STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 24 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 663,

RULING ON MOTION TO DISMISS AFFIRMATIVE DEFENSES

DEC Case No.
R8-2018-0529-51

-by-

JOSEPH JOYCE,

Respondent.

BACKGROUND

Staff of the Department of Environmental Conservation ("Department" or "DEC") commenced this enforcement action by service of a notice of hearing and complaint dated August 6, 2018. Department Staff alleged that respondent Joseph Joyce ("respondent") clear cut at least 5.8 acres of wetland, and 2.5 acres of adjacent area, on his property located at 8638 East Avenue, Box 62, East Pembroke, Genesee County, New York (the "site"). The complaint alleged that clearcutting without a permit or other authorization from the Department violated ECL 24-0701(1) and 24-0703(1). Department Staff's complaint alleged further that respondent placed fill within the wetland on his property, in violation of ECL 24-0701(1) and 24-0703(1), and Section 663.3(e) and 663.4(d)(20) of 6 NYCRR.

Department Staff requested that the Commissioner find respondent in violation of ECL Article 24 and Part 663 of 6 NYCRR, and impose a civil penalty of twenty-two thousand dollars ($22,000). Complaint, Wherefore Clause, ¶¶ I and II. In addition, Department Staff sought an order directing respondent to submit a wetland restoration plan for approval to the Department, and upon approval of the plan, to undertake restoration of the wetland and adjacent area at the site. Id., ¶¶ III and IV.

Respondent's September 6, 2018 answer (the "Answer") asserted two affirmative defenses:

- First Affirmative Defense: Petitioner's allegations are barred as Petitioner lacks jurisdiction and standing over Respondent.

- Second Affirmative Defense: Petitioner's allegations are barred by the doctrines of laches, unclean hands, mistake, invalidity, release or discharge, statute of limitations, undue burden, miscarriage of justice, and impossibility.

Answer, at 2, ¶¶ 5 and 7.

In a motion dated September 12, 2018, Department Staff moved to dismiss both defenses. Respondent's October 15, 2018 opposition to the motion included the affidavits of Joseph Joyce (the "Joyce Aff.") and respondent's counsel, James M. Wujcik, Esq. (the "Wujcik Aff."), both sworn to October 15, 2018, as well as an amended answer (the "Amended Answer"). Department Staff requested and was granted leave to file a reply, and submitted the October 22, 2018 affirmation of Dusty Renee Tinsley, Esq. (the "Tinsley Aff.").

According to respondent's counsel, the affirmative defenses were included in the Answer because counsel was unable to speak to respondent prior to the time an answer was due, and counsel anticipated that his client would not want to waive those defenses. Wujcik Aff., ¶¶ 5-6. Respondent's Amended Answer elaborated upon the two affirmative defenses. In its reply to respondent's opposition, Department Staff argued that to the extent respondent's opposition "is deemed to include a Request to Serve an Amended Answer," respondent's request should be denied. Tinsley Aff., ¶ 6.

Section 622.5(a) of 6 NYCRR provides that a party may amend its pleading once without permission before the time to respond expires. Thereafter, consistent with the New York Civil Practice Law and Rules ("CPLR"), a party may amend its pleading by permission of the ALJ or the Commissioner, at any time prior to the Commissioner's final decision, absent prejudice to the ability of any other party to respond. Section 622.5(b). Section 3025(b) of the CPLR states that leave to amend shall be freely given, upon such terms as may be just.

In this case, Department Staff sought and was granted leave to reply to respondent's opposition. In its reply, Department Staff renewed its arguments for dismissal of respondent's affirmative defenses, based upon the revised answer. Moreover, Department Staff's reply does not allege, and has not shown, any prejudice resulting from respondent's amendment.

Respondent's opposition is deemed to include a request to enter an amended answer. The request is granted, pursuant to Section 622.5(b) of 6 NYCRR. Accordingly, this ruling addresses Department Staff's motion to dismiss the affirmative defenses asserted in respondent's Amended Answer, rather than those in the original Answer. As discussed below, the motion to dismiss the first affirmative defense is denied; the defense amounts to a denial which is not subject to clarification or dismissal. The motion with respect to the second affirmative defense is granted.

