respondent claimed that the Department should be equitably estopped from bringing an enforcement proceeding against him because staff negligently or wrongfully misrepresented to respondent that no permits were required to construct the agricultural pond on the Fordham Road property, and that he relied on those misrepresentations when he purchased the property, constructed the agricultural pond, and developed the orchard located there.

By motion dated July 15, 2014, Department staff moved to strike affirmative defenses, among other relief. With respect to the third affirmative defense, staff sought dismissal on the ground that any representations staff may have made concerning permits required to dig an agricultural pond under the Freshwater Wetlands Act (ECL article 24) are irrelevant to the charge in this matter -- the alleged disturbance of a protected stream without a permit in violation of 6 NYCRR 608.2. Moreover, staff argued that respondent's ignorance of the permit requirement for protected stream disturbance was no defense. Staff also argued that ECL article 15 (upon which 6 NYCRR 608.2 is based) is a strict liability statute and, thus, respondent's intentions were irrelevant to the charge.

In papers dated July 22, 2014, respondent opposed the motion to strike defenses. With respect to the third affirmative defense, respondent disclaimed reliance on ignorance of the law. Instead, respondent claimed that he had repeatedly inquired of a knowledgeable person at the Department regarding the permit requirements for the project, in accordance with Department protocol. Citing to maps of Stuyvesant Brook and Wetland K-113 downloaded from the Department's website, respondent noted the disclaimer "Disclaimer: This map does not show all natural resources regulated by NYS DEC, or for which

permits from NYS DEC may be required. Please contact your DEC Regional office for more information." Respondent asserted that as directed, he repeatedly contacted Nancy Heaslip at the Department as the staff person responsible for knowing the permit requirements for various regulated activities and for responding to inquiries from the public about those requirements. Respondent alleges that he was repeatedly assured by Ms. Heaslip that no permits were required to construct the agricultural pond at issue. Respondent further asserted that he justifiably relied on staff's advice.

In the December 12, 2014 ruling, I denied that part of staff's motion as sought dismissal of the third affirmative defense:

> "[A]s 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 Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282[, appeal dismissed and cert denied 488 US 801] [1988]; see also Matter of Bartell, ALJ Ruling, June 11, 2009, at 12). Only in the rarest of cases may an agency be equitably estopped for wrongful or negligent acts or omissions by the agency that induce reliance by a party who is entitled to rely and who changes its position to its detriment or prejudice (see Parkview, 71 NY2d at 282; Bender v New York City Health & Hosps. Corp., 38 NY2d 662, 668 [1976]; see also Matter of Martino, Rulings of the ALJs, April 28, 2008, at 3-4). To plead an estoppel defense, respondent must allege facts that show in what manner and to what extent respondent relied on the complainant's inconsistent conduct and was prejudiced thereby (see [Glenesk v Guidance Realty Corp.], 36 AD2d [852,] 853 [2d Dept 1971]).
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> "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 (see Leon v Martinez, 84 NY2d at 87; Butler v Catinella, 58 AD3d 145, 148 [2d Dept 2008]; see also [Matter of] Truisi, [ALJ Ruling on Mot to Strike or Clarify Affirmative Defenses, April 1, 2010,] at 10; Matter of ExxonMobil Oil Corp., ALJ Ruling, Sept. 13, 2002, at 3). A motion to dismiss will be denied if the answer, taken as

a whole, alleges facts giving rise to a cognizable defense (see Truisi, at 10; Foley v D'Agostino, 21 AD2d 60, 64-65 [1st Dept 1964]). In addition, affidavits submitted in opposition to the motion may be used to save an inartfully pleaded, but potentially meritorious, defense (see Faulkner v City of New York, 47 AD3d 879, 881 [2d Dept 2008]).

"Here, liberally construing the answer and examining respondent Grout's affirmation gives rise to a cognizable defense. Respondent alleges that he repeatedly contacted the Department -- prior to purchasing the property at issue, prior to constructing the pond, and during pond construction -- to inquire whether permits were required for the project. Respondent also alleged that Department staff made repeated site visits. Respondent asserts that Department staff repeatedly assured him that no permits were required for the project, and that staff did not identify any stream as C(T) when observing the property. Respondent alleges that staff did not notify respondent that there might be a trout stream on the property until July 2008, during construction of the pond, and that staff did not inform respondent that a permit might be required until after the construction was completed.

