STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law; Article 12 of the New York State Navigation Law; and Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York,	**RULING** DEC File No. R2-20070921-355

- by -

KATZAV REALTY, LLC,

Respondent.

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Appearances:

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

- - Hirsch & Hirsch, LLP (Scott Hirsch, of counsel), for respondent

PROCEEDINGS

Department staff commenced this enforcement proceeding against respondent Katzav Realty, LLC (Katzav) by service of a notice of hearing and complaint, both dated December 11, 2007. The staff allege in the complaint that the respondent owns property at 1131-1141 East 233rd Street, Bronx, New York, upon which the staff discovered oil contamination on April 17, 2006. Staff further alleges that the respondent has violated Environmental Conservation Law (ECL) § 17-0501, Navigation Law (NL) § 173 and § 32.5 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) by discharging petroleum into the environment and by failing to perform an investigation and cleanup of the contamination.

Respondent filed an answer dated February 11, 2008 in which it generally denies the allegations, denies sufficient knowledge or information upon which to respond to the allegations, and sets

forth seven affirmative defenses.[1] Pursuant to 6 NYCRR § 622.4(f), by notice of motion and affirmation dated February 14, 2008, Department staff moved for an order to strike or direct clarification of the respondent's affirmative defenses. As of the date of this ruling, this office has not received any response to staff's motion from Katzav or its counsel and the time to respond has passed. 6 NYCRR § 622.6(c)(3).

DISCUSSION

An affirmative defense is a matter that is the respondent's burden to plead and prove and includes such defenses as collateral estoppel, statute of limitations, and release. See, Civil Practice Law & Rules (CPLR) 3018(b). As explained by Professor Siegel, an affirmative defense raises a matter that is not plain from the face of the complaint. See, New York Practice, 3rd ed., Siegel (1999) at 351. CPLR 3211(b) allows a party to move to dismiss a defense if it "is not stated or has no merit." There is no reason to address matters at trial that have no relevancy to the claims. 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. CPLR 3211(a)(7).

Section 622.4(c) of 6 NYCRR reiterates the CPLR's requirements in stating that "[t]he 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."

In its first affirmative defense, the respondent maintains that it "is not a discharger as both properly defined under any of the ECL or NL Sections cited herein or applicable New York State Court of Appeals interpretation(s) thereof." Defenses which only contain conclusions of law without supporting facts

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[1] In the verified answer, the respondent is identified as "Katza Realty, LLC" rather than Katzav Realty, LLC. My research of the New York State Department of State's Division of Corporation's entity listings indicate that the latter is the correct spelling. See, http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2552602&p_corpid=2522081&p_entity_name=%4B%61%74%7A%61%76&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0.

are insufficient. See, First Data Merchant Services Corp. v. Olympia York Builders and Developers, Inc., 14 Misc. 3d 1228(A), 2007 WL 416185 (NY Sup. 2007) (unreported disposition) citing Glensek v. Guidance Realty Corp., 36 AD2d 852, 952 (2d Dep't 1971). One can glean from statements made as part of the respondent's other affirmative defenses that Katzav is claiming that because it bought the property in 2004, it is not responsible for contamination that pre-existed its ownership.

However, staff advises that its case is solely based on the contamination discovered in 2006 when twelve 550-gallon tanks were removed from the site. See, Urda Affirmation (Aff.), ¶11. The Court of Appeals ruled in State v. Green, 96 NY2d 403 (2001) that a landowner is liable as a discharger where it "can control activities occurring on its property and has reason to believe that petroleum products will be stored there." Accordingly, in order to maintain this affirmative defense, the respondent must amend its answer to provide facts that could support it.

Ruling: Staff's motion to strike this affirmative defense is denied and its motion to clarify is granted; respondent must amend its answer to clarify the defense in order to sustain it.

In its second affirmative defense, Katzav states that it "never performed any act which caused or contributed to any condition which is set forth in the Complaint." This statement is just a general denial and not an affirmative defense.

Ruling: Staff's motion to strike is granted.

In its third affirmative defense, the respondent alleges that it never failed to contain the discharge because it came into existence 15 years before Katzav purchased the property. The respondent also claims that because it was unaware of the discharge it could not have taken any action to "spread it". In this denial, the respondent is again stating that because it purchased the property after the spill, it could have no effect on its impacts prior to its purchase. But because staff is limiting its claims to the discovery of contamination in 2006, this affirmative defense has no merit.

In its motion papers, staff repeatedly claims that the respondent is not meeting "its burden of proof" in these affirmative defenses; however, that is not the role of a pleading. Rather, it is only to provide notice to the parties as to what the alleged claims and defenses are. The burden of proof is met through the submission of evidence not in pleadings.

Ruling: Staff's motion to strike is granted.

Katzav states in its fourth affirmative defense that the complaint fails to state a cause of action upon which proper relief can be granted. In Glensek, *supra*, the court held that "[a] defense that a complaint does not state a cause of action cannot be interposed in any answer." Rather, such a claim should be made the subject of a motion to dismiss. Propoco, Inc. v. Birnbaum, 175 AD2d 774, 775 (2d Dep't 1990) (citations omitted). As DEC Administrative Law Judge Sherman ruled in Grammercy Wrecking and Environmental Contractors, Inc. (January 14, 2008), the Department staff cannot prevail unless it has met its burden of proof on all counts set forth in the complaint and thus the respondent's defense is superfluous. 6 NYCRR § 622.11(b)(1).