DISCUSSION

Affirmative defenses are defined under the CPLR as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." CPLR 3018(b). An affirmative defense is a respondent's burden to plead and prove. Section 622.11(b)(2) of 6 NYCRR.

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." Department Staff may move for dismissal of an affirmative defense on the merits (see CPLR 3211(b) ("A party may move for judgment dismissing one or

more defenses, on the ground that a defense is not stated or has no merit")). Nevertheless, this is a drastic remedy that should not be granted where there is any doubt regarding whether the affirmative defense is viable (*see e.g. New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 323 (1995) (holding that "it was error to dismiss the affirmative defense at this early pleading stage of the litigation, because plaintiff had yet to establish that the affirmative defense was meritless as a matter of law"); *Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 (2d Dept 2008) ("Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed")).

First Affirmative Defense

With respect to the first affirmative defense, respondent stated in the Amended Answer that:

> ¶ 6. To date, Petitioner has not provided adequate evidence in the form of any documents depicting exactly where the current assessment of wetlands pursuant to the authority contained in the Complaint are located.
>
> ¶ 7. No officer from the New York State Department of Environmental Conservation (hereinafter "DEC") has provided this information to Respondent.
>
> ¶ 8. Respondent has been advised he is in violation, however, no one from the DEC is willing to discuss the alleged violations with specificity to his property. It is uncertain what the DEC's position is.
>
> ¶ 9. Thus, Petitioner lacks jurisdiction and standing over Respondent.

In essence, the first affirmative defense asserts that Department Staff has not advised respondent of the nature and extent of the wetlands on his property. Respondent contends that as a result, Department Staff lacks jurisdiction and standing to support the violations alleged in the complaint. This amounts to a denial.

A denial, or an elaboration of the grounds for a denial, is not an affirmative defense and should not be pleaded as such. Rather, once a respondent has denied a charge or other matter alleged in the complaint, the matter denied is in dispute and a respondent may proffer evidence to contest the truth of the matter at hearing (*see Richard v American Union Bank*, 253 NY 166, 176-177 (1930) ("Under a denial of the material allegations of the complaint the defendant might introduce any relevant evidence which would tend to show the falsity of the allegations of the complaint. The defendant cannot change argumentative denials into an affirmative defense by pleading them affirmatively"). Because an "argumentative denial" pleaded as an affirmative defense is not an affirmative defense, such a denial is harmless surplusage and is not subject to clarification or dismissal.[1] This reasoning applies to the first affirmative defense, which is therefore not subject to clarification or dismissal.

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[1] In this regard, denials denominated as affirmative defenses are to be treated in the same manner as the defense of failure to state a cause of action (*see e.g. Butler v Catinella*, 58 AD3d 145, 150 (2nd Dept 2008) (adopting the position of the Appellate Division, First Department, and Appellate Division, Third Department, "[which] have

Department Staff's reply states that "Department Staff has had conversations with Respondent regarding the location of the wetland on his property, provided Respondent with maps depicting the location of the wetland, including on his property . . . [and] the process by which wetlands are mapped generally and specifically with regard to the wetland located on Respondent's property." Tinsley Aff., ¶ 5(b)(iii). To the extent respondent seeks information regarding the specific violations, respondent may serve discovery upon Department Staff to ascertain the locations of wetlands, if any, on his property, and the basis for the violations alleged.

Second Affirmative Defense

The second affirmative defense referred to the doctrines of laches and unclean hands (Amended Answer, ¶ 11), and went on to state that

> ¶ 12. Respondent was first notified by citation of the involvement of Petitioner in March, 2017.
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> ¶ 13. Over the many intervening months between the issuance of the citation and the filing of the instant Notice of Hearing, Respondent made many overtures to different DEC Officers and supervisors in the local regional office in Avon, New York to communicate where wetlands are on my property with no affirmative response.
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> ¶ 14. This inaction renders an undue burden and presents a miscarriage of justice.
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> ¶ 15. To date, that action has never been pursued by the DEC.
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> ¶ 16. Respondent then contacted opposing counsel and stated he would like to request a hearing which preceded the instant action.
>
> ¶ 17. Respondent did not retain counsel at the time and is unaware of the significance or difference of the pending action in a local justice court or this pending action.
>
> ¶ 18. Respondent has never received a clear indication from Petitioner as to what the basis is for Petitioner's actions.
>
> ¶ 19. This inaction by Petitioner further constitutes undue burden, miscarriage of justice and mistake on behalf of Petitioner.

Laches and unclean hands are equitable defenses that are seldom available against an agency acting in a governmental capacity to enforce a public right or safeguard a public interest. *Matter of Cortlandt Nursing Home v. Axelrod*, 66 N.Y.2d 169, 177, n. 2 (1985). Section 301 of the State Administrative Procedure Act ("SAPA") requires an agency to provide a hearing "within a reasonable time," but in this case the second affirmative defense indicates that respondent first became aware of the violation in March of 2017. Department Staff's complaint was served in August of 2018. This lapse of time is not unreasonable, especially since respondent's Amended

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previously held that pleading the defense of failure to state a cause of action is unnecessary, constitutes 'harmless surplusage,' and that a motion by the plaintiff to strike the same should be denied")).

Answer does not allege any facts that would demonstrate actual prejudice as a result of delay by Department Staff in commencing this proceeding.

Unclean hands is another equitable defense rarely available against a governmental agency. To plead a defense of unclean hands, respondent must allege that the Department has committed some unconscionable act that is directly related to the subject matter of the proceeding and has injured respondent (*see Hytko v Hennessey*, 62 AD3d 1081, 1085-1086 (3rd Dept. 2009)). Even if the defense were available in this administrative proceeding, and affording respondent every possible inference, respondent does not cite any specific affirmative unconscionable act or omission by the Department. Respondent also fails to allege any resulting harm to respondent from such an affirmative act or omission, directly related to the subject matter of this proceeding. Accordingly, the second affirmative defense should be dismissed to the extent it raises laches or unclean hands.

Respondent's assertion, in ¶¶ 13 and 14, that he made overtures to Department Staff to ascertain the location of any wetlands on his property and received no response, is another denial along the same lines as the first affirmative defense. Respondent's claim that any inaction imposes an undue burden or a miscarriage of justice is essentially a laches defense, and is therefore dismissed.

Respondent's argument that he never received a clear indication from Department Staff as to the basis for the agency's actions, or is unaware of the significance of this proceeding, is undercut by Department Staff's complaint. The complaint sets forth the basis for the Department's jurisdiction, as well as the applicable statutes and regulations, and the penalty sought for the two violations alleged. The remaining allegations of undue burden, miscarriage of justice and mistake are not supported by a statement of facts which constitute the grounds of this affirmative defense, as required by Section 622.4(c). Respondent has therefore failed to satisfy the regulatory requirement applicable to the assertion of affirmative defenses, and has failed to provide sufficient notice regarding the facts underlying any of the purported defenses. Staff's motion to dismiss the second affirmative defense is granted.

CONCLUSION

Department staff's motion to dismiss the first affirmative defense is denied. The defense is a denial, which is not subject to clarification or dismissal. Department Staff's motion to dismiss the second affirmative defense is granted.

SCHEDULING ORDER

On or before Friday, March 8, 2019, the parties are to serve any discovery requests. Responses to discovery requests are to be served on or before Friday, March 29, 2019. Upon receipt of a statement of readiness pursuant to Section 622.9 of 6 NYCRR, a conference call will be scheduled to discuss dates for the hearing. No further motions may be filed unless counsel have conferred in an effort to resolve any disputes, and the ALJ has permitted the filing of the motion.

/s/
Maria E. Villa
Administrative Law Judge

Dated: February 7, 2019
Albany, New York