"These allegations, taken together, sufficiently allege prejudice to respondent arising from his justifiable reliance upon staff's statements that no permits were required for respondent's project. Thus, respondent has stated a defense, if not to liability, then at least in mitigation of any penalty or remedial relief that might be imposed in this matter. Accordingly, Department staff's motion to dismiss the third affirmative defense should be denied"

(Ruling at 13-15).

By motion dated December 26, 2014, and consistent with CPLR 2221(d), Department staff seeks leave to reargue the December 12, 2014 ruling insofar as it denied staff's motion to dismiss the third affirmative defense. In its motion, staff also seeks a new ruling (1) finding that respondent has imputed knowledge of the Stuyvesant Brook stream classification from the regulation implementing ECL article 15, title 5, (2) finding that equitable estoppel is not a "cognizable defense" to

liability as a matter of law, and (3) finding that the Department's motion to strike the defense of equitable estoppel be granted and reversing the ruling for the reasons stated by staff counsel.

In response to Department staff's motion for leave to reargue, respondent filed a January 16, 2015 affirmation of attorney Meave M. Tooher in opposition to the motion for leave to reargue.

II. DISCUSSION

Motions for leave to reargue prior rulings issued in Department enforcement hearing proceedings are analyzed applying the standards governing CPLR 2221(d) motions (see Matter of Pierce, Ruling of the Commissioner on Motion for Reconsideration, June 9, 1995, at 1; Matter of 2526 Valentine LLC, Ruling of the Administrative Law Judge on Motion for Reconsideration, March 10, 2010, at 3). Under CPLR 2221(d), a motion for leave to reargue shall only be granted upon a showing that the decision-maker overlooked or misapprehended the law or facts, or for some reason mistakenly arrived at the earlier ruling (see id.). A motion for leave to reargue does not provide a vehicle for raising new facts or legal questions not raised on the prior motion (see CPLR 2221(d); Simpson v Loehmann, 21 NY2d 990, 990 [1968]). Nor is it "designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]).

As an initial matter, Department staff takes no issue with the December 2014 ruling's statement of the standards applicable to motions to strike affirmative defenses (see Affirmation of Karen Lavery in Support of Motion for Leave to Reargue ¶ 8 [quoting Ruling at 10]). Staff also acknowledges that equitable estoppel has been applied in Departmental proceedings to reduce or suspend the penalty imposed (see id. ¶ 45). The circumstance that the defense is available in reduction of a penalty is sufficient grounds alone to sustain the defense against staff's motion to dismiss.

In any event, staff's objection is limited to the narrow holding in the December 2014 ruling that the equitable estoppel defense might be available to limit liability in this matter. In this regard, staff has failed to establish that the law or facts were overlooked or misapprehended on the prior motion.

First, staff asserts the prior ruling contains internal inconsistencies in the description and application of the facts. Staff notes that the ruling rejected respondent's reliance on the ECL article 24 Freshwater Wetlands Law's exception for agricultural pond construction as a defense to the article 15 stream disturbance charge. Staff asserts that it is inconsistent to reject the article 24 defense while citing to respondent's queries and conversations with staff regarding the agricultural pond as a basis for respondent's estoppel defense. Staff contends that respondent's queries concerning whether an article 24 permit was required for pond construction are irrelevant to the article 15 charge. Staff's assertions are unpersuasive.[1]

It must be borne in mind that this proceeding is only at the pleadings stage. No evidence has been presented and, thus, no facts have been established. At this point, all that are involved are factual allegations in the pleadings, as amplified by respondent's affidavit (see Leon, 84 NY2d at 88; Faulkner, 47 AD3d at 881 [reviewing proof submitted in opposition to motion to dismiss defense]). Moreover, respondent is given the benefit of every reasonable inference, as is required on a motion to dismiss affirmative defenses, and if any doubt exists as to the availability of a defense, it should not be dismissed (see Leon, 84 NY2d at 87; Becker v Elm Air Conditioning Corp., 143 AD2d 965, 966 [2d Dept 1988]; Pellegrino v Millard Fillmore Hosp., 140 AD2d 954, 955 [4th Dept 1988]).[2]

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[1] In its motion, Department staff repeatedly provides incorrect page references to the Ruling, which makes it very difficult to follow staff's argument. I have previously corrected the typographical errors in staff's complaint (see Ruling at 4-6). A more careful proofreading of papers before submitting them to this tribunal would eliminate such difficulty and confusion, and avoid the necessity of correcting staff's pleadings and papers.

[2] Department staff did not offer evidence in support of its motion to dismiss. Thus, staff's motion only addressed the sufficiency of respondent's

Staff's argument mischaracterizes respondent's pleadings and allegations, and fails to afford him reasonable inferences. Staff asserts that respondent only inquired whether an article 24 freshwater wetlands permit was required for the pond project. However, respondent's allegations are not so narrow. Rather, respondent alleges that he made repeated inquiries to the Department's employee, Nancy Heaslip, to determine whether permits were required to construct an agricultural pond on the property, and that he was assured by Ms. Heaslip that "no permits would be required" (Grout Affidavit [7-3-14], at 2 ¶ 9 [emphasis added]; see also id. at 3 ¶¶ 14-15; Answer [7-7-14], at 3 ¶ 19, 4 ¶¶ 23 and 25). The reasonable inference from these allegations is that respondent was seeking guidance from knowledgeable staff whether an article 24, an article 15, or any other permit was required for the project, not just an article 24 permit. Contrary to staff's assertions, such an inquiry is directly relevant to respondent's estoppel defense to the article 15 charge.

With respect to the alleged conversations between respondent and Ms. Heaslip, it is notable that Department staff has not denied that the conversations took place. Nor has staff provided an affidavit of Ms. Heaslip or any other staff member with knowledge of the conversations between Ms. Heaslip and respondent detailing staff's version of the alleged conversations. In particular, staff has made no allegations, or offered any evidence, concerning what respondent told Ms. Heaslip, what Ms. Heaslip's understanding of respondent's project was and what it involved, when she first became aware that respondent's project involved the disturbance and burying of the stream at issue, and when she became aware that the site contained a protected stream. Nor has staff provided any evidence that respondent specifically limited his inquiry to the need for an article 24 permit. Thus, Department staff did not offer any allegations or proof to contradict respondent's version of the events.

Citing Matter of Romer (Order of the Commissioner, July 2, 2003), staff also asserts that a site visit cannot be

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pleadings. Staff's motion was not the equivalent of one for summary judgment, and the prior ruling did not address the motion as such (see Ruling at 10; Gonsenhauser v Central Trust Co., 51 AD2d 664, 664 [4th Dept 1976]).

construed as authorization to proceed without a permit. Romer is distinguishable, however. First, Romer was decided after a hearing on an evidentiary record and not on a motion to dismiss affirmative defenses. Thus, Romer is inapposite in this matter which, as noted above, is still at the pleadings stage.

Moreover, Romer involved the unsubstantiated assertion that unnamed Department officials gave respondent verbal approval to proceed without a permit in the face of clear written instruction from the Department that a permit was required (see id., Hearing Report at 14-17). In this case, respondent alleges that he made multiple inquiries to a specific staff member, Ms. Heaslip, who made several site visits and gave repeated confirmation that no permits were required for the project (see Grout Affidavit at 2 ¶ 9, 3 ¶¶ 15-16). The record contains no allegation that Department staff provided respondent with written instruction that a permit was required for the pond. Indeed, as noted above, Department staff has not denied that the conversations between respondent and Ms. Heaslip occurred, or that Ms. Heaslip told respondent that "no permits were required" for the pond construction. In addition, staff does not deny or otherwise challenge respondent's further allegations that on a site visit conducted during pond construction, Department staff directed that the subject stream be diverted (see id. at 4 ¶ 22), or that Department staff member Peter Brinkerhoff made no mention of a trout stream or any need for a permit during an inspection of the project after the stream diversion occurred (see id. at 4-5 ¶ 25). Thus, the allegations in this matter are distinguishable from the facts in Romer.

Staff's assertion that the prior ruling contains errors of law is equally unavailing. Staff proposes, without citation or any other case law support, the novel theory that estoppel may not be invoked against a strict liability statute such as ECL 15-0501. Staff's theory apparently is that equitable estoppel is unavailable against a statute that does not require a showing of "knowledge" as an element of the charge. If this is so, it is Department staff, and not the prior ruling, that misapprehends the law of estoppel. Application of the doctrine of equitable estoppel does not negate a plaintiff's showing of knowledge. Rather, application of estoppel prevents a plaintiff from asserting an otherwise

valid claim on the basis of plaintiff's own wrongful or negligent actions (see Bender, 38 NY2d at 668).

Whether a plaintiff's valid claim is based upon a strict liability statute or not is irrelevant to the analysis. An examination of the cases in which estoppel has been invoked against a governmental entity supports this conclusion. For example, in Bender, the statute involved was the General Municipal Law § 50-e notice of claim provision (see 38 NY2d at 665; see also Matter of Hartsdale Fire Dist. v Eastland Constr., Inc., 65 AD3d 1345 [2d Dept 2009], lv denied 14 NY3d 701 [2010] [Town Law § 180 notice of claim provision]; Town of Smithtown v Jet Paper Stock Corp., 179 AD2d 634, 634 [2d Dept 1992] [same]). In Matter of Rudley v Landmarks Preservation Commn., the statute involved was New York City's landmarks designation law (see 182 AD2d 61, 63 [1st Dept 1992], affd on other grounds 82 NY2d 832 [1993]). In Brennan v New York City Hous. Auth., the statute involved was the Public Officers Law § 30 in-state residency requirement (see 72 AD2d 410, 411 [1st Dept 1980]; see also Matter of Young v Supervisor of Town of Lloyd, 159 AD2d 828 [3d Dept], lv dismissed 76 NY2d 761 [1990] [same]). In each of these cases, the statutes involved contained no "knowledge" requirement, nor did the courts in any way negate any showing of knowledge by the party raising the estoppel defense. Rather, the courts invoked equitable estoppel based on the estopped parties' own actions (see e.g. Brennan, 72 AD2d at 413 [rejecting defense that plaintiffs are deemed to know the law; where a duly authorized officer makes an authoritative interpretation of the law, a mistake of law estops the government]). In light of this authority, to conclude estoppel is never available in the context of a strict liability statute would be to accept the "simplistic and obsolescent doctrine that estoppel may never lie against public agencies" (id. [emphasis added]).

I also find unpersuasive staff's assertion that estoppel is unavailable because respondent allegedly failed to conduct due diligence (citing Matter of Parkview Assocs., 71 NY2d at 282). Staff ignores the circumstance that respondent pleaded his good-faith attempts at due diligence. Again, respondent alleges that he repeatedly made inquiry of a knowledgeable and authoritative employee at the Department who, while acting in her official capacity, provided repeated assurances that "no permits were required" for the pond project.

Thus, respondent sufficiently pleaded due diligence in support of his equitable estoppel defense.

With respect to the remaining relief staff seeks on its reargument motion, including its request for a finding that respondent has imputed knowledge of the stream classification, that relief goes beyond the relief staff sought on the original motion and, thus, is not properly entertained on a motion for reargument (see Foley v Roche, 68 AD2d 558, 567-568 [1st Dept 1979]).

In sum, the prior ruling contains no error of law or facts in concluding that respondent pleaded an estoppel defense sufficiently to sustain that defense against Department staff's motion to dismiss. To the extent Department staff is now seeking a ruling on the merits of respondent's defense, staff did not offer, either on this motion or on the prior motion, any evidence to support dismissal of the defense as a matter of law. Thus, the prior ruling correctly limited its analysis to the sufficiency of the pleadings. Accordingly, the motion for leave to reargue the prior ruling should be denied.

Although respondent's pleadings are sufficient to avoid dismissal of the defense, it should also be noted that respondent will nonetheless bear a heavy burden to establish the defense to avoid liability for the alleged failure to obtain a permit for the alleged disturbance of the protected stream. As the prior ruling held, estoppel is rarely evoked against a governmental agency exercising its statutory duties (see Ruling at 14). The defense to liability for violation of a statute should be allowed only when failure to do so would operate to defeat a right legally and rightfully obtained (see Waste Recovery Enterprises, LLC v Town of Unadilla, 294 AD2d 766, 768 [3d Dept 2002], lv denied 1 NY3d 507, cert denied 542 US 904 [2004]; Matter of Hauben v Goldin, 74 AD2d 804, 805 [1st Dept 1980]; Matter of McLaughlin v Berle, 71 AD2d 707 [3d Dept 1979], affd for reasons stated below 51 NY2d 917 [1980]). Thus, to establish his entitlement to estoppel on the issue of liability, respondent will have to establish that he described his proposed project in sufficient detail to make staff fully aware that his pond project included the alleged diversion and burying of the stream on the site.

Finally, I note that further motion practice addressed solely to the pleadings does not advance this matter to final resolution on the merits. I urge both parties to move this matter forward, either through summary judgment motions or at hearing, rather than expend any more resources and time arguing about the sufficiency of defenses. Accordingly, I will be contacting the parties shortly to establish a schedule for bringing this matter to hearing.

III. RULING

Department staff's motion for leave to reargue the December 12, 2014 Ruling is denied.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: August 14, 2015
Albany, New York