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

In its fifth affirmative defense, the respondent claims that the staff has failed to name certain other "proper, responsible and indispensable party(s) . . ." Department staff argues that the answer fails to provide factual or legal support for this allegation in order to demonstrate that other parties should have been included as respondents or that the Department was required to include them. The Department staff has identified the respondent as the entity responsible for the alleged violations in the complaint. As noted by ALJ Sherman in Grammercy Wrecking, *supra*, Part 622 does not provide for joinder of a potentially liable party. It may be appropriate for the respondent to introduce evidence of other parties' culpability; however, there is no requirement that the Department staff pursue those entities.[2],[3]

Ruling: Department's motion to strike respondent's fifth affirmative defense is granted. In the event that the respondent is found liable for the alleged violations in the complaint, it is possible that the involvement of other potentially responsible parties may be relevant to mitigation of penalties.

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[2] NL § 181(5) has been interpreted by the Court of Appeals to allow faultless landowners to seek contribution against the actual discharger. White v. Long, 85 NY2d 564, 568 (1995).

[3] As noted in Matter of Juda Construction, Ltd., 20091 WL 1083050 (ALJ Villa, August 23, 2001), the Department staff have the prosecutorial discretion to commence a separate proceeding against other potentially responsible parties at a later time.

In its sixth affirmative defense, without providing any factual support, the respondent alleges that the complaint must fail on the grounds of laches, estoppel, equitable estoppel or waiver due to the Department's 15 years of inaction regarding the subject spill. These equitable defenses are not generally available against the State. With respect to laches, as staff notes, this matter was commenced twenty months after the discovery of contamination in April 2006. Section 301(1) of the State Administrative Procedures Act (SAPA) sets a reasonable time standard for all parties in an administrative proceeding to be given the opportunity for a hearing. "In determining if a period of delay is reasonable within the meaning of the (SAPA) § 3101(1), an administrative body . . . must weigh certain factors including: (1) the nature of the private interests allegedly compromised by the delay, (2) the actual prejudice to the party, (3) the causal connection between the conduct of the parties and the delay, and (4) the underlying public policy advanced by government regulation." Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 178 (1985). If the respondent experienced an unreasonable delay in being afforded an opportunity for a hearing, it must assert those facts in an amended answer and any findings would necessarily be based upon the four Cortlandt factors.

With respect to the other laundry list of equitable defenses, estoppel is rarely recognized against the State. Wedinger v. Goldberger, 129 AD2d 712 (2d Dep't 1987), *aff'd*, 71 NY2d 428 (1988). Only when a party can demonstrate that a government agency negligently or wrongfully induced reliance by a party so that it changed its position to its detriment may estoppel be invoked. Bender v. New York City Health & Hospital Corp., 38 NY2d 662 (1976). In the event that this case fits within one of those rare instances, Katzav is directed to clarify this defense in an amended answer.

Waiver is never a valid defense against the State because public officials cannot waive law enforcement on behalf of the public. See, Matter of Town of Southold (ALJ Rulings, March 17, 1993).

Ruling: With respect to the two affirmative defenses of laches and estoppel, the respondent may amend its answer to clarify based upon the above discussion. Without such clarification, these defenses are dismissed. I am granting the staff's motion to dismiss the affirmative defense of waiver.

In its seventh and last affirmative defense, the respondent alleges that "[s]ince the spill occurred fifteen years prior to

Respondent's purchase, the Complainant must demonstrate that the Respondent was aware of the (alleged) contamination prior to its purchase under the holding in State of New York v. Speonk Fuel, Inc., (2004)." As stated by staff, the precipitating event for this proceeding is the discovery of contamination in April 2006, two years after the respondent purchased this property. Urda Aff., ¶ 11. Moreover, respondent misconstrues the applicable holding in Speonk, 3 NY3d 720 (2004). The court, relying on its holding in State of New York v. Green, *supra*, provides that liability is predicated on the ability of the party to take action to prevent or to clean up contamination resulting from a spill. Accordingly, whether the spill did indeed occur prior to respondent's ownership of the facility or not, the issue is whether or not it responded to the discovery of contamination in a timely fashion.

Ruling: The staff's motion to strike the seventh affirmative defense is granted.

CONCLUSION

I grant staff's motion to strike the respondent's 2nd, 3rd, 4th, 5th, and 7th affirmative defenses in their entirety and the 6th affirmative defense partially. I grant the staff's motion directing respondent to clarify its first affirmative defense and part of its sixth affirmative defense. In accordance with this ruling, I direct the respondent to serve and file an amended answer by no later than March 24, 2008.

Dated: Albany, New York
February 27, 2008

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

TO: John K. Urda, Assistant Regional Attorney
New York State Department of
Environmental Conservation
47-40 21st Street
Long Island City, New York 11101

Scott Hirsch, Esq.
Hirsch & Hirsch
64 Hilton Avenue
Hempstead, New York 